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1948

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Pacific Reporter, Second Series, Vol. 191, Nos. 1-3: Vol. 192, Nos. 1-4.

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CALIFORNIA REPORTER

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SECOND SERIES

31 Cal.2d 555

PEOPLE v. SLOBODION.

Cr. 4857.

Supreme Court of California, in Bank.

March 23, 1948.

1. Infants 🔑20

Sodomy 🔑6

Evidence sustained conviction under the statutes penalizing lewd and lascivious conduct against a child under the age of 14 years and sex perversion. Pen.Code, §§ 288, 288a.

2. Criminal law 🔑1036(5)

In prosecution for lewd and lascivious offense against a child under 14 years of age and for sex perversion, police officer's testimony relating how child took him to deserted house where offenses were committed was harmless error in light of entire record and failure of defendant to object to it as inadmissible hearsay. Pen. Code, §§ 288, 288a.

3. Criminal law 🔑339

In prosecution for lewd and lascivious offense against a child under 14 years of age and for sex perversion, evidence by prosecutrix, a child six years of age, that she identified defendant in police line up after the offense was admissible to corroborate her story and to rebut the suggestion that her identification at the trial was the result of a recent contrivance. Pen. Code, §§ 288, 288a.

4. Criminal law 🔑339

In prosecution for lewd and lascivious offense against a child under 14 years of age and for sex perversion, police officer's testimony that he saw the prosecuting witness identify the defendant at a police line up was admissible to corroborate her story and to rebut the suggestion that her identification at the trial was the result of a recent contrivance. Pen.Code, §§ 288, 288a.

5. Criminal law 🔑339

In prosecution for lewd and lascivious offense against a child under 14 years of age and for sex perversion, testimony of a third party that the 6 year old child pointed the defendant out to him shortly after she complained of defendant's acts and as she saw him walking near her house carrying an ice cream cone as he had done at the time of the offenses was admissible to corroborate her story and to rebut the suggestion that her identification at trial was result of a recent contrivance and was not inherently unreliable. Pen.Code, §§ 288, 288a.

6. Criminal law 🔑339

In prosecution for lewd and lascivious offense against a child under 14 years of age and for sex perversion, third party's testimony offered without objection that he identified defendant in a police line up as the person to whom he had spoken in the immediate neighborhood where the offense was committed shortly after six year old prosecutrix complained to him was admissible to corroborate the third party's testimony of identification at the trial. Pen. Code, §§ 288, 288a.

7. Criminal law 🔑984

Sex perversion committed at same time as lewd and lascivious offense against a child under 14 years of age was not included in the latter offense, and separate punishment for both offenses was permissible, where offenses were based on separate and distinct acts. Pen.Code, §§ 288, 288a.

Appeal from Superior Court, Alameda County; Benjamin Jones, Judge.

John Slobodion was convicted of a lewd and lascivious offense against a child under the age of 14 years and of sex perversion, and he appeals.

Judgment and order affirmed.

Prior opinion, 186 P.2d 177.

William H. Quinn, of Oakland, for appellant.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., and Frank D. Parker, Deputy Dist. Atty., both of Oakland, for respondent.

J. F. Coakley, Dist. Atty., Alameda County, and Arthur H. Sherry, Asst. Dist. Atty., Alameda County, both of Oakland, John P. Sparrow, Dep. Dist. Atty., Alameda County, of Berkeley, Edmund G. Brown, Dist. Atty., City and County of San Francisco, of San Francisco, John Quincy Brown, Dist. Atty., Sacramento County, of Sacramento, Charles J. McGoldrick, Dist. Atty., Sonoma County, of Santa Rosa, and James M. Thuesen, Dist. Atty., Fresno County, of Fresno, amici curiæ.

TRAYNOR, Justice.

Defendant was charged in two counts of an information alleging (1) a violation of Penal Code section 288, which defines lewd and lascivious conduct against a child under 14 years of age, and (2) a violation of Penal Code section 288a, which defines a form of sex perversion. In the first count defendant was charged with placing his "hands and private parts upon the bare body and private parts" of the prosecutrix, a six year old girl; in the second count he was charged with "copulating the mouth" of defendant with "the sexual organ" of the prosecutrix. The defense contended at the trial that if the acts complained of actually occurred, the prosecutrix erroneously identified defendant as the wrongdoer. Defendant was convicted on each count and was given concurrent sentences. He appeals from the judgment of conviction and from the order denying a new trial.

Defendant contends that the evidence was insufficient to support the verdict. As usually happens, the testimony of the prosecutrix was for the most part uncorroborated. She could not remember the date when the offenses were committed, but other witnesses established that the date was September 15, 1945. On that day, according to the prosecutrix, defendant, persuaded her to accompany him to an abandoned house less than a block from her home. A room in the house contained a bed and a table. Defendant removed a bottle of whiskey from his pocket and took off some of the prosecutrix's clothing as well as his own. Defendant then put the child on the bed. He put his private parts into her private parts and and then put his mouth to her private parts. He then sat her on the table and repeated the foregoing acts. Defendant allowed the child to return home after she twice requested him to let her go. Before defendant took her into the house, and again while they were inside, he told the prosecutrix that he would get her an ice cream cone.

A boatswain in the Coast Guard and his wife occupied rooms in the prosecutrix's home. The boatswain arrived home that afternoon at about 2:30 P.M. and heard the prosecutrix complaining to his wife that someone had done something "bad to her." Shortly thereafter, the prosecutrix saw defendant walking alongside her home with an ice cream cone in his hand. She pointed the man out to the boatswain, who went outside and asked defendant if he had taken the child into the abandoned house. Defendant replied that he had not, but stated that he had asked her if she wanted an ice cream cone. During the conversation defendant offered the boatswain a drink from a bottle of whiskey.

Defendant testified in his own behalf, stating that at the time of the alleged offenses he had been in a saloon. After drinking some beer he proceeded to his home, situated near that of the prosecutrix. Defendant testified that on the way home he purchased a bottle of whiskey and an ice cream cone. The ice cream was for his landlord's grandchild. Defendant stated that he "always brought something home" for the child. As defendant walked by the prosecutrix's house, the boatswain asked defendant for the ice cream. Defendant offered the boatswain a drink of whiskey but the boatswain wanted the ice cream, saying, "I want to take it in and give it to a child." Defendant replied, "That is what I got it for, a child." Nevertheless, the boatswain took the ice cream from defendant.

Defendant contends that the evidence is insufficient to support the verdict, on the ground that the testimony of the prosecutrix is "so vague, uncertain and contradictory as to clearly indicate her inability to accurately remember and relate facts, and by reason thereof her testimony is not worthy of belief." As illustrative of his contention, defendant points to the prosecutrix's testimony that there are twelve days in a week; that the incidents complained of occurred in November or December, whereas they actually occurred in September; and that the man who committed the acts was smaller than her father, whereas prosecutrix's father weighs about eighty pounds less than defendant. Defendant considers the proseeutrix's testimony impeached by her statements during cross-examination that defendant wore a red necktie, whereas she testified at the preliminary examination that she did not think he wore a necktie. Defendant also contends that the prosecutrix was coached on the grounds that three persons (presumably one or two police officers and a representative of the district attorney) helped her "remember her story" and that she testified that she knew the incidents occurred on a Saturday because her mother told her so.

[1] In all its important phases, the prosecutrix's story is coherent and consistent. Her version of the incident remained unimpeached in all its essentials on cross-examination. She declared unequivocally that her mother did not tell her what to say. The statement by the prosecutrix that about three persons helped her "remember her story" was in the form of an affirmative response to a question put by defendant on cross-examination. A reading of the entire record does not reveal instances of coaching, except in the use of the words "private parts" by the child. The defendant could show no more than that the prosecutrix had discussed the affair with several persons in authority. Since the testimony of the prosecutrix was, so far as the record shows, worthy of belief, minor inconsistencies not destructive of her story were for the jury to pass upon.

[2] Defendant contends that evidence prejudicial to the defendant was erroneously admitted. A police officer testified that on September 15th, the day of the offense, he was taken by the prosecutrix to the abandoned house where the child showed him how "she entered the house with the man, unknown to us at that time, and showed us where he had set her on the table and also were he had laid her on the couch in the kitchen." Defendant contends that this testimony, even if considered as a "fresh complaint", went too far in that it contained the details of the complaint, instead of the fact of complaint and nothing more, and that it was inadmissible hearsay. Defendant, however, did not object to the admission of the foregoing evidence, and it would be technical in the extreme to hold that the officer's repetition of the child's statement in this case was anything but a minor incident in the trial, without importance when the record is read in its entirety.

Defendant contends that the admission of evidence pertaining to certain nonjudicial identification of defendant was erroneous. The prosecutrix testified that she identified defendant in a police lineup, and a police officer testified that he was present when the prosecutrix made the identification. Here again, defendant made no objection to the introduction of the testimony of which he now complains, but even if he had this evidence of previous nonjudicial identification would have been admissible.

"Ordinarily, when a witness is asked to identify the assailant, or thief, or other person who is the subject of his testimony, the witness' act of pointing out the accused (or other person), then and there in the courtroom, is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him.

"The psychology of the situation is practically the same as when Recent Contrivance is alleged. To corroborate the witness, therefore, it is entirely proper * * * to prove that at a former time, when the suggestions of others could not have intervened to create a fancied recognition in the witness' mind, he recognized and declared the present accused to be the person. If, moreover (as sometimes is done) the person was then so placed among others that all probability of suggestion (by seeing him hand-cuffed, for example) is still further removed, the evidence becomes stronger. The typical illustration is that of the identification of an accused person at the time of arrest. * * *" IV Wigmore on Evidence, 3d Ed., p. 208.

[3, 4] The foregoing rule stated by Wigmore is not accepted in all jurisdictions, but the weight of recent authority is in accord with his views. See 1 Wharton's Criminal Evidence, 11th Ed., p. 691; Annotation, 70 A.L.R. 910.) Conflicting lines of authority have arisen in California on this point. One group of cases holds that the admission of evidence of previous identification is erroneous, but in each case the defendant either failed to object or the court held that the error was not prejudicial. People v. Cotton, 117 Cal.App. 469, 472, 4 P.2d 247; People v. Covington, 121 Cal.App. 61, 65, 8 P.2d 490; People v. Lavender, 137 Cal.App. 582, 592, 31 P.2d 439; People v. Dyer, 30 Cal.App.2d 590, 593, 86 P.2d 852. Another group of cases holds that testimony of previous identification is admissible, particularly where the eyewitness has first identified the defendant in the courtroom. People v. Hale, 64 Cal.App. 523, 527, 222 P. 148; People v. Garcia, 83 Cal.App. 463, 468, 256 P. 876; People v. Savage, 66 Cal.App.2d 237, 245, 246, 152 P.2d 240; People v. Richardson, 74 Cal.App.2d 528, 542, 169 P.2d 44. The only case decided by this court that deals with the question holds without discussion that such identification is admissible. People v. Sieber, 201 Cal. 341, 349, 257 P. 64. We therefore conclude that the evidence by the prosecutrix that she identified defendant in a lineup after the offense was admissible to corroborate her story and to rebut the suggestion that her identification at the trial was the result of recent contrivance. The same considerations apply to the testimony of the police officer that he saw the witness identify defendant.

[5] The boatswain was permitted to testify, over objection, that the child pointed the defendant out to him shortly after she complained of defendant's acts, and at the time she saw him walking near her house carrying the ice cream cone. Again, the identification of defendant by the prosecutrix is admissible to corroborate her testimony. Defendant contends, however, that the identification is unreliable on the ground that the prosecutrix identified not himself but the ice cream; that she merely associated him with the wrongdoer because he was carrying an ice cream cone. Defendant's argument that the identification was erroneous constitutes the basis of his defense and was resolved against him by the jury. The identification was not unreliable, and it was properly admitted for the consideration of the jury. The identification was made during or immediately after the child's complaint to the boatswain, and there is no indication that the child was coached when she pointed out the defendant to the boatswain. There are doubtless many instances where previous identification would be inadmissible because of the unreliable character of the identification, but here the prosecutrix's recognition of defendant occurred only a short time after the offense, and it was made independently on her part.

[6] The boatswain testified that he saw defendant outside the house soon after the incident and that defendant admitted purchasing the ice cream cone for the prosecutrix. He also testified, without objection, that he identified defendant in a police lineup as the person to whom he spoke outside the house. Here, again, the testimony of previous identification was admissible to corroborate the witness's testimony of identification at the trial.

It is contended that defendant was improperly convicted of violating both section 288 and section 288a of the Penal Code; that under the rule expressed in People v. Greer, 30 Cal.2d 589, 184 P.2d

512, defendant should have been convicted only of a violation of section 288. In People v. Greer, the defendant was convicted at his first trial of a violation of Welfare and Institutions Code section 702 (contributing to the delinquency of a minor) and at a later trial of violations of Penal Code section 261(1) (statutory rape) and section 288 (lewd and lascivious conduct). We held that if the act upon which these charges were based was the same for all three offenses, defendant could be convicted only of the section 702 offense since that offense is included in the offenses defined by section 288 and section 261(1). We further held that since section 288 specifically includes acts constituting other crimes mentioned in part one of the Penal Code, a person cannot be convicted of both a violation of section 288 and a violation of section 261(1) for the same act. The reasoning of the Greer case would apply to the present one if the charges in both counts were based upon the same act, since section 288a is in part one of the Penal Code. We have concluded, however, that both counts in the present information are based upon separate acts.

The opinion in People v. Greer states that: "The divisibility of acts in cases involving sex offenses is not easily susceptible of exact definition. The cases show no uniformity in this field, and there are many instances of artificial distinctions. The rule can be set down for the guidance of the trial court in the present case, however, that if the touching of the prosecutrix's body charged in the first information [charging a violation of section 702] was essentially such touching as would be considered a part of the rape itself, it could not serve as a basis for a separate conviction. If, on the other hand, it was clearly not a part of the rape, but a part of a separate course of conduct, it could he held a separate offense." People v. Greer, supra, at page 600 of 30 Cal.2d, at page 519 of 184 P.2d; see also 57 Yale L.J. 132. We stated also that the defendant in that case could not be convicted of violations of both section 261(1) and section 288, because the act forming the basis for the charge under section 261(1) was the same as the act forming the basis for the charge under section 288. "Except for the rape itself, the only act of which she accused defendant was the forcible removal of her underclothing immediately preceding the rape. To hold that the removal of the prosecutrix's underclothing constitutes an act separate from the rape, however, would be artifical in the present context and would permit double punishment not authorized or contemplated by section 288." People v. Greer, supra, at page 604 of 30 Cal.2d, at page 521 of 184 P.2d.

In the present case defendant committed certain acts that could be considered rape or attempted rape; these acts clearly support the conviction for violation of section 288. The effect of the amended section 288 is to permit the charging of lewd and lascivious conduct on the basis of acts that also constitute other crimes provided for in part one of the code. People v. Greer, supra, at page 589 of 30 Cal.2d, at page 512 of 184 P.2d. In addition, however, defendant also committed certain acts denounced by section 288a. Thus, this case is factually dissimilar to People v. Greer. Here, defendant could have been convicted of two crimes without resort to section 288; in People v. Greer, the defendant could have been convicted only of a violation of either section 261(1) or section 288, for the basis of his conviction in either case would depend upon the same act.

It is true that the acts in the present case were all committed within a relatively short time. Nevertheless, defendant committed acts separately denounced in two code sections, independent of section 288, and these offenses are not necessarily or even normally associated with each other.

[7] The acts forming the basis for the charge under section 288 were not mere fondling and touching preparatory to the commission of the acts denounced by section 288a. No question would arise if defendant had been charged with rape or attempted rape and with a violation of section 288a, since there is evidence that he committed both offenses and neither is included in the other. The same result

may be reached by charging one of the offenses under section 288. Under such circumstances we are compelled to conclude that the two offenses charged in the information are separate ones, just as mayhem can be separate from rape even though it may have occurred during an episode involving rape.

The judgment and order are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.

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31 Cal.2d 549

INDEPENDENT PROGRESSIVE PARTY v. COUNTY CLERK OF ALPINE COUNTY et al.

S. F. 17721.

Supreme Court of California.
March 23, 1948.

1. Elections 🔑154(2)

A new political party could proceed under section of Elections Code authorizing court proceeding to prevent error on primary ballot when county clerks were about to deprive party of right to elect members of county central committees in their counties at primary election because of uncertainty under Elections Code in ascertaining the number of members to be chosen for each county central committee. Elections Code, § 2900.

2. Elections 🔑121(2)

The Legislature in enacting statute making votes cast for political party's candidate for Governor, or, if there was no such candidate, the votes cast for that party's candidate for an office filled by a state-wide election at the last gubernatorial election, the basic figure upon which computation of number of members of county central committee is made does not foreclose a new party from having members of county central committees selected at the primary election following its qualification. Elections Code §§ 2540(c), 2540.5, 2831, 2832, 2837.

3. Elections 🔑121(1)

The right to action through political parties is fundamental.

4. Elections 🔑158

In any election where party system furnishes means by which citizen's right of suffrage is made effective, denial of his party's right to participate in the election accomplishes "disfranchisement of voters" or compels them, if they vote, to vote for representatives of political parties other than that to which they belong, and the deprivation of the right of selection is a deprivation of the right of franchise.

See Words and Phrases, Permanent Edition, for all other definitions of "Disfranchisement of Voters".

5. Elections 🔑126(1)

The purpose of a "primary law" is to preserve the integrity of parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Primary Law".

6. Elections 🔑121(2)

Section of Elections Code making votes cast for political party's candidate for Governor or, if there was no such candidate, the votes cast for that party's candidate for an office filled by state-wide election at the last gubernatorial election, the basic figure upon which computation of number of members of county central committee is made, did not foreclose new party from having members of county central committee selected at primary election following party's qualification, and the basic figure under the statute would be the votes cast for all candidates for Governor at the last gubernatorial elections. Elections Code, § 2540(c), 2837, § 2540.5, 2831, 2832.

◆

Proceeding by Independent Progressive Party against County Clerks of the Counties of Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Fresno, Glenn, Humboldt, Imperial, Inyo, Kern, Kings, Lake, Lassen, Madera, Marin, Mariposa, Mendocino, Merced, Mo-doc, Mono, Monterey, Napa, Nevada, Orange, Placer, Plumas, Riverside, Sacramento, San Benito, San Bernardino, San Diego, San Joaquin, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tulare, Tuolumne, Ventura, Yolo, and Yuba, under statute authorizing court proceeding to prevent error on primary ballot.

Decision in accordance with opinion.

Gladstein, Andersen, Resner & Sawyer and Norman Leonard, all of San Francisco, for Independent Progressive Party.

Clarence A. Linn, Deputy Atty., Gen., for respondent County Clerks of Counties of Solano, Fresno, Sacramento, San Joaquin, Sonoma and Butte, and also amicus curiae on behalf of the State of California.

CARTER, Justice.

[1] The Independent Progressive Party brings this proceeding involving action or non-action on the part of the clerks of all of the above named respondent counties under section 2900 of the Elections Code. That section reads: "Whenever it is made to appear by affidavit to the Supreme Court, district courts of appeal, or superior court of the proper county that an error or omission has occurred or is about to occur in the placing of any name on, or in the printing of, an official primary election ballot, or that any wrongful act has been or is about to be done by any person charged with any duty concerning the primary election, or that any neglect of duty has occurred or is about to occur, such court shall order the officer or person charged with such error, wrong or neglect forthwith to correct the error, desist from the wrongful act or perform the duty, or show cause why he should not do so. Any person who fails to obey the order of such court shall be cited to show cause why he is not in contempt of court." This is a proper case for proceeding under that section. See, Communist Party v. Peek, 20 Cal.2d 536, 127 P.2d 889.

It appears from the affidavit filed pursuant to section 2900 that on March 16, 1948, the above named party qualified to participate in the primary election of June 1, 1948, pursuant to section 2540(c) of the Elections Code; that the clerks of the above named counties have been notified of such qualification under sections 2573 and 2574 of the Elections Code and that there shall be elected at such election members of county central committees for that party under section 2831 of the code; that because of the uncertainty in ascertaining the number of members to be chosen for each county central committee and the numbers for the respective areas in such county, the county clerks will deprive the party of the right to elect members of county central committees in said counties at said primary election.

The difficulty arises from the provisions of the Elections Code dealing with the selection of members of county central committees in counties with less than five assembly districts which apparently includes all 58 counties in the state except three. The statute states: "In all counties containing less than five Assembly districts the county central committee shall be elected by supervisor districts, and the number to be elected from any supervisor district shall be determined as follows: There shall be taken the number of votes cast in the supervisor district *at the last gubernatorial election for that party's candidate for Governor,* or, if the party had no candidate for Governor, *for the candidate of the party voted on throughout the State* who received the greatest number of votes and who was the candidate of that party alone. This number shall be divided by one-twentieth of the number of votes cast in that county for Governor, or, where the party had no candidate for Governor, for the candidate mentioned above. The integer next larger than the quotient obtained by such division shall constitute the number of members of the county central committee to be elected by that party in that supervisor district.

"The county central committees in counties containing less than five Assembly districts shall be composed of not less than 21 members. If the procedure outlined in the preceding paragraph would result in less than 21 members being elected for any county central committee, the number of votes cast for that party's candidate in each supervisor district shall be divided by an amount sufficiently smaller than one-twentieth of the votes cast for Governor in that county as to give a membership in the county central committee equal to or the nearest amount which is greater than 21 members." [Emphasis added.] Elections Code, sec. 2837. There is no other provision in the Elections Code expressly dealing with this subject and it would seem that a new party such as is here involved would have no basis under that provision for computing the number of members of county central committees to which it is entitled or their apportionment among supervisor districts in the county. The base figure upon which the computation is made is the votes cast for the party's candidate for Governor or if there was no such candidate, the votes cast for that party's candidate for an office filled by a state wide election, at the last gubernatorial election. Inasmuch as the party has just been created it obviously did not have such candidate of either kind in the last gubernatorial election.

[2-5] We believe it is clear, however, that the Legislature did not intend to foreclose such new party from having members of county central committees selected at the primary election following its qualification. The inescapable implication flows from the wording of section 2540(c) of the Elections Code establishing a method of officially creating a new party, that such party shall have the right to participate in the primary election following its creation. It provides: "If on or before the *seventy-fifth day before any primary election* there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 per cent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated therein, which proposed party those voters desire to have participate in *that* primary election." [Emphasis added.] The italicized portion of the last quoted section clearly provides that if petitions with the requisite number of signatures are filed seventy-five days before any primary, the party shall be entitled to participate in *that* primary; that is, the primary seventy-five days before which the petition must be filed. It has been squarely held that the right of suffrage is fundamental, which includes the right to action through parties. Communist Party v. Peek, supra. As said in the Communist Party case at page 543 of 20 Cal.2d, page 894 of 127 P.2d: "The inability of the Legislature to infringe the citizen's constitutional right of suffrage prior to 1900 meant that, in any situation where the party system was an integrel part of the elective machinery, the Legislature could not deny to a particular political party the right to participate in a given election. Britton v. Board of Com'rs, supra, [129 Cal. 337, 61 P. 1115, 51 L.R.A. 115.] Eaton v. Brown, 96 Cal. 371, 373, 31 P. 250, 17 L.R.A. 697, 31 Am.St.Rep. 225. In any election where the party system furnishes the means by which the citizen's right of suffrage is made effective, denial of his party's right to participate in the election accomplishes, in the words of the court in the Britton case, 'the disfranchisement of voters, or [compels] them, if they vote at all, to vote for representatives of political parties other than that to which they belong. The deprivation of the right of selection is a deprivation of the right of franchise.' Britton v. Board of Com'rs, supra, page 344 of 129 Cal., 61 P. 1115, 51 L.R.A. 115; cf. People v. Election Com'rs., 221 Ill. 9, 18, 77 N.E. 321, 5 Ann.Cas. 562; State v. Phelps, 144 Wis. 1, 5, 33, 128 N.W. 1041, 35 L.R.A., N.S. 353; see Starr, Legal Status of American Political Parties, (940) 34 Am.Pol. Science Rev. 439, 444." It is evident from the holding in that case that it would raise grave questions as to the constitutionality of the provisions with respect to county central committees if they are interpreted to preclude the election of such committees by newly and legally formed parties. The integrity of the party function must be maintained, or as expressed in the Communist Party case at page 545 of 20 Cal.2d, page 894 of 127 P.2d: " 'The obvious purpose of a primary law is to preserve the integrity of parties. The necessity for maintaining the integrity of

such parties is recognized in the constitutional provision with reference to primary elections * * * it is the duty of the Legislature, when legislating upon the subject of primaries, to so legislate as to maintain the integrity of parties, and the integrity of any political party * * *.' Throughout the court's opinion in the Uhl case [Socialist Party v. Uhl, 155 Cal. 776, 103 P. 181] it is emphasized that the power of the Legislature to restrict the right of suffrage is limited to prescribing tests and conditions for participation in primary elections which are reasonable and not arbitrary." County central committees are integral parts of the party machinery and the function of that party. It is said: "The county central committee shall have charge of the party campaign under general direction of the State central committee or of the executive committee selected by the State central committee" (Elections Code, sec. 2831), and "County central committees shall perform such other duties and services for their respective political parties as seem to be for the benefit of each party." Elections Code, sec. 2832. Other specific functions of such committees appear throughout the Elections Code all pointing to an orderly, democratic and comprehensive system for the functioning of parties and hence the exercise of suffrage through such means. As a further indication of the established intent and policy that the new party should be entitled to participate in the primary election is this Court's comment when holding section 2540.5 of the Elections Code invalid. That section reads: "Notwithstanding the provisions of Section 2540, no party shall be qualified to participate in any primary election unless it appears to the Secretary of State, as a result of examining and totaling the statements of registration of voters and their political affiliations transmitted to him by the county clerks 25 days prior to the last preceding primary election, that not less than 2,500 voters declared their intention of affiliating with that party." This Court said: "It should be noted that, although Elections Code, § 2570 and 2571, * * * require that data on the number of registered voters in each party be transmitted to the secretary of state eighty days prior to each direct primary election and also twenty-five days prior thereto, the requirements for participation in section 2540.5 are measured by the information conveyed twenty-five days before the last preceding primary election, which ordinarily constitutes a period of two years. Since the provisions of section 2540.5 are made absolute, it is clear that no party, however substantial it might be, could participate in a primary election in this state unless it had 2,500 registered voters at a date two years prior to the time when it seeks to assert its right. In the case of a newly organized party the test imposes an absolute bar to participation in a primary election held after its organization because the right to participate is measured by events which transpired before it was in existence. Such a test cannot possibly avoid impairing constitutional rights of suffrage by barring from the ballot political parties which represent substantial numbers of citizens. Moreover, as already pointed out, the test applied must be reasonable. To adopt a test predicated upon the number of registered voters affiliated with a particular party two years in the past when information exists as to the present registration and where there is no alternative test, is to apply an arbitrary and unreasonable standard which does not tend to accomplish any proper legislative purpose. Section 2540.5 of the Elections Code, therefore, must be held to be invalid because it is not a reasonable exercise of the power possessed by the Legislature to establish tests and conditions for participation in primary elections." Communist Party v. Peek, supra, at page 554 of 20 Cal. 2d., page 899 of 127 P.2d.

[6] It is manifest, therefore, that the Legislature intended that a reasonable method should exist for ascertaining the number of members, both for the counties and the supervisor districts in the counties for county central committees of parties which had not participated in the preceding primary election. It will be remembered from the above quoted provisions of the Elections Code that the basic figure from which computations are made is the votes cast for Governor at the last gubernatorial

election. While particular reference is made to the party's candidate for Governor, the main factor is votes cast at the election for Governor or other state wide officer. Inasmuch as the party had no candidate we are left with the main factor and that must be applied. Hence the votes cast for all candidates for Governor at the last gubernatorial election should be used as the basic figure under section 2837. In other respects the computation should proceed in the manner specified in that section.

Respondents are therefore directed to compute the number of members of the County Central Committee of the Independent Progressive Party in their respective counties, in the following manner:

The County Central Committees shall be elected by supervisor districts, and the number to be elected from any supervisor district shall be determined as follows:

There shall be taken the number of votes cast in the supervisor district at the last gubernatorial election for all candidates for governor; this number shall be divided by one-twentieth of the number of votes cast in that county for all candidates for governor. The integer next larger than the quotient obtained by such division shall constitute the number of members of the County Central Committee to be elected by the Independent Progressive Party in that supervisor district.

The County Central Committee in the respective counties aforesaid shall be composed of not less than 21 members. If the procedure outlined in the preceding paragraph results in less than 21 members being elected for any County Central Committee, the number of votes cast in the supervisor district at the last gubernatorial election for all candidates for governor shall be divided by an amount sufficiently smaller than one-twentieth of the number of votes cast in that county for all candidates for governor as to give a membership in the County Central Committee equal to, or the nearest amount which is greater than, 21 members.

After having so computed the number of members of the County Central Committee of the Independent Progressive Party in their respective counties, respondents are directed to publish the said computations as part of the notice provided for in sections 2575 and 2576 of the Elections Code.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

* * *

PEOPLE v. WALKER. *

Cr. 4833.

Supreme Court of California, in Bank.

March 31, 1948.

Rehearing Granted April 29, 1948.

1. Criminal law 🔑485(2)

In murder prosecution, wherein defendant pleaded not guilty by reason of insanity, question to alienist who had given as his opinion that defendant was sane, whether it would have produced a doubt in alienist's mind as to defendant's sanity, if alienist had had full details of defendant's family background, was properly excluded, where question was a repetition in slightly different form of previous question, and alienist had also reiterated that he did not believe that his conclusion would have been changed.

2. Homicide 🔑347

Supreme Court would not reduce conviction for homicide from first degree murder to second degree murder because of the fact that defendant whose family had a history of insanity was rendered emotionally unstable by his army combat service in defense of his country.

3. Homicide 🔑237

In first degree murder prosecution, evidence sustained finding that defendant whose family had a history of insanity, and who had been rendered emotionally unstable by his war experiences, was sane.

4. Homicide 🔑235

Evidence sustained conviction of murder in first degree for homicide committed in course of perpetration of burglary, over defense that burglary had been abandoned at time of homicide, where defendant had severed lock on gates where he intended to commit burglary, had then gone around block to see if he had been observed, and when defendant returned to scene, he was approached by a police officer, and defendant then shot officer, since a failure to complete a crime, because of a threatened arrest or appearance of the police, is not such a free and voluntary act as to constitute an "abandonment" of the crime. Pen.Code, § 189.

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* Subsequent opinion 201 P.2d 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Erwin M. Walker was convicted of murder and of attempted murder, and an appeal from the conviction of murder automatically came before the Supreme Court.

Affirmed.

Hindin, Weiss & Girard and Fred Girard, all of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendant has been convicted of the murder in June, 1946, in Los Angeles, of police officer Loren C. Roosevelt, and of the attempted murder in April, 1946, of two other officers. The appeal from the judgment of conviction of murder is automatically before this court by virtue of the provisions of section 1239 of the Penal Code. Appeals from the judgments of conviction of attempted murder are not here presented.

To the murder charge defendant pleaded not guilty by reason of insanity and alienists were appointed to examine him and report on his mental condition. When the cause was called for trial defendant waived a jury. He was questioned closely by the court to insure that he understood that in entering only the insanity plea, he was admitting the commission of the offense, and that under his waiver of a jury, if the court found him to be legally sane at the time of commission of the crime, it would have no recourse other than to find him guilty of the murder and to impose a sentence of either life imprisonment or death. Upon defendant's assurance that this was clearly understood, trial of the insanity issue proceeded. Counsel stipulated that the court might consider that evidence in fixing the degree of the crime.

On appeal defendant questions the sufficiency of the evidence to establish murder of the first degree, pleads for reduction of the crime to murder of the second degree, and criticizes a ruling of the trial court on the admission of evidence.

The evidence shows in substance the following: Defendant, now about 29 years of age, was a normal boy, above the average in intelligence. He was interested in radio work, was a good athlete, on the track team, graduated from Hoover School, and had one year at California Institute of Technology. He was thereafter employed by the police department as a radio operator. He lived with his parents and sister, was gentle, affectionate, considerate above the ordinary for the welfare of others, and gave no trouble in any way.

In 1941 he entered military service and served in the Pacific area. After graduating from officers' training school in Australia with rank of second lieutenant, he was assigned, by reason of his technical knowledge, to a small group of men engaged in radar repair and maintenance in advance invasion areas. After some service on other islands he was sent to Wake Island about June, 1944, and stayed until November, 1944. While there he was subjected to Japanese bombardment for some days and nights. With his personnel he found some thousand dismembered, decomposed Japanese bodies strewn over the area. The stench affected the men's ability to rest, sleep, and eat. The practice prevailed for a while among the enlisted men of preparing the heads of Japanese so that the skulls could be shellacked and used for desk ornaments.

Defendant moved to Leyte Island about November, 1944, and participated in a portion of the invasion of that island after bombardment. He and another officer selected a campsite and took some security measures for the safety of about 85 men, but did not post a day guard because of orders which had been received. Defendant was sent back to his ship under orders and when he returned to the island he learned that there had been a Japanese sneak attack at dawn and that his closest friend had died under conditions of valor. He claims he felt an overwhelming sense of guilt for failure to take further security measures, although all of the officers were cleared by investigation of any lapse of duty. Thereafter defendant and his group were subjected to approximately three days and nights of continuous battle by reason of the invasion of Japanese paratroopers, and this despite the fact they were not a combat but a signal corps company. Up to this time defendant was well liked by all the men who worked with him, and was reputed to be more than usually considerate of them.

After the Leyte occurrence defendant felt he could not serve as an officer and asked to be permitted to return to the United States. He was released from active duty in December, 1944, but was promoted to first lieutenant in July, 1945, about three months after his arrival in the United States. There was a progressive change in his temperament for the worse after he left Leyte.

Early in 1945, while still on active duty, defendant burglarized a garage, taking a set of tools, voltmeter, and radio tuner. In August, 1945, he entered the ordinance warehouse at night and stole six Tommy guns, twelve .45 automatics, six .38 revolvers, ammunition, holsters, and clips. He was discharged from the army in November, 1945. During his first week of terminal leave, he stole an automobile, changed the license plates, and used it to transfer some of the stolen goods. From a men's store, he stole civilian clothes. From record and film companies he stole amplifiers, electronic equipment, records, projector, recording turntable, camera, and other equipment. He rented a garage and fitted it up as an experimental workshop. His burglaries continued and yielded funds for living as well as other property.

He never returned to live with his family. They found him a changed person mentally and physically from the boy they had known. He was morose, melancholy, taciturn, brooding, rough with small children, secretive, and difficult. He took several small jobs, but quit them. He generally carried a machine gun.

An attempted sale by defendant in April, 1946, of equipment taken in one of the burglaries, gave the police a clue to his identity and whereabouts. Two officers attempted to effect an arrest but defendant shot his way out, thus committing the attempted murders of which he was found guilty. In May, 1946, defendant burglarized another establishment, taking from it a roll of safety and detonating fuse and a roll of priming cord. With the thought of blowing safes and cutting locks, he made nitro-glycerine out of fuming nitric acid, sulphuric acid and glycerine.

In the early dark of a morning in June, 1946, defendant drove to a meat market, and preparatory to an attempt to blow the safe in it, he severed the lock on the gates with bolt cutters and put on his own padlock. He then hid the bolt cutters in an adjoining area, got into his car, and drove around the block to see if he had been observed. Not seeing anyone, he retrieved the bolt cutters and returned to his car, again driving around the block. He saw someone with a flashlight in the vicinity where he had hidden the cutters. He turned his car at the second street past the meat market and parked it half way down the block. He then walked back and saw the person with the search light enter a car and drive it toward him. It drew up directly opposite him and he saw that the driver was an officer. The officer called defendant to the car and asked what he was doing in the neighborhood. Defendant told some story about seeing a girl friend. The officer, sitting behind the steering wheel with a flashlight in his left hand and his right hand on the butt of his gun, asked defendant for his identification. Defendant slowly drew his loaded .45 automatic from under his belt and pointed it at the officer, who then whipped out his own revolver. Defendant shot twice at the officer, ducked, and ran, abandoning his own car. The officer died in the hospital a few hours later. Defendant's abandoned car was found to contain bolt cutters, a loaded Thompson submachine gun, a bag of tools, sap, sash cord, bell wire, hacksaw blades, hand drill, electric drill, crescent wrenches, pry bar, extension cord, hammer, pliers, wire cutters, nitroglycerine, adhesive tape, percussion cap crimped to a 4x4 white blasting fuse and a primer cord attached to the percussion cap.

After the murder defendant gave up the idea of blowing safes and worked at several jobs for brief periods. He then experimented with making California license plates and drivers' licenses, which could be used in selling "hot" cars. He had theretofore stolen various cars. In December, 1946, he started robbing liquor stores. These crimes led to his apprehension by the police, although he attempted to resist arrest with a Thompson submachine gun. After arrest defendant gave detailed confessions regarding his commission of numerous crimes.

Whether defendant embarked on his career of crime with an idea of making society support him and pay for his suffering, or whether he did it, as he claims, under an aberration, was an issue for the trial court. Defendant asserts that although he had been told that his best friend had been killed in the dawn attack on Leyte Island, nevertheless he either met this friend as a stowaway on the transport home, or else had a vision or hallucination of meeting him; that the two decided that the blame for the war lay at the door of the industrialists and evolved a plan to prevent any future similar occurrence. Defendant told his friend of an idea he had of inventing an electronic radar gun, which by shooting a beam would disintegrate metal into powder, and by which they could seize control of the Government and enforce legislation which would increase the cost of war to a point where it could not profitably be waged, effecting this primarily by raising to a high level the salaries paid to soldiers.

Defendant testified that he was to meet his friend after his discharge, but the friend never appeared; that he committed his series of thefts with the idea of securing the equipment to proceed with his invention and protect it; and that even in wounding and killing the police officers, he thought the sacrifice was justified by his plan to forever end war. Defendant said that later he came to the realization that his idea was "strictly screwball," too far fetched and foolish to expect anyone to believe it; that it would need very ultra short frequencies to upset a molecular structure, which could not be obtained by normal radio means; that he was attempting to develop means whereby such frequencies could be developed between light rays and longer radio waves.

The way in which defendant planned and effected his crimes and his success in eluding capture for so long a time showed a keen mentality. After he was arrested his family revealed to him a long history of insanity in both branches of the family. A great-great-great-grandfather was insane for nine months. A great-great-granduncle, great-great-grandfather, and great-grand-aunt also spent time in the insane asylum. A great-grandfather committed suicide, as did a grand-aunt. A grandmother is confined at Patton. A grand-aunt had hallucinations. A cousin is mentally retarded; the father a psychoneurotic.

Dr. R. O. Lieuallen, a member of the staff of the Norwalk State Hospital, appointed by the court to examine defendant, testified that after taking into consideration both the family and personal history of defendant, he believed that it was evident that defendant had a bad family background, and an unstable nervous system; that it was difficult to evaluate just how much his home environment or service experience had helped to precipitate his criminal conduct, but in his opinion defendant was sane at the time of commission of the murder and at the time of trial. Upon being shown an exhibit which charted the family history of insanity the doctor admitted it was worse than he thought it was but that it did not change his opinion.

Upon objections by defendant on the ground of remoteness of time of examination (February–March, 1947) from time of commission of the murder (June, 1946), the doctor also admitted that it was possible for defendant to have been insane during the period of criminal activity and to have recovered his sanity at time of examination, but he reiterated his opinion that defendant was sane, and that the story told by defendant of the appearance of his friend on board the ship did not "ring of the true delusion or hallucination"; then at some length he explained why it did not ring true.

Two other doctors examined defendant and also reached the conclusion that although he was emotionally unstable, he was sane both at the time of his commission of the murder and at the time of their examination.

[1] Dr. Lieuallen, on re-direct examination, was asked whether his report would have been different in some respects if at the time he had had the full details of defendant's family background. He replied: "I probably would have mentioned more about the family background, but I do not think it would have changed my conclusion about it." Then when asked if it would have produced "a doubt in your mind as to his possible sanity," the court sustained an objection to the question as having been asked and answered. This ruling is assigned as error. However, the record shows that the second question was a repetition, in slightly different form, of the previous question, and that the doctor had also reiterated that he did not believe that his conclusion would have been changed. The ruling was not erroneous, much less prejudicially so.

[2, 3] Defendant contends that in view of his family background and the impact of his war experience upon his mentality; this court should reduce the crime to second degree murder; that "aberration naturally resulting from defense of one's country, from a moral viewpoint should be viewed by the courts with more favor." This appeal to sympathy cannot avail defendant. It is similar to the plea of "shellshock" which was raised by a veteran of the first world war in People v. Gilberg, 197 Cal. 306, 240 P. 1000. As this court there said 197 Cal. at page 313, 240 P. at page 1003: "It must be accepted as a fact, found by the jury, that the defendant was responsible to the law for his act. There is absolutely no substantial evidence in the record that even tends to show that the defendant was affected by any kind or degree of insanity which the law recognizes as an excuse for the commission of interdicted acts, either at the time of, or prior to, the commission of the crime." Under defendant's plea of not guilty by reason of insanity, the only issue was his sanity, and that was resolved against him. The record affords abundant support for the conclusion that he was sane.

At the time the court was considering the fixing of the degree of the crime, the district attorney expressed the belief that the murder was of the first degree because it was committed in the course of perpetration of a burglary and also, although there was some conflict in the evidence on the issue, because it was a wilful, deliberate killing. The court commented in substance that although the record might well support a finding that the killing was wilful and deliberate, nevertheless he would rest his finding upon the one basis of a first degree murder committed in the perpetration of an attempted burglary.

[4] Defendant argues that the killing was more in the nature of a killing in the commission of assault with a deadly weapon than in the attempted perpetration of a burglary; that the burglary had been abandoned at the time of the murder for then defendant's sole purpose was to disarm the officer so as to evade arrest for the prior shooting of two other officers.

The evidence, however, supports the court's view. At the time of the murder defendant had already snipped the bolt on the door of the meat market and replaced the lock, and he was scouting the neighborhood to see that the coast was clear; in other words, he was in the process of completing his attempted burglary after commission of a definite overt act. A killing in an attempt to perpetrate a burglary is murder of the first degree (Penal Code, sec. 189). A failure to complete a crime because of threatened arrest or the appearance of the police is not such a free and voluntary act as to constitute an abandonment. People v. Corkery, 134 Cal.App. 294, 297, 25 P.2d 257. Moreover, the record also supports the conclusion that the killing was wilful, deliberate, and premeditated. As the trial court remarked at the time of imposing the death penalty, "I feel that when the defendant shot and wounded officers Forbes and Johnson he felt that he was coming to the end of his rope and that it was either him or them, and I believe even more so when he shot Officer Loren Roosevelt in the car that that same thought went through his mind, that this was the crucial point in his life; that if Roosevelt got the drop on him and captured him, that all of his past career would come up to him, but that if he succeeded in getting Officer Roosevelt out of the way, he would have another chance. However, I believe that in addition to my finding that the killing of Loren Roosevelt was murder in the first degree as a matter of law, I feel that it was a deliberate killing, a purposeful killing on the defendant's part."

The sufficiency of the evidence to support the finding of sanity is not questioned. Defendant himself testified at great length on the trial. He showed a mentality and scientific learning far above the average. The concern of the trial court over the case is reflected in his remarks at the close of the trial and at the time of imposing sentence of death. Among other things he said: "This is a case in which I feel my responsibility very greatly. * * * The defendant, of course, in his lengthy time on the witness stand here showed a high degree of intelligence. I seldom recall a more intelligent witness, a witness who gave clearer responses to the questions than did Mr. Walker. It is true that he had a war experience that, in the vernacular of the service men, might be termed rugged, but without analyzing it or comparing it too much, I would say that perhaps millions of his fellow Americans had experiences that were equally rugged during the war. Furthermore when the defendant came home and back to his country, apparently his services were so satisfactory that after his return home he received a promotion so that there certainly could not have been any important effect that way. The whole course of conduct of the defendant as testified to by the defendant and by the witnesses shows to my mind intelligence and plan far beyond anything that is usually seen in a case of this type. * * * Now, we come to the question of hallucinations. * * * I frankly cannot accept the idea of the hallucinations, because it does not fit in with the rest of the testimony; it doesn't fit in with his plans and it doesn't fit in with any number of things. * * * I am convinced affirmatively that the defendant was at the time of the commission of the acts charged in the indictment and is now legally sane. * * *"

In fixing the penalty, the court further said, "The decision that I have to make in this case is the most difficult and solemn that ever faces a judge. * * * I recognize the defendant's war service and the disturbing effect it may have had upon him; but as I also said yesterday, his service was shared by millions of other boys who have come back home and who have led and are leading normal lives. I recognize the fact that the defendant has what may be classified as an unstable personality; that he may be disturbed emotionally, but I think it would be true that most persons who choose for themselves a life of violent crime are unstable and disturbed. I believe that that cannot enter into our deliberations. * * * It seems to me that this defendant has shown by his own testimony on the witness stand, by the story of his life of crime, also by the statement that he has made to other officers that he is beyond the possibility of rehabilitation; that he will be a menace to society wherever he is, whether that is inside or outside the penitentiary. His remarks have indicated that if he were sent to the penitentiary on a sentence there he would immediately set about ways of getting out, and I think the chances are fairly good that he might be successful. Because of a belief that this defendant will be a menace wherever he is, inside or outside of the prison walls, I very regretfully, I may say prayerfully, fix the penalty in this case as the death penalty provided by law."

Defendant moved for a new trial which was denied.

On this appeal we have reviewed the entire record, including the proceedings on the motion for a new trial. We have been unable to discover any error justifying a reversal of the judgment or the reduction of the crime to that of murder of the second degree. We are therefore compelled to conclude that the judgment and order denying the motion for a new trial must be, and each of them is, affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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84 Cal.App.2d 550

QUAN v. KRASEMAN et al.

Civ. 13640.

District Court of Appeal, First District,
Division 2, California.
March 25, 1948.

1. Specific performance 🔑121(8)

In action to compel specific performance of defendants' contract to sell realty to plaintiff, evidence that contract price was not a fair price and that contract as a whole was inequitable and unfair, particularly in that contract called for payment of $15,000 of the purchase price by delivery of unsecured notes, justified denial of relief.

2. Evidence 🔑21

It is common knowledge that a contract calling for payment of great bulk of purchase price by delivery of unsecured notes is rarely, if ever, entered into between informed parties.

3. Appeal and error 🔑1009(2)

The decision whether a contract sought to be specifically enforced is fair and equitable is left with trial court in first instance, and, where there is evidence supporting finding, judgment will not be disturbed.

4. Specific performance 🔑117

In an action for specific performance, burden is on plaintiff to allege and prove that contract is not inequitable or unconscionable.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by Louis A. Quan against Frederick Kraseman, also known as Fred Kraseman, and another, for specific performance of a written contract to sell real property to plaintiff. Judgment for defendants, and plaintiff appeals.

Affirmed.

Wm. Frank Worthington, Jr., and Leonard A. Worthington, both of San Francisco, for appellant.

John J. Jones, of San Jose, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for specific performance of a written contract to sell real property. Judgment went to defendants.

[1, 2] The defendants were an elderly couple who, without independent advice, were persuaded by plaintiff to sign an agreement to sell their home property for $16,000 on a down payment of $1000, the balance covered by unsecured promissory notes providing instalment payments over a period of eight years. The trial court found on substantial evidence that the contract price was not a fair price and that the contract as a whole was inequitable and unfair. The latter finding is supported by the evidence that the contract called for payment of $15,000 of the purchase price of $16,000 by delivery of promissory notes which were wholly unsecured. It is a matter of common knowledge that such a contract is rarely, if ever, entered into between parties who are aware of their mutual rights and obligations.

[3, 4] It is settled law that the decision whether a contract sought to be enforced is fair and equitable is left with the trial

court in the first instance, and where, as here, there is evidence supporting the finding, the judgment will not be disturbed. This follows from the principle that the burden is on the plaintiff to allege and prove that the contract is not inequitable or unconscionable. 23 Cal.Jur. pp. 490, 493–495.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

84 Cal.App.2d 562

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. WILLIAMS.

SAME v. WILLIAMS et al.

Civ. 16117, 16118.

District Court of Appeal, Second District,
Division 2, California.
March 25, 1948.

Hearing Denied May 20, 1948.

1. Execution 🔑73

Acts done by San Francisco bank to enforce payment of its judgment could not avail Los Angeles bank in aid of its attempt to enforce its judgments against same judgment debtor more than five years after their entry, where it did not appear that officials of Los Angeles bank had any knowledge of acts by the San Francisco bank, or that its delay in issuance of execution or conducting a supplemental examination resulted from information as to unsuccessful attempts of San Francisco bank. Code Civ.Proc. §§ 681, 685.

2. Execution 🔑73

The affidavit for execution under statute relating to enforcement of judgment more than five years after its entry must show due diligence. Code Civ.Proc. §§ 681, 685.

3. Appeal and error 🔑1008(3)

A factual determination by trial court of issues tried by affidavits, in which there is a conflict, is final on appeal.

4. Execution 🔑73

The standard of diligence fixed as criterion by which conduct of judgment creditor is to be measured in proceedings for enforcement of judgment more than five years after its entry is the customary, usual, reasonable, and diligent procedure which would be taken in the average law office to collect a judgment where records reveal no assets. Code Civ.Proc. §§ 681, 685.

5. Execution 🔑73

An abuse of discretion in denying motion for enforcement of judgment more than five years after date of its entry is established when it is shown that trial court has exceeded the bounds of reason, all circumstances before it being considered. Code Civ.Proc. §§ 681, 685.

6. Execution 🔑73

Denial of judgment creditor's application for issuance of execution more than five years after entry of judgment was not an abuse of discretion, where evidence failed to show any diligence on part of judgment creditor in an effort to enforce judgment during the five-year period. Code Civ.Proc. §§ 681, 685.

7. Execution 🔑73

On application of judgment creditor for issuance of execution more than five years after entry of judgment, judgment debtor was not required to aver whether he had leviable assets during the five-year period or whether he concealed his assets. Code Civ.Proc. §§ 681, 685.

8. Execution 🔑73

If judgment creditor makes showing that others have done usual acts necessary to establish a showing of due diligence to satisfaction of trial court, and it appears therefrom that judgment debtor had no assets during statutory life of judgment, trial court will not demand that needless act should have been done by judgment creditor before ordering issuance of execution more than five years after entry of judgment. Code Civ.Proc. §§ 681, 685.

9. Execution 🔑73

Bare averment by judgment creditor that judgment debtor was found to be in possession of some $25,000 on certain date was not proof that judgment debtor had or concealed any assets prior to expiration of the first five years of the judgment, as regards judgment creditor's right to an issuance of execution more than five years after entry of the judgment. Code Civ.Proc. §§ 681, 685.

10. Appeal and error ⚷179(1)

Where judgment creditor's affidavits in support of application for issuance of execution more than five years after entry of judgments did not plead an excuse for its want of diligence, judgment creditor was in no position in reviewing court to inject such plea. Code Civ.Proc. §§ 681, 685.

11. Execution ⚷73

A proceeding by judgment creditor for issuance of execution more than five years after entry of judgments was strictly a legal proceeding which was prescribed by statute, and equitable doctrine that one cannot be guilty of laches if, by his delay in acting, his antagonist was not prejudiced was not applicable therein. Code Civ.Proc. §§ 681, 685.

12. Execution ⚷73

Under statutes requiring judgment creditor to exercise due diligence to discover property of judgment debtor subject to execution within five-year period following entry of judgment, during which period execution may be secured as of right, as a prerequisite to securing execution after five years, a judgment creditor cannot rely upon hearsay statements that judgment debtor had no property. Code Civ.Proc. §§ 681, 685.

◆

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Actions by Bank of America National Trust & Savings Association against J. A. Williams, and by same plaintiff against J. A. Williams and Lenore Williams, his wife, and others, wherein judgments were entered in favor of plaintiff. From orders denying plaintiff's applications for execution under section 685 of the Code of Civil Procedure, the plaintiff appeals.

Affirmed.

Hugo A. Steinmeyer, G. L. Berrey, and John E. Walter, all of Los Angeles, for appellant.

Courtney L. Moore, of San Francisco, for respondent J. A. Williams.

MOORE, Presiding Justice.

The question for decision in these consolidated appeals is whether such due diligence had been employed during the five years following entry of judgment as required the trial court in the exercise of a sound discretion to order the issuance of execution some 13 years after date of judgment.

Two judgments were entered by the superior court of Los Angeles county in favor of appellant and against certain named respondents, one of July 15, 1932, the other March 21, 1934, aggregating about $50,000. Applications for execution under section 685 of the Code of Civil Procedure were made in both cases in January of 1947 on identical moving papers and they were denied March 6, 1947. They are treated here as one action.

Only the above mentioned judgments are involved in the appeals herein, but because of certain arguments of appellant it is essential here to state that in June, 1933, the bank obtained judgment against J. A. Williams, herein referred to as respondent, and one W. F. Dunn in the superior court of San Francisco which was twice renewed, the last judgment being for the sum of $4,169.30. Following the issuance and nulla bona return of execution on the San Francisco judgment and a supplemental examination of the debtor Dunn in February of 1945, and his release from liability for a consideration, an alias execution issued from the same court and an order for the examination of Williams ensued. The latter thereafter telephoned appellant's San Francisco office that he was ill and had no property, whereupon the proceeding there was dismissed.

Prior to 1933 a judgment creditor was free to ask for the issuance of execution (Code of Civ.Proc., sec. 681) on any unpaid judgment, whatever its age. In that year section 685 was added to the Code of Civil Procedure as follows:

> "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion. * * *"

Within the five-year period of the life of the judgments herein appellant took only four steps to discover property of respondent, namely: (1) It inquired by letter dated September 22, 1932, to the Capital Company in San Francisco with reference to respondent's financial status. The reply from the correspondent received in the same September was: "Williams is well known to us * * * unfortunately, we are told he lost absolutely everything. His address is 41 Sutter Street, San Francisco." (2) Appellant's vice president Groner at Los Angeles checked or caused to be checked "Daily Notification Sheets" for instruments transferring real property recorded each day. (3) Also, he checked from time to time the index to the Los Angeles county assessment roll and (4) investigated the ownership of property standing in the name of Lenore Williams, only to learn that she had long been divorced from respondent and that the involved property was her separate estate and heavily encumbered. By the letter from the Capital Company it was made clear that respondent had an office at 41 Sutter street, listed in both city and telephone directories, with which Mr. Groner was familiar. The checking of the realty transfers and assessment rolls of Los Angeles county was done in making a routine check of some 6000 bad accounts of the bank there. Within the same five years the Los Angeles bank did not by any means whatever communicate with respondent, or issue an execution, or even attempt to conduct a supplemental examination. In brief, for eight years after entry of judgment no serious effort was undertaken by appellant to effect collection. Finally, in 1940 it wrote a letter to the Motor Vehicle Department and in 1944 wrote to respondent.

[1] In the course of its argument appellant lays store by the acts done by the San Francisco bank to enforce payment of its judgment. But the steps taken at San Francisco cannot avail appellant in aid of its attempt now to enforce the Los Angeles judgments. The Los Angeles officials of appellant are not shown to have had any knowledge of the events at San Francisco. Certainly no delay or hesitancy at Los Angeles is shown to have resulted from information received from the north or to have caused the Los Angeles bank to desist from the issuance of execution under section 681 or from conducting a supplemental examination. Not only did the San Francisco office check (1) assessment rolls in the counties of respondent's residence and place of business, (2) publications of realty transfers, (3) automobile registrations and (4) inquire of respondent as to his ability, but subsequent to the five-year period it twice renewed its judgment. Such diligence was unknown to the Los Angeles office. The prompt steps taken by the San Francisco branch, therefore cannot inure to the benefit of the Los Angeles office.

[2] The affidavit for execution under Section 685 must show due diligence under the circumstances of plaintiff's case. Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 363, 132 P.2d 207; Hatch v. Calkins, 21 Cal.2d 364, 371, 132 P.2d 210; Cochrane v. Cochrane, 57 Cal.App.2d 937, 939, 135 P.2d 714. The judgments herein are based upon two secured notes of respondent to another bank which had been acquired by appellant at the nadir of the depression. Respondent was one of some 6000 insolvents in debt to appellant's Los Angeles bank. Naturally, under the existing conditions of widespread insolvency, they did not stir the hopes of the

bank. It is but a step to the deduction that the Los Angeles officials did not look to the San Francisco office to supply the "due diligence," an essential requirement of the bank's right to process under section 685. That it did not do so is evidenced positively by a want of proof thereof.

Notwithstanding respondent's home and field of operations were some 450 miles from Los Angeles, appellant contends that its searching of assessment rolls and indices to property transfers was evidence of its diligence in its aims to enforce payment by him. If the mere examination of public records in the county of the debtor's residence in the hope that he "will acquire property in his own name constitutes a minimum of effort" (Helvey v. Castles, 73 Cal.App.2d 667, 674, 167 P.2d 492), then what words will characterize such examination by a judgment creditor residing and operating in a distant county in which the debtor never resided or trafficked in realty? A serious intention to pursue its debtor would have induced some action indicative of diligence. But neglect to obtain an execution under section 681 or to make an examination of the debtor and merely to read, through a course of some 14 years as a routine matter, the lists of assessments and transfers in Los Angeles county is evidence of no diligence at all. The letter to the Capital Company is not proof of diligence. Although the reply thereto indicated the insolvency of respondent and the recency of the judgment, not an act was done to verify the hearsay report of appellant's correspondent.

[3-6] Since there was no diligence at all on the part of appellant there is no question of the trial court's abuse of discretion in denying appellant's motion left for determination. But if any doubt should remain of the correctness of the order in denying the issuance of the writ one needs but to be reminded that the factual determination by the trial court of issues tried by affidavits in which there is a conflict is final. Doak v. Bruson, 152 Cal. 17, 19, 91 P. 1001; Brainard v. Brainard, 82 Cal.App.2d 478, 186 P.2d 990. The standard of diligence fixed by the courts as the criterion by which the conduct of a judgment creditor is to be measured in proceedings under section 685 is the customary, usual, reasonable and diligent procedure which would be taken in the average law office to collect a judgment where the records reveal no assets. Terrill v. Shepherd, 57 Cal.App.2d 290, 294, 134 P.2d 491. Whether a court has abused its discretion in denying a motion under the section is established when it is shown that the court has exceeded "the bounds of reason—all circumstances before it being considered." Kosloff v. Kosloff, 67 Cal.App.2d 374, 379, 154 P.2d 431, 434. In view of the facts above recited it cannot be maintained that the court below is guilty of such abuse.

The cases (Mongerson v. Williams, 64 Cal.App.2d 279, 148 P.2d 419, and Troendle v. Clinch, 74 Cal.App.2d 480, 169 P.2d 55) cited by appellant as authority for its asserted due diligence are readily distinguished. In both are records of more than due diligence by the judgment creditors and of delays not caused by them. Within the five-year period, in both cases, every step was taken that was reasonably calculated to uncover the assets of the debtors. "Due diligence" had been exerted as shown clearly by the affidavits whereby the judgment creditors had complied with the requirements of the statute. The object of section 685 is to withhold execution upon a judgment after five years unless the applicant therefor alleges and proves satisfactory reasons showing why he was unable to enforce payment of his judgment within the statutory period, or that he has within the five years exercised due diligence to discover leviable assets of his debtor. Butcher v. Brouwer, 21 Cal.2d 354, 358, 132 P.2d 205. The clear implication of the statute as well as of the court in the Butcher case is that if the trial judge is not persuaded by the affidavits of the plaintiff that the latter has exercised due diligence, or if he is convinced by the affidavits of the defendant that, notwithstanding such due diligence, circumstances have occurred subsequent to the five-year period upon which it should be held, in the exercise of a sound discretion that execution should not issue, then the plaintiff is not entitled to enforce his judgment.

[7-10] Appellant's argument that respondent did not aver whether he had leviable assets during the five-year period, or whether he concealed his assets, is irrelevant. The statute requires the plaintiff to show that he has exercised due diligence. Naturally, if the plaintiff makes a showing that others have done the usual acts necessary to establish a showing of due diligence to the satisfaction of the trial court, and it appears therefrom that the defendant had no assets during the statutory life of the judgment, as was the situation in Southern California Telephone Co. v. Damenstein, 81 Cal.App.2d 216, 183 P.2d 675, cited by appellant, it follows that the court will not demand that needless acts should have been done before ordering the issuance of execution under section 685. But no such situation was presented to the trial court in the instant action. It cannot justly be held that the hearsay letter of the Capital Company was the equivalent of four separate supplemental examinations and discharges in as many actions within the five-year period. Southern California Telephone Co. v. Damenstein, supra. There is no evidence of respondent's financial status during the five years, either that he concealed assets or had no assets. The bare averment that he is found to be in possession of some $25,000 in October, 1946, is not proof that he had or concealed any assets prior to the expiration of the first five years of the judgments. Moreover, since appellant's affidavits did not plead an excuse for its want of diligence it is in no position in the reviewing court to inject such plea. On the contrary respondent averred that while he had been interviewed by Mr. Grassens of the San Francisco office concerning payment of the San Francisco judgment, that official never once mentioned the Los Angeles judgments.

[11] Appellant resorts without success to the popular doctrine of equity that one cannot be guilty of laches if by his delay in acting his antagonist was not prejudiced. This is strictly a legal proceeding which is prescribed by statute and governed by a body of law which has grown out of the statute. Long v. Long, 76 Cal.App.2d 716, 173 P.2d 840, was an equity action to which the doctrine was applicable, but it is of no aid to appellant in the instant case.

[12] Appellant's final contention is that if Williams was without assets he is not prejudiced thereby. The authorities cited (Helvey v. Castles, 73 Cal.App.2d 667, 675, 167 P.2d 492; Mohr v. Riccomi, 14 Cal.App.2d 416, 58 P.2d 659; Ruddell v. Warne, 68 Cal.App.2d 600, 157 P.2d 428; Troendle v. Clinch, supra; Butcher v. Brouwer, supra) are distinguishable or became effective prior to Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210, which determined that a creditor cannot rely upon hearsay statements that the defendant had no property.

The order in each case is affirmed.

WILSON, J., concurs.

McCOMB, J., deeming himself disqualified, did not participate in the foregoing opinion.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

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84 Cal.App.2d 536

FREY v. CORBIN et ux.

Civ. 7436.

District Court of Appeal, Third District, California.
March 24, 1948.

1. Landlord and tenant 🔑24(1)

A valid lease of real property must set forth, in addition to the parties, a description of the premises, rental to be paid and term for which property is demised.

2. Landlord and tenant 🔑80½

In action to establish rights of subtenant, evidence sustained finding that plaintiff was entitled to a lease from defendants for a period of five years at a rental of $148 per month. Civ.Code, § 3538.

3. Estoppel 🔑52, 53

The expression that an estoppel must possess an element of fraud means that case must be one in which circumstances and conduct would render it a fraud for party to deny what he had previously induced or suffered another to believe and take action on, and there need be no precedent, corrupt motive or evil design.

4. Estoppel 🔑55

One against whom estoppel is asserted must, either by his silence or representation, have created a belief in existence of a state of facts which it would be unconscionable to deny.

5. Estoppel 🔑87

Where plaintiff, sub-tenant, would not have made improvements and alterations but for representation of defendants that plaintiff could remain so long as defendants had lease, defendants were estopped from denying plaintiff's right to sub-lease for duration of defendants' lease.

◆

Appeal from Superior Court, Solano County; Joseph M. Raines, Judge.

Action by Edward C. Frey against B. Hardin Corbin and wife to establish a sub-tenancy wherein the defendants filed a cross-complaint for damages and restitution of premises. Judgment for plaintiff and defendants appeal.

Affirmed.

Everitt L. Mossman and Wallace W. Cox, both of Vallejo, and David C. Dunlap, of San Francisco, for appellants.

Taft, Wright & Hopkins, of Vallejo, for respondent.

PEEK, Justice.

By his complaint plaintiff sought to have declared his tenancy as a subtenant of defendants in certain business property located in the city of Vallejo, and that defendants be estopped to deny his tenancy during the term of his alleged lease. Defendants answered denying generally the allegations of plaintiff's complaint, and sought damages and restitution of the premises, as stated in their cross-complaint, for the alleged failure of plaintiff to pay the increased rental demanded of him in defendants' notice of change in the terms of plaintiff's tenancy theretofore served upon him by defendants.

At the conclusion of the trial on the issues so joined the court specifically found that commencing on or about March 7, 1944, plaintiff and one Schamun became the sublessees of defendants at 717½ Marin Street, Vallejo. On September 8, 1944, plaintiff purchased the interest of his partner in the meat and vegetable market operated by them at said address, and ever since has been the sole owner thereof and has continued to occupy the premises as a subtenant of defendants. During all of this time defendants were the lessees of the premises occupied by plaintiff as mentioned and also of 717 Marin Street (wherein they operated a photo supply shop), under a lease which expired on or about January 1, 1945, and which was renewed on or about that date for a period of five years. About April, 1943, when defendant B. Hardin Corbin entered the armed forces he executed and delivered to his wife, the defendant Carol Corbin, a general power of attorney, including the power to sublease said premises and to do all things necessary in connection therewith. On December 24, while Mrs. Corbin was so acting under said power of attorney plaintiff requested a written lease of that portion of the premises then occupied by him. At said time Mrs. Corbin told plaintiff: "You have nothing to worry about; as long as we are lessees of the property, you can occupy the premises at 717½ Marin Street." Plaintiff, in reliance upon the promises of said defendant Carol Corbin, made no attempt to obtain a separate lease for himself from the owners but urged Mrs. Corbin to obtain a renewal of defendants' lease and assured her if a new lease could be obtained he would pay his share of the increased rental.

On or about December 30, 1944, Mrs. Corbin informed plaintiff she had obtained a new lease beginning January 1, 1945, and that commencing January 25, 1945 his rental would be $122.50, which rental plaintiff paid to and including April 25, 1945. On or about March 25, 1945 Mrs. Corbin informed plaintiff she had received a letter from her husband wherein he stated that plaintiff should assume the entire increase under the new lease, and accordingly beginning April 25, 1945 his rental would be $148.00 per month and at that time it was agreed the sum of $148.00 was the last raise and that the rent would not thereafter be increased. Plaintiff agreed to such conditions and in reliance upon said representations paid defendants the designated rental of $148.00 to and including March 25, 1946, and ever since has been able and willing to continue to pay the same. On or about January 2, 1945, plaintiff desired to alter and improve the premises occupied by him and asked permission of Mrs. Corbin to do so, whereupon he and Mrs. Corbin went to one of the owners explaining in detail the proposed alterations and improvements which they approved by both the owner and Mrs. Corbin. Plaintiff in further reliance upon representations of Mrs. Corbin proceeded to so alter and improve his store expending therefor the sum of approximately $4000.00. Mrs. Corbin observed the work being done by plaintiff and made no objections thereto, and had it not been for her representations that he could remain on the premises as long as she and her husband were the lessees of the whole building and premises plaintiff would not have made the improvements.

The court further found that defendant B. Hardin Corbin on February 7, 1946 (after his return from the armed service) served a three day notice on plaintiff to pay rent in the sum of $148.00 or surrender possession of the premises, and that plaintiff thereupon paid the rent demanded. On February 21, 1946 defendant B. Hardin Corbin caused to be served on plaintiff a further notice that beginning March 25, 1946 his rent would be increased to the sum of $200.00 per month, and that plaintiff refused to pay the increased rental, relying at all times upon the agreement made with Mrs. Corbin. Additionally the court found that the sum of $148.00 was a reasonable rental, and that plaintiff had waived no rights in his lease to the premises.

The court concluded from the foregoing findings of fact that plaintiff was entitled to a lease from defendants for a period of five years from and after January 1, 1945 at a rental of $148.00 per month; that defendants are equitably estopped to deny said tenancy; that defendants be restrained from interfering with plaintiff in his occupancy thereof and that the attempted eviction of plaintiff for failure to pay the increased rental was of no effect and that defendants take nothing by their cross-complaint.

From the judgment which was entered accordingly defendants have appealed, in general attacking the sufficiency of the evidence to support the findings on two grounds, (1) that the evidence is insufficient to support the findings that any lease for a term of five years had been entered into between the parties, either oral or otherwise, or the agreed rental therefor, and (2) that evidence is wholly lacking in the necessary elements of estoppel to assert the Statute of Frauds.

[1] As appellants contend, it is well established that "a valid lease of real property must set forth, in addition to the parties, a description of the premises, and the rental to be paid, the term for which the property is demised." Losson v. Blodgett, 1 Cal.App.2d 13, 36 P.2d 147, 149.

[2] The sufficiency of the designation of the parties or the description of the premises is not questioned but appellants do strongly question the sufficiency of the evidence relative to the rental to be paid and the term of plaintiff's occupancy.

It is first contended that the different rentals paid, that is, $122.50 and $148.00, is of itself positive evidence of the fact that the parties did not consider the rent as fixed in any definite amount. However, the record disclosed testimony that the sum of $122.50 was understood by plaintiff and Mrs. Corbin to be tenative only and was subject to the subsequent confirmation or change by Mr. Corbin after he had an opportunity to reply to the letter from his wife wherein she specifically asked what the rental should be; also there was the additional testimony that Mrs. Corbin stated to plaintiff that the final raise to $148.00 would be the last, and the fact that this sum was paid by plaintiff for approximately one year pursuant to the reply from Mr. Corbin that plaintiff should pay the entire amount of the increase demanded by the terms of the new lease. Although the sum of $122.50 was tentative it appears to have been so only bcause of the time necessarily consumed in the delivery of Mrs. Corbin's letter to Mr. Corbin in India, and the time for his reply to reach her. The sum of $148.00 then became the definite price as agreed between plaintiff and Mrs. Corbin, the time and manner of payment remaining unchanged. Levin v. Saroff, 54 Cal.App. 285, 288, 201 P. 961.

The second portion of defendants' first contention likewise appears to be without merit. The record shows that the original lease expired in November 1944, and that negotiations were carried on by defendant Mrs. Corbin from the previous September until the new lease was executed, either during the last two weeks of December 1944 or the first part of January 1945 (the exact date thereof is not shown).

The record further shows that the conversations upon which plaintiff predicates his case took place over a considerable period of time beginning at a date several months prior to the expiration of the old lease and continuing into January 1945, after the new lease had taken effect. Specifically the testimony of plaintiff shows that during the latter part of December 1944 or the first part of January 1945 Mrs. Corbin informed him she had a new lease, at which time she again told him and his attorney he had nothing to worry about, that he could remain as long as defendants had a lease. It was upon such facts that the trial court in effect concluded that the statements of Mrs. Corbin constituted an oral offer to lease the premises for the term of defendants' lease, to-wit, five years. While the actual dates of the conferences between plaintiff and Mrs. Corbin do not appear with any degree of exactness it cannot be said that there is no evidence to support the findings of the trial court. The lease obtained by Mrs. Corbin was for the definite term of five years, and by reference to such certainty the sublease of plaintiff was thereby made certain. C.C. sec. 3538; Tiffany on Real Property, 3d Ed., p. 130.

In support of their final contention appellants assert that there is no finding of actual fraud, that the terms of the alleged lease did not appear with sufficient certainty, that the alleged detriment suffered by plaintiff in making the improvements was an act of his own initiative performed after the execution of the alleged lease and that there was no representation that a written contract would be executed.

[3] As stated in the case of Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198, 202: "'All that is meant in the expression that an estoppel must possess an element of fraud is that the case must be one in which the circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon. * * * There need be no precedent corrupt motive or evil design.'"

[4] The gist of the rule would seem to be that the one against whom the estoppel is asserted must, either by his silence or representation, have created a belief in the existence of a state of facts, which it would be unconscionable to deny. Notten v. Mensing, supra.

[5] Here the court found that had it not been for the representation of Mrs. Corbin that plaintiff could remain as long as defendants had a lease, plaintiff would not have made said improvements and alterations. The facts thus found to be true and which find support in the record warrant the application of the doctrine in the present case.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

SMITH et al. v. HARGER et al.

Civ. 3568.

District Court of Appeal, Fourth District, California.

March 15, 1948

1. Automobiles 🔑155

The entry of trucks on school grounds on single occasion to repair or improve grounds did not constitute "public traffic" on grounds, so as to make provisions of Vehicle Code permitting vehicle on highway to start or back only if reasonable saftey permits and requiring sounding of horn when necessary to safe operation of vehicle applicable to grounds in absence of specific traffic regulations for grounds. Vehicle Code, §§ 543, 603(c), 671.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Traffic".

2. Automobiles 🔑155

Truck driver on school grounds must observe greater degree of care than truck driver on highway, but standard of care is the same.

3. Automobiles 🔑155

Whether truck driver sued for injuries sustained when truck struck child on school grounds was negligent depended on whether driver in light of all existing circumstances exercised care of reasonably prudent person.

4. Automobiles 🔑245(4)

In action for injuries sustained when truck struck child on school playground, evidence whether driver exercised care of reasonably prudent person in respect to keeping lookout and giving warning while backing truck so as not to be negligent, was for jury.

5. Schools and school districts 🔑122, 147

In action against school district and school principal for injuries sustained when child was struck by truck spreading dirt on school grounds, evidence whether school district and principal were negligent in respect to taking sufficient precautions for safety of child was for jury.

6. Schools and school districts 🔑147

In action against playground supervisor for injuries sustained when child was struck by truck spreading dirt on school playgrounds, evidence whether supervisor negligently discharged her duties was for jury.

7. Automobiles 🔑223(2)

A child, who was struck by truck on school playgrounds, could be contributorily negligent, notwithstanding that child was only five years and nine months old.

8. Automobiles 🔑245(74)

In action for injuries sustained when child was struck by truck on school playgrounds, evidence whether child, who had been warned not to go on grounds and to stay away from trucks was contributorily negligent, was for jury.

9. Automobiles 🔑246(2)

In action for injuries sustained when child was struck by truck on school grounds, instruction to consider whether others had assumed responsibility for supervising children on playgrounds in determining whether driver negligently operated truck was not error as relaxing degree of care required of driver or as excusing driver's violation of statute permitting parked vehicle to be started or backed only if reasonably safe to do so. Vehicle Code, § 543.

10. Automobiles 🔑169

The statute permitting parked vehicle to be started or backed only if reasonably safe to do so requires only ordinary or reasonable care on part of driver of vehicle in view of the circumstances then existing. Vehicle Code, § 543.

11. Automobiles 🔑246(2)

In action for injuries sustained when child was struck by truck on school playgrounds, instruction to consider manner in which child conducted himself as a circumstance in determining whether driver was negligent was not error.

12. Schools and school districts 🔑122

In action against school district and playground supervisor for injuries sustained when child was struck by truck on school playgrounds, instruction that school district was not liable for any negligence of supervisor, if supervisor was working only for city in playground and recreation department, was not error as unduly limiting school district's responsibility for supervisor's negligence, where evidence did not disclose that supervisor acted under orders of school district or was agent, servant or employee of district.

13. Trial ⚷253(4)

In action against school district and school principal for injuries sustained when child was struck by truck on school playgrounds, instructions that recovery could not be had in absence of duty of district and principal to supervise playground at time of accident was not error as excluding, as foundation of liability, fact that district and principal could not escape consequences of dangerous instrumentalities which they caused to exist, where instructions were in accordance with pleadings that district and principal so negligently supervised playground as to proximately cause the accident.

14. Negligence ⚷138(3)

In negligence action, giving of instruction on doctrine of unavoidable accident was proper, where doctrine was set up as a special defense by defendants and there was some evidence to sustain it.

◆

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by Gary LeRoy Smith, a minor, by and through his guardian ad litem, Virginia Smith, and another, against John Thomas Harger and others, for damages for injuries sustained when the minor was struck by a truck. From the judgment, the plaintiffs appeal.

Affirmed.

Rae B. Carter and John D. Chinello, both of Fresno, for appellants.

Stammer & McKnight and James K. Barnum, all of Fresno, for respondents Harger and Haddock.

James M. Thuesen, Dist. Atty., Robert M. Wash, Deputy Dist. Atty., and Conley, Conley & Conley, all of Fresno, for respondents School District and Carpenter.

Chester O. Hansen and John Said, both of Fresno, for respondent Warren.

BARNARD, Presiding Justice.

This is an action for damages for injuries suffered by the minor plaintiff when he was struck by a truck owned by the defendant Haddock and driven by the defendant Harger while on a school ground in Fresno, and for medical and other expenses incurred by the father of the boy. The accident occurred at 4:15 on the afternoon of April 23, 1945, while dirt was being hauled in to fill some low places in the school ground. By an arrangement between the school district and the playground department of the city the use of certain school grounds, including this one, was turned over to the playground department after school hours. The school day ended here at 3:30 P.M., and after that time the playground department assumed supervision and control over this playground and the school district exercised no supervision over any children who might play there after classes were dismissed for the day.

The complaint alleged that Gary was injured through the negligence of Harger while in the course of his employment by Haddock. The City of Fresno and the school district were joined as defendants on the theory that they were then exercising joint management and control over this playground. Carpenter, the principal of this school, one Quigley, the playground superintendent, and Mrs. Warren, the playground supervisor who was present and in charge at the time of the accident, were joined as defendants, it being alleged that in their several capacities each was then acting within the scope of his employment as an agent, servant and employee both of the city and of the school district in supervising the play of minor children on this school ground. Separate answers were filed amounting to a general denial and, with the exception of that of Harger and Haddock, raising the defenses of unavoidable accident and contributory negligence. During the trial the plaintiff dismissed the action as against Quigley and the City of Fresno. A jury returned a verdict in favor of all of the remaining defendants. A motion for a new trial was denied and the plaintiffs have appealed from the judgment on the grounds that the evidence is insufficient, as a matter of law, to support a judgment for the defendants, or for any of them, and that certain instructions given were prejudicially erroneous.

The evidence discloses the following: These school premises are approximately 600 feet long, north and south, and 300 feet wide, east and west. The school building occupies the easterly portion, and the westerly portion was used as a playground and was enclosed by the building on the east and by a fence on its south, west and north sides. On the day of the accident the superintendent of buildings for the school district arranged with the foreman for Haddock to have some dirt hauled in and spread in some low places on this school ground. The two went to the school ground where the principal, Carpenter, pointed out the low spots to be filled. These were all in the west half of the grounds, some to the north and some to the south. The foreman pointed out that it would be dangerous to work with the trucks on the school grounds with children about and the building superintendent assured him there would be supervision to watch the children. The foreman then instructed Harger where the fill was to be made and told him there would be children on the playground at times and that the supervisors would be there to look after them. The hauling started about one o'clock, three trucks being used. Harger had delivered and spread about a dozen loads before the accident occurred, during which operations any children on the grounds were kept away from the trucks by teachers or by employees of the playground department. The truck he was using was a dump truck with a tail gate hinged at the top and secured by hooks at the bottom. By levers in the cab the front end of the body could be raised and the hooks released permitting the tail gate to swing free and the dirt to flow out on the ground. The left door of the cab had been removed and there was a mirror attached to that door frame, enabling the driver to see along the left side of the truck but when the body was tilted he could not see along the right side.

Carpenter talked with the foreman, showing him the low places about one P.M. Ten minutes later he sent a notice to all room teachers advising them of the coming of the trucks and directing them that the children be warned. Later in the afternoon he sent a second notice to all teachers stating that the work would not be completed as soon as expected and telling them to warn the children to go directly home after school and stay there.

The injured minor was 5 years and 9 months old at the time. He was a pupil in the kindergarten in this school, his school hours being from 1:00 to 3:30 P.M. On receiving the first notice from the principal Gary's teacher called all the children together and told them that the trucks were working on the yard and that they must stay away from them. During the afternoon recess the children were not permitted to go on the school grounds to the west of the building. After receiving the second notice, and before dismissing the children at 3:30, Gary's teacher explained the matter again and told the children to leave by the door leading to the street on the east side, not to go onto the school grounds, to go directly home, and not to come back to the school grounds. When this teacher visited Gary at the hospital after the accident she asked him if she had not told him to stay away from the trucks, and he replied that she had. This teacher had previously warned the children almost daily about the danger from automobiles, and Gary's mother testified that she had similarly warned him from the time he could first understand until after he started to kindergarten.

Gary lived a short distance from this school and arrived home at 3:35. He changed his clothes, had something to eat, and started back to this school ground at about five or ten minutes to four. When he asked permission to return to the playground his mother at first refused to let him go. It does not clearly appear whether his mother later gave her permission or whether he went without it. He appeared on the playground entering by a corridor through the building from the east, with three other boys. As they emerged from the corridor they passed near Mrs. Warren, who told them to stay away from the grounds where the trucks were working. At that time possibly 50 children were on the playground but were on the northerly part thereof. Dirt had already been hauled and spread on this portion and the trucks were then working on the southerly portion. These boys then moved along the building toward the south and stopped. As Mrs. Warren watched them they started walking toward the south gate and then turned and ran westerly toward the rear end of the truck which was slowly moving northward. She ran toward the boys shouting at them to stay away from the truck, and as she was running and continuing to shout a warning the accident occurred. Apparently, the tail gate of the truck struck the boy. She saw Gary behind the truck, to the east of its center, and as the backward movement of the truck started she saw him jump backwards and fall.

An eight-year-old boy who was with Gary testified that just before the accident he was standing near the right rear wheel of the truck, and that just before the truck hit him Gary was "putting his hands up behind the truck, pushing on it." Garys' mother testified that on the next day this boy, in describing the accident, had told her that he had then told Gary "not to get near."

Harger had entered with this truck through a gate at the south end of these grounds. He testified that his foreman had told him to drive carefully in there, that teachers would be there until school was out, and that after there was supposed to be a lady there who was hired by the city to look after the children; that as he entered the gate he saw several small boys around the gate, all of whom stood to one side as the truck passed; that he drove in a northwesterly direction at a speed of two or three miles an hour and stopped in the southwest quarter of the playground; that while so driving he looked carefully in front, to the left and to the right; that as he stopped he noticed several children near the building 50 or 60 feet east of the truck who were walking south toward the gate; that they were about opposite the cab of the truck and he saw them through the window of the east door; that as he proceeded they passed behind the truck on his right, and he couldn't see them; that when he stopped he engaged the mechanism raising the truck body, released the tail gate and started forward so as to spread the dirt; that as he proceeded at about two or three miles an hour he put his foot on the left running board and leaned out to watch the dirt as it came from the truck; that he was attempting to spread the dirt uniformly and this was the only way he could do so; that he was spreading the dirt at the extreme south end of the part to be filled and saw no other children on the south half of the playground as he prepared to spread the dirt; that when he had proceeded ten or twelve feet he discovered the dirt was not spreading in sufficient depth and it became necessary to retrace his path; that he stopped, looked in front, to the left and to the right, and immediately started to back; that he then saw no children around the truck; that when he had backed about three feet he heard a yell from behind and to the right of the truck, and from a position where he could not see because of the raised bed of the truck; that he stopped immediately, pulled forward about three feet and got out and ran to the rear of the truck; and that he then saw the injured boy "kind of sitting" a few feet to the east of the rear end of the truck.

It was brought out in the evidence that the governing board and officers of this school had established no special conditions or regulations regulating "public traffic" on these school grounds and had posted no signs giving notice thereof.

The appellants contend that the evidence discloses, as a matter of law, that each of the respondents was guilty of negligence. As to Harger and Haddock, it is argued that a driver is required to exercise greater caution in a school yard than under ordinary circumstances; that since no special regulations for "public traffic" on these grounds had been adopted sec. 603(c) of the Vehicle Code made all the provisions of that code relating to traffic on highways applicable to these grounds; that sec. 543

of that code prohibits the starting or backing of a vehicle on a highway until this can be done with reasonable safety; that sec. 671 requires the sounding of a horn when reasonably necessary to insure safe operation of a vehicle; that Harger here stopped his truck and then backed it without sounding his horn and without being able to see whether the children were behind his truck; and that this establishes negligence as a matter of law, citing Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 110 P.2d 1044; Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680.

[1-4] No "public traffic" on these grounds was here permitted and sec. 603(c) could have no application to such a case as this where, on a single occasion, trucks necessary to the making of repairs or improvements to the grounds are permitted to enter for that purpose. Even if secs. 543 and 671 of the Vehicle Code were otherwise applicable questions as to whether a movement could be made with reasonable safety, whether an audible warning was reasonably necessary, and as to proximate cause, would still remain. While it may be conceded that a greater degree of care was here called for the standard of care remained the same. Whether that standard was observed and met was still a question for the jury. As was said in Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680, 684: "* * * the determinative question the jury here was called upon to decide, in considering the issue of the driver's negligence, was whether in the light of all the existing circumstances and conditions shown by the evidence he exercised the care of a reasonably prudent person in backing up his truck." The evidence discloses that a considerable amount of care was here exercised by other parties in the warnings given, and in the supervision afforded, and some by the driver in proceeding slowly and in looking around before he moved forward or moved backward. Whether this care was sufficient or whether more was called for under the circumstances was a question of fact. Seeing these boys near the building 50 or 60 feet to his right and walking toward the gate this driver might well assume that they were on their way to this gate to leave the grounds. There were no children playing in the south half of the grounds, a supervisor was in charge, and it does not necessarily appear that as a reasonable man he should have anticipated that these boys would suddenly change their course and come over and play behind the truck while it was in the process of dumping its load. It cannot be said, as a matter of law, that reasonable care required the posting of an extra man behind this truck during this operation, and whether a reasonable man in the position of this driver, under these circumstances, would have gotten out and gone behind the truck to look before retracing the ten or twelve feet he had come and while the dirt was still pouring out of the truck, is purely a question of fact and not one of law.

[5] As to the school district and Carpenter it is argued that they had created a hazardous condition on this school ground, that common prudence should have told them that at least some precautions on their part were necessary to protect the children, and that the record conclusively shows that they took no precautions whatever. The record demonstrates that they took a considerable amount of precaution and whether or not the amount of care was sufficient, under the circumstances, was a question of fact. As a result of the precautions taken the child arrived safely at home.

[6] As to respondent Warren it is argued that the conclusion is inescapable that she was utterly remiss in discharging her duties, and that negligence on her part clearly appears as a matter of law. Again, questions of fact are presented and this contention is without merit.

[7, 8] It is also argued in this connection that, as a matter of law, the minor appellant could not be found guilty of contributory negligence because of his age, citing Conroy v. Perez, 64 Cal.App.2d 217, 148 P.2d 680 and Gonzales v. Davis, 197 Cal. 256, 240 P. 16. This contention cannot be sustained. Todd v. Orcutt, 42 Cal.App. 687, 183 P. 963; Carrillo v. Helms Bakeries, Ltd., 6 Cal.App.2d 299, 44 P.2d 604; Mecchi v. Lyon Van & Storage Co., 38

Cal.App.2d 674, 102 P.2d 422, 104 P.2d 26; Walsh v. Van Tuyle, 21 Cal.App.2d 302, 69 P.2d 189; Charves v. San Francisco-Oakland Terminal Railways, 44 Cal.App. 221, 186 P. 154. It is further argued that there is no evidence here showing contributory negligence on the part of this boy. The facts above summarized are a sufficient answer to this contention.

It is next contended that the following three instructions, given at the request of Harger and Haddock, were prejudicially erroneous.

"In determining whether the defendant John Thomas Harger was negligent, you must consider the fact, if true, that others had assumed responsibility for supervising the children on the school ground and keeping them away from the trucks. This fact, if true, did not relieve the truck driver from the duty to himself exercise ordinary care, but it is a circumstances to consider in determining what was ordinary care on his part, and if you find from the evidence that others did assume that responsibility, and that in view of that circumstance, John Thomas Harger drove, managed, operated, and controlled his truck as any ordinary prudent person would have driven, managed, operated, and controlled it, then John Thomas Harger was not guilty of negligence."

"In determining the responsibility, if any, of the defendants John Thomas Harger and J. E. Haddock, Ltd., you are instructed that the mere fact that the truck was backed in the course of spreading the dirt was not in itself unlawful or negligent, and that the law did not necessarily require the truck driver to get out of his cab and walk around the truck before backing, or that outriders assist the driver in looking for children behind or to the right of the truck. All that was required in this connection was that he use ordinary care in backing the truck and in keeping a lookout for children in the vicinity of the truck."

"In determining whether the defendant John Thomas Harger was negligent, you must consider all of the circumstances under which he was driving, including the speed at which he was driving the dump truck, the nature of the work he was doing, the manner in which Gary LeRoy Smith conducted himself, and the arrangements, if any, which had been made between the parties to protect the children on the school ground from the danger of the trucks. If you find from all the evidence and from the law as given to you in these instructions that the defendant John Thomas Harger conducted himself in all ways as a person of ordinary prudence under like circumstances would have conducted himself, and that the accident happened only because of negligence on the part of others, or because of the conduct upon the part of the child which could not have been anticipated in the exercise of ordinary care, then his failure to avoid the accident was not alone sufficient to constitute him negligent in this case."

[9] It is argued that the first of these instructions relaxed the degree of care required even if the truck driver did not know that others had assumed the responsibility mentioned, and that it excused the truck driver for violating the provisions of sec. 543 or the Vehicle Code. This instruction included the element as to the truck drivers' knowledge that others had assumed the responsibility by the provision "and that in view of that circumstance," and it appears, without conflict, that the driver did have knowledge of this circumstance. While it included the fact that others had assumed responsibility as one of the circumstances to be considered in deciding whether the driver had exercised ordinary care under the circumstances, it did not inform the jury that the degree of care was relaxed or inform the jury that the driver was relieved of his duty to exercise ordinary care. The instruction did not excuse the driver for violating sec. 543 of the Vehicle Code and did not mention that section. In another instruction given at the request of the appellants, the jury was instructed in the language of sec. 543 and told that a violation of that section was negligence as a matter of law.

[10, 11] It is argued that the last sentence of the second of these instructions is erroneous because sec. 543 of the Vehicle Code requires something more than the exercise of ordinary care while backing.

If that section be considered applicable it still requires only ordinary or reasonable care in view of the circumstances then existing. It is argued that the third of these instructions was erroneous in telling the jury that it must consider the manner in which the minor conducted himself, in determining whether Harger was negligent. This was included merely as one of the circumstances and neither error nor prejudice appears.

[12] Complaint is made of three instructions given at the request of the respondent School District and Carpenter. In the first of these the jury was told that the school district was not chargeable with the negligence, if any, of Sallie E. Warren unless she was the servant, agent or employee of the district, and that "If you find from the evidence that prior to and at the time of the accident, Sallie E. Warren was working only for the City of Fresno in the playground and recreation department, you cannot hold the School District liable for her negligence, if any." It is argued that this quoted sentence unduly limited the school district's responsibility for her negligence to whether or not she was then working for the district; that the evidence discloses that she acted on the orders and directions of the school district and assumed responsibilities on its behalf; that even if she was only "working" for the city at the time, she was also serving the school district in a capacity apart from her work; and that the jury was entitled to base a verdict against the school district on the theory of respondeat superior because of her negligence. We are unable to find any evidence that Mrs. Warren was here acting under orders of the school district, or that she had assumed responsibilities on its behalf. Moreover, the complaint alleged that Mrs. Warren was the "agent, servant and employee" of the school district, and the case was tried on that theory and there was a failure of proof in this regard. At the request of the appellants the court gave some half dozen instructions along the same line although the words "working only" were not there used. Neither error nor prejudice appears in this connection.

[13] In the other two instructions in this group the jury was told that the appellants had sued Carpenter and the school district on the theory and allegation that they so negligently managed, controlled and supervised this playground as to proximately cause the accident here in question; that in the absence of any duty on the part of said defendants to manage, control or supervise the playground immediately prior to and at the time of the accident there could be no recovery against either of said defendants; that if the jury should find that at the time in question the playground was under the sole management, control and superintendence of the City of Fresno and its playground department, and there was at the time no duty on the part of Carpenter or the school district to manage, control or supervise the playground and in connection therewith to control Gary Smith, then their verdict must be in favor of those defendants; and that no verdict could be returned against those defendants unless it was found that at the time those defendants had a duty to manage, control or supervise Gary Smith on said playground. It is argued that these two instructions excluded, as a foundation of liability, the fact that the school district and Carpenter cannot escape the consequences of dangerous instrumentalities which they have caused to exist. This contention is without merit. The instructions were in accordance with the pleadings, and the question was left to the jury as to whether or not these respondents owed any duty, under the circumstances, which they had failed to perform.

It is next contended that the court erred in giving instructions relating to contributory negligence on the part of the minor appellant, both because the evidence did not warrant instructions on that doctrine and because it was improper to submit such an issue to the jury because of the age of the minor plaintiff. As heretofore pointed out, the matter was one which was properly left to the jury and no complaint is made that the instructions themselves were not correct.

[14] Appellants' final contention is that at the request of the school district and

Carpenter an instruction on the doctrine of unavoidable accident was given. The only objection made is that the evidence received did not warrant an instruction on that doctrine. This doctrine was set up as a special defense by these respondents, there was some evidence to sustain it as to them, and under such circumstances the giving of an instruction in accordance with that theory was proper. Graham v. Consolidated Motor Transport Co., 112 Cal. App. 648, 297 P. 617; Sitkei v. Ralphs Grocery Co., 25 Cal.App.2d 294, 77 P.2d 311.

It cannot be held, as a matter of law, that the respective respondents were negligent and we find no reversible error in the instructions.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

84 Cal.App.2d 531

PEOPLE v. GRAVES et al.

Cr. 4178.

District Court of Appeal, Second District,
Division 3, California.
March 24, 1948.

Hearing Denied April 22, 1948.

1. Poisons ⚷9

Evidence sustained conviction of possession of an opium preparation in violation of the Health and Safety Code, on ground that defendant had constructive possession through an agent, where defendant admitted that his companion placed opium pill in flame and then rolled pill over hole in bottle part of pipe while defendant had tube of pipe in his mouth. Health and Safety Code, § 11500.

2. Criminal law ⚷696(2)

Where defendant's counsel at preliminary examination moved to strike out certain testimony, but that motion was denied, and at trial in superior court the People's case was submitted under stipulation on transcript of the testimony taken at the preliminary examination, and there was no objection by defendant's counsel in superior court as to such testimony or any motion to strike it out, superior court's failure to strike out such evidence on its own motion was not error.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Everett Artie Graves and another were convicted of unlawful possession of an opium preparation, and the named defendant appeals.

Judgment affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant Graves and one Pinkston were accused of the crime of violation of section 11500 of the Health and Safety Code, in that, on March 31, 1947, they unlawfully had in their possession a preparation of opium. Upon stipulation, the People's case as to defendant Graves was "submitted on the transcript of testimony taken at the preliminary hearing and the exhibit, which exhibit is admitted in evidence and marked Exhibit No. 1, both sides reserving the right to introduce additional evidence." Pinkston pleaded guilty. In a trial without a jury (a jury having been waived), defendant Graves was adjudged guilty. He appeals from the judgment, and asserts that the evidence was insufficient to justify the conviction and that the court erred in receiving certain evidence.

A police officer testified that on March 31, 1947, about 9:05 p. m., he and another officer went to a window of a certain house in Los Angeles; that the third or fourth slat of the Venetian blind at the window was tilted inward, and he looked through the blind where the slat was tilted and saw the defendant Graves and Pinkston lying on a bed facing each other; that a girl was lying at the foot of the bed; that at that time Graves had, in his hands, a 3-ounce bottle, a nipple, and a glass tube, which he was holding over a lighted lamp, and he had the tube in his mouth; that the lamp was on the bed between them; that Pinkston had a yen pock (an opium pill) in the flame of the lamp "and was rolling it over the top" of a hole in the bottle; that Graves held the tube in his mouth "off and on at intervals" for approximately seven minutes; that Graves then handed the instrument (bottle, nipple and tube) to Pinkston, who put the tube in his mouth, and held a yen hock (a device for cooking an opium pill over a flame)over the flame of the lamp; and that the officers were at the window about 22 minutes. The officer testified further that they (the officers) then entered the house through a window of another room and went into the room where the defendants were; that at that time Pinkston was off the bed, had the yen hock in his hand, and then threw it on the bed; that Graves was just getting off the bed; that the girl was off the bed; that a lighted lamp was on a platter on a table pad in the center of the bed; that the "pipe" was on the bed and was very hot; that he (the officer) took the yen hock off the bed; that a small yen pock was on the bed and another small one was in a dish in the room; and that a package and a jar of black granular substance known as yen shee (carbonized opium) were on a table in the room.

The officer also testified that he asked Graves how long he had been smoking opium, and he said, "I have been smoking opium for about a year"; that he (the officer) asked him how long he had been smoking opium "this night," and he said, "What time did you first get here?"; that the officer then said, "When I first saw you, you were smoking opium" and then Graves said: "I haven't smoked since then. I smoked for only about 15 minutes." The officer also testified that he asked Graves how long he had been smoking opium in that house, and that Graves said he had only been there once, and that he had been smoking opium with Pinkston about six or eight times before.

A police officer, who was qualified as a forensic chemist, testified that he examined the substances referred to herein as yen pock and yen shee, and that those substances were opium and carbonized opium respectively; that he examined the bottle (with the hole in it), the nipple and glass tube, and that in his opinion, based on his experience in observing paraphernalia used by opium users, those three things when put together form a crude opium pipe; that a yen hock "consists of a piece of metal sharpened at one end and blunt on the other end to cook a pill or pock over the flame"; that in the opium smoking business, in his opinion, a yen hock is used by placing a small amount of opium on it and rotating it over a small flame in order to get the opium to the right consistency, and then the opium is put in contact with the pipe and is inhaled by the smoker.

Graves testified that he had lived in the house referred to herein, and that he had moved from it about a month before he was arrested; that on the occasion when he was arrested he had gone to the house to see if he had any mail there; that after he moved from the house he had not returned to it until the day of his arrest; that Pinkston and the girl were in the house when he arrived there; that Pinkston was smoking opium; that he (Graves) had been there about an hour before he was arrested; that at the time of the arrest Pinkston told the officers that the opium belonged to Pinkston and that he had paid $100 for it; that Graves told the officers that he (Graves) did not use the opium; that one of the officers said that he looked through the window and saw everyone in there using it; that Graves replied that the officer had made a mistake, that Graves did not use it, and it was impossible for the officer to see into the room through the Venetian blinds; and that he (Graves) had not been smoking "any of that stuff in that room."

Pinkston testified that the Venetian blinds were new and in perfect order, and that no blind was at such an angle that anyone could see into the room; that Graves was not smoking any of this opium that day. On cross-examination he testified that he went to the house about 8 p. m., and that he took the opium and paraphernalia with him to the house; that he began smoking opium about 8:30 p. m.;

that about noon of that day he had hidden the opium in some bushes near the house; and that at the time he hid the opium in the bushes the apparatus was "already there" in the bushes, but he did not know who put it there.

[1] Appellant argues that the evidence, if believed, was sufficient to show that Graves was in possession of an opium pipe or that he attended an opium resort, but there was no evidence tending to show that he had a preparation of opium in his possession; and that, on the contrary, the evidence established that it was Pinkston who was in possession of the opium. In the view of the evidence most favorable to the respondent, the evidence shows that the officer saw appellant with the tube of the crude opium pipe in his mouth at intervals for approximately seven minutes; that appellant admitted that he had been smoking opium at approximately the time when the officer said he saw appellant with the tube of the pipe in his mouth; that an opium pill was being rolled over the hole in the bottle part of the pipe while appellant had the tube of the pipe in his mouth; that when the officers entered the room suddenly an opium pill was then found on the bed at a place thereon which was between the places where appellant and Pinkston had been lying; that another opium pill was found in a dish in the room, and a jar of carbonized opium was also in the room. Under the provisions of said Section 11500 of the Health and Safety Code, possession of a preparation of opium exists when a person has the actual control or dominion over it, or when he has the right to possession or control of it, either individually or through an agent. The trial judge could have inferred properly from the evidence herein that Pinkston and appellant actually possessed the opium jointly or that appellant had the right of possession or control of it individually, or that while Pinkston was holding the opium pill over the flame and while rolling it over the hole in the bottle, when appellant was smoking, appellant had constructive possession of it through Pinkston as his agent. See People v. Johnson, 66 Cal.App.2d 164, 165, 152 P.2d 331; and People v. Gallagher, 12 Cal.App.2d 434, 436, 55 P.2d 889. The evidence was sufficient to support the conviction.

[2] Appellant also contends that the trial court erred in receiving in evidence certain testimony which was included in the transcript of the preliminary examination. Upon stipulation, as above stated, the People's case as to appellant was submitted on the transcript of the testimony taken at the preliminary examination. That transcript shows, as above indicated, that the officer testified that appellant said he had been smoking opium for about a year, and that he had smoked opium with Pinkston six or eight times before. That transcript also shows that counsel (not present counsel) who represented appellant at the preliminary examination made a motion to strike out the testimony last above referred to on the ground that it was immaterial, and that the motion was denied. At the trial herein in the superior court, counsel for appellant did not object to that testimony or move to strike it out. Apparently it is appellant's contention that even though he stipulated that the People's case might be submitted upon the testimony taken at the preliminary examination, and even though at the trial he made no objection to or motion to strike out that testimony, the trial judge should have announced or in some manner indicated that he would not follow that particular ruling of the committing magistrate. There was no such responsibility on the part of the trial judge. It was the duty of appellant to object to such testimony as he deemed objectionable. The trial judge was entitled to rely, in the absence of an objection to particular testimony, upon the stipulation that the People's case was submitted on the testimony taken at the preliminary examination. This contention of appellant is not sustained.

The judgment is affirmed.

SHINN, Acting P. J., and VALLEE, Justice pro tem., concur.

84 Cal.App.2d 374

NOON v. NOON.

Civ. 15976.

District Court of Appeal, Second District,
Division 1, California.
March 16, 1948.

1. Divorce ⚷298(1)

In awarding custody of child of divorced parents, paramount consideration is child's welfare. Civ.Code, § 138 (2).

2. Divorce ⚷296, 312

Trial court has wide latitude in exercise of its discretion to award custody of child of divorced parents as child's welfare requires, and reviewing court will not interfere with exercise of such discretion in absence of clear abuse. Civ.Code, § 138 (2).

3. Divorce ⚷302

In interlocutory divorce judgment awarding custody of children to mother conclusively determined mother's fitness to have such custody as of date of judgment.

4. Divorce ⚷303(1)

Wife's enrollment of children, whose custody was awarded to her in divorce action, as resident students in school at which mother left children during vacation periods when children were permitted to leave school and be with mother in her home, and husband's ability to provide home for children in his mother's residence, constituted "changed circumstances" within rule permitting change of custody.

See Words and Phrases, Permanent Edition, for all other definitions of "Changed Circumstances".

5. Divorce ⚷303(1)

Once jurisdiction attaches to grant a divorce and award custody of minor children, such jurisdiction is continuing and power to amend, modify or annul an award of custody as existing conditions demand remains. Civ.Code, § 138 (2).

6. Divorce ⚷303(2)

Rule of "changed circumstances" authorizing modification of order regarding custody of minor children of divorced parents on changed circumstances means only that action of court in refusing to modify order of custody unless there is a showing of changed circumstances does not amount to an abuse of discretion. Civ. Code, § 138 (2).

7. Divorce ⚷312

In reviewing order changing custody of children of divorced parents, sole duty of reviewing court is to determine whether record is so barren of substantial evidence to support order that the order should be regarded as a clear abuse of discretion.

8. Divorce ⚷303(3)

Order taking custody of eight year old son from divorced wife at end of term of school in which wife had enrolled son as resident student and giving custody to husband living with his mother and permitting wife to retain custody of four year old daughter who was also enrolled in school was supported by substantial evidence and was not abuse of discretion. Civ.Code, § 138 (1, 2).

9. Divorce ⚷303(3)

On application for change of custody of children of divorced parents, trial court can disregard investigator's report when there is other evidence and can also adopt investigator's recommendations after considering all the other evidence.

10. Divorce ⚷303(3)

Divorced wife could not assert that trial court's consideration of recommendations of court investigator invalidated order changing custody of children where wife requested appointment of investigator and investigator was appointed on stipulation of husband and wife, and wife did not seek to present additional evidence after investigator reported, and did not request that investigator appear and testify subject to rules of evidence and right of cross-examination, and it was not shown that trial court considered only report and not affidavits of husband and wife, notwithstanding that report contained statements which were not competent evidence. Code Civ.Proc. § 261a.

11. Divorce ⚷303(3)

On application for change of custody of children of divorced parents, facts justifying modification of custody order can be established by affidavit of court investigator appointed at request of parents. Code Civ.Proc. § 261a.

◆

Appeal from Superior Court, Los Angeles County; Stanley M. Mosk, Judge.

Divorce action by Elma H. Noon against James E. Noon. The plaintiff secured an interlocutory judgment of divorce in which custody of the minor children was awarded to the plaintiff. Thereafter James E. Noon applied for a modification of the interlocutory judgment so as to grant him custody of the minor children. From an order determining the custody of the children, the plaintiff appeals.

Order affirmed.

James E. Minds and Maurice E. Hibbert, both of Los Angeles, for appellant.

Austin & Austin and Irving P. Austin, all of Compton, for respondent.

WHITE, Justice.

This is an appeal from an order of the Superior Court of Los Angeles County determining the custody of minor children. The mother secured an interlocutory judgment of divorce on January 15, 1946, in which judgment it was provided "that the sole care, custody and control of the two minor children of the parties is awarded to the plaintiff, subject to the right of reasonable visitation on the part of defendant; the defendant shall have the right of visitation with his children on the first and third Sundays of each month, at such hours as will not interfere with their proper rest and feeding."

On August 5, 1946, defendant father applied to the court for a modification of the interlocutory judgment so as to grant him custody of said minor children "with the right of reasonable visitation in plaintiff," and that the "provision in said judgment for alimony to plaintiff be modified by discontinuance of any award of alimony." In support of his application for change of custody of the minor children, defendant father filed an affidavit wherein he alleged:

"That the plaintiff has not had the physical custody of said children since the date of said judgment, but has left them at the Boys and Girls Aid Society, 760 E. Mountain View Street, Altadena, California; that at said home said children have certain vacation periods and week ends at which times they are permitted by the regulations to leave the environment of the said home. That plaintiff has refused to permit defendant to take said children on any other time than that specified in said judgment and on many of said periods has left said children at said home and has not provided any outside recreation for them. That the plaintiff does not desire and has no intention of taking physical custody of said children and making a home for them; that defendant is now residing with his mother, Mrs. Lena H. Noon, at 712 N. Mayo Avenue, Compton, California, and is in a position to make a good home for said children under the care and supervision of his said Mother, and is able to provide the home atmosphere which said children are not now receiving at said home.

"That said judgment provided that plaintiff pay to defendant $110.00 per month for alimony and for support money for said children. That at the time said order was made the plaintiff was not working; that at the present time plaintiff is employed as a stenographer at a net salary of $150.00 per month."

Plaintiff mother filed a counter-affidavit in which she averred that the two children, James Michael, a son, aged approximately eight years, and Nancy Ellen, a daughter, of the approximate age of four years, were enrolled in the Boys and Girls Aid Society School in Altadena, a Los Angeles County approved home for children. That she was receiving from defendant the sum of $110.00 per month for the support of herself and the two children; that by reason of the amount of such award she was required to work, and that her net earnings were approximately $35.00 per week. "That defendant has consistently endeavored to undermine plaintiff's control over said children and for a time did upset plaintiff's control over James Michael, the older of the two children, telling said child that the said

Boys and Girls Aid Society was not a good place for him to remain and that he, the defendant father, would get him out."

It was further charged in defendant mother's counter-affidavit "That said defendant has by devious means attempted to force plaintiff to have the children removed from said Boys and Girls Aid Society even to the extent of withholding support money from her until a contempt citation was brought in this court to enforce the payment of said support money." The counter-affidavit further charged that the defendant was not a fit and proper person to have either partial or full custody of said children; that "his influence on the children whenever they are with him has been to continuously talk down the character and deportment of plaintiff to said children and to make them unhappy and dissatisfied in any place except in the home of defendant's mother; that the said actions on the part of the defendant have caused the elder child to be upset emotionally upon his return to the home and he has required special handling by the persons in charge of the supervision of said child at the Boys and Girls Aid Society whenever he has been away with his father." The mother further averred that should custody of the children be granted to defendant father and they be placed by him with his mother, "such action will only tend to permit said defendant's mother to continue to undermine the children's love for the plaintiff."

In her counter-affidavit defendant mother requested that should the court be in doubt about the "qualifications and surroundings in which said children are being nurtured, that a duly qualified investigator of this court be appointed to investigate said surroundings and report back to the court together with her recommendations."

The record herein comes to us upon a clerk's transcript, and we are not apprised therein as to what occurred when the order to show cause, issued pursuant to the foregoing affidavit of defendant husband, came on for hearing; but from the briefs filed hearin it appears to be conceded that such hearing was had in Department 8 of the Superior Court on August 29, 1946, and that both parties, with their counsel, were present. And in view of the fact that plaintiff mother, in her counter-affidavit requested the appointment of a "duly qualified investigator of this court", we feel justified in adopting defendant father's statement made in his brief that "by stipulation the matter was referred to a court assistant."

In any event, the record before us does disclose that on October 15, 1946, the matter was transferred to Department 14. After reciting the presence in court of both parties and their respective attorneys, the minute order entered, so far as here pertinent, reads as follows:

"The parents on alternate week-ends may visit the minor children in the school-home and that the defendant may take the two minor children to his home one week-end a month from Saturday at 10:00 A. M. to Sunday at 5:00 P. M., beginning October 19, 1946, and plaintiff may take the children for the same period on the next week-end they are permitted to leave the school. Plaintiff and defendant have visitation on alternate Sundays on the week-ends the children remain in the school. At the end of the present school term, defendant is to be granted the full care, custody and control of the child, James Michael. Said child to reside thereafter with his father in the paternal grandparents' home. The care, custody and control of Nancy is to continue with the plaintiff, and the defendant shall pay to the plaintiff the sum of $50.00 per month for the child's support. Plaintiff may have visitation with James Michael at all reasonable times and may take him to her home or to home of his maternal grandparents one week-end a month from 10:00 A. M. Saturday to 6:00 P. M. Sunday, providing she notifies the defendant or the paternal grandmother in advance. Defendant may have visitation with Nancy one week-end a month and take her to his parents' home from 10:00 A. M. Saturday to 6:00 P. M. Sunday providing it is not the week-end that Michael is away from home. Each parent shall have both children at the same time for one-half of each Holiday vacation period as agreed between the parties. Neither parent shall say anything derogatory of the other parent in the presence of the children. * * *."

After providing for the payment by defendant of plaintiff's attorney's fee, the minute order proceeds as follows: "So long as the children remain in school, defendant is directed to pay the expense of the children at the Institution. Defendant is ordered to pay $1.00 per month for her (wife's) support."

[1, 2] Appellant's first contention is that the mother is the natural custodian of a child of tender years, and in the absence of very compelling circumstances should be awarded its custody. It is true that "as between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother * * *." (Civ.Code, sec. 138, subpar. 2.) But a veritable forest of cases uniformly hold that the paramount consideration is the welfare of the child, and that in making an award of custody the court is to be guided "by what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare." (Civ.Code, sec. 138, subpar. 1.) Equally well established is the rule that under the statute just cited the trial court is allowed a wide latitude in the exercise of its discretion, which must be exercised on the basis of the best interest of the child and not upon the desires of the parties. Unless a clear case of abuse of discretion is shown, an appellate court will not interfere with the determination made by the trial court. Crater v. Crater, 135 Cal. 633, 634, 635, 67 P. 1049; Kelly v. Kelly, 75 Cal.App.2d 408, 410, 171 P.2d 95; Norris v. Norris, 50 Cal.App.2d 726, 731, 123 P.2d 847; Runsvold v. Runsvold, 61 Cal.App.2d 731, 732, 733, 143 P.2d 746; Munson v. Munson, 27 Cal.2d 659, 666, 166 P.2d 268.

[3] Appellant's contention that the interlocutory judgment of divorce granted January 11, 1946, wherein she was awarded custody of both children, conclusively determined her fitness to have such custody as of that date, is sound. However, no attack is made upon appellant's fitness in the proceeding now before us. Respondent bases his motion for modification upon the ground that because of the reasons advanced by him in his supporting affidavit, as well as the report of the court investigator, the best interests of the children would be served by granting to him their custody.

[4] Appellant next asserts that an award of custody once made may not be changed in the absence of changed conditions or unusual circumstances. We are impressed that the supporting affidavits of both parties herein show a change of circumstances, in that although appellant mother was awarded custody of the children, she was not exercising actual physical custody over them, but had enrolled them as resident students at the Boys and Girls Aid Society School; that she left the children at the school during certain vacation periods when they were permitted to leave the school and be with her in her own home, while respondent contended that he was in a position to provide a good home for the children at the residence of his mother, thereby affording them a normal home atmosphere which allegedly they were not receiving at the institution where they were quartered.

[5, 6] And in any event, the so-called "changed circumstances" rule is not inflexible, nor without possible exceptions. As was said by this court in Kelly v. Kelly, supra, at page 415, of 75 Cal.App.2d, at page 99 of 171 P.2d, "It seems to us that the question of 'changed circumstances' is but another form of evidence which the court may consider in the exercise of its discretion to hear and decide the question of modification of custody orders previously made. But notwithstanding 'changed circumstances', there can be no doubt that once jurisdiction attaches to grant a divorce and award custody of the minor children of the marriage, our statute provides that such jurisdiction is continuing and the power to amend, modify or annul an award of custody as existing conditions demand ever after remains. Foster v. Foster, supra, 8 Cal.2d [719] at page 726 68 P.2d 719. The reasoning which dictated adoption by the courts of the so-called rule of 'changed circumstances' is thus epitomized in Foster v. Foster, supra, 8

Cal.2d [719] at page 727 68 P.2d [719] at page 722, where the court, after announcing the rule of law we have just mentioned, stated: 'But this does not mean the parties to such litigation may, after a court has once heard evidence upon the subject of their fitness to act and rule upon the question, immediately again invoke the powers of the court to have it inquire into the same or other facts existing at the time of or prior to the former decree. Such holding would lay a foundation for interminable and vexatious litigation. * * * The rule is stated to be that to justify a modification there must be a change of circumstances arising after the original decree is entered, or at least showing that the facts were unknown to the party urging them at the time of the prior order, and could not with due diligence have been ascertained. 19 Cor.Jur. 350.' The so-called rule means only that the action of the court in refusing to modify an order of custody unless there is a showing of 'changed circumstances' does not amount to an abuse of discretion."

[7, 8] We have hereinbefore set forth the contentions made by both parties to this proceeding in their respective affidavits, and they will not be repeated here. Suffice it to say that there was thereby presented to the court for determination the question of what would be for the best interests of the children, and such determination is addressed to the sound discretion of the trial court, subject, of course, to the qualifications found in section 138, sub-paragraph 2, of the Civil Code. And it is not a question of whether we agree with the action taken by the trial court, but our sole duty is to determine whether the record is so barren of substantial evidence to support the order made that the same should be regarded as a clear abuse of discretion. The record before us discloses no such abuse of discretion as would authorize this court to reverse the decision of the trial court.

As her next ground for reversal of the order, appellant earnestly asserts that "modification of an order of custody may not be based solely upon the recommendations of the court investigator." To support her claim in this regard, appellant relies principally upon Fewel v. Fewel, 23 Cal.2d 431, 144 P.2d 592, 593. But we are persuaded that no analogy can be drawn between the circumstances prevailing in the cited case and those present in the case at bar. In the Fewel case the court investigator was appointed on the court's own motion and not by stipulation. The report of the investigator was received by the court in chambers and was not imparted to counsel. The court refused to hear evidence on the part of plaintiff and made the order of modification exclusively on the recommendation of the court investigator. When the court referred the matter on its own motion to a court investigator the parties were instructed to return upon a subsequent date "without witnesses because the report of the investigator will be final." When the motion was again called for hearing the court immediately stated, "We are going to adopt the recommendation of the investigator, gentlemen, I will say to you." Such was the procedure which the Supreme Court stated "cannot be sustained" because it deprived plaintiff of a fair trial in open court, and deprived her of the right to produce and have consideration given to material evidence. She was also precluded from cross-examination of adverse witnesses.

In the case now engaging our attention, appellant in her answering affidavit requested the appointment of a court investigator, and it is conceded that the investigator was appointed upon stipulation of the parties. Respondent asserts, and it is not denied by appellant, that "the parties further stipulated at the time the matter was referred to the investigator, that the report of the investigator might be received in evidence to be supplemented by further evidence if the parties so desired."

Appellant has not produced in this court the contents of the stipulation in question, and we feel justified in assuming that the rules of Department 8 of the Superior Court of Los Angeles County, where domestic relations matters are heard, requiring a stipulation such as respondent contends was entered into, were followed, and that the usual stipulation prevailed herein. The parties had previously filed their affidavits, which, together with the report of the investigator, were before the court. There is no showing that any request was made by appellant to present additional evidence, to file further affidavits or that she was denied the right to cross-examine the court investigator. It is true that the court indorsed upon the investigator's report the words "Approved and so ordered," but in the case of Fewel v. Fewel, supra, relied upon by appellant, the Supreme Court, at pages 434 and 435 of 23 Cal.2d, at page 594 of 144 P.2d expressly states that the trial court may "direct its assistant to ascertain and report evidence and make recommendations based thereon"; That "they are far more than 'messengers' of the judge without 'province to recommend a decision.'"

[9] The report of the investigator herein was presented in affidavit form, and the record herein shows no timely demand by appellant that such investigator appear and testify subject to the rules of evidence and the right of cross-examination. Fewel v. Fewel, supra, at page 436 of 23 Cal.2d, 144 P.2d 592. And as heretofore noted, there is no showing that the order of the court was not made after consideration of the affidavits of both parties as well as the report of the investigator, and by the same rule which entitled the court to disregard the investigator's report when there is other evidence, the court may, after considering all other evidence, nevertheless adopt the recommendations proffered by the court investigator. Fewel v. Fewel, supra, at page 436 of 23 Cal.2d, 144 P.2d 592.

[10] It is true, as contended by appellant, that contained in the investigator's report were many statements which were not competent evidence. Some were hearsay and others referred to conditions antedating the interlocutory judgment of divorce, while still other statements were mere opinions and conclusions of the investigator; but the report also contained much first-hand information concerning the children, the parents, the conditions under which the children were living, and the type and kind of home in which respondent father proposed to place them. In other words, there was contained in the report much of the information referred to by the Supreme Court in Fewel v. Fewel, supra, at page 435 of 23 Cal.2d, at page 594 of 144 P.2d, as being "of vast importance to the court and to the children whose interests are involved." No objection was made to the aforesaid incompetent evidence, and we cannot assume that the court considered any other than competent and admissible evidence. There is no showing made here that the appointment of the investigator and the report made by her were not in conformity with the intent and purpose of section 261a of the Code of Civil Procedure, to "assist the court in the transaction of the judical business of said court," or that the investigator replaced rather than assisted the court.

[11] Appellant's final contention, that facts justifying modification of an order in re custody of children may not be established by affidavit of the court investigator, does not require discussion. In Fewel v. Fewel, supra, at page 436 of 23 Cal.2d, 144 P.2d 592, 595, the Supreme Court emphatically states that "The reports of the investigators should be presented in affidavit form, or otherwise under oath." In any event, the investigation and subsequent report of the court investigator were made pursuant to stipulation of the parties, and it is but reasonable and natural to assume that it was contemplated and intended that such report should be used at the hearing. Otherwise, for what purpose was it stipulated that the investigation might be made and the report rendered?

For the reasons herein stated, the order is affirmed.

YORK, P. J., and DORAN, J., concur.

HORACEK v. SMITH et ux. *

Civ. 13578.

District Court of Appeal, First District, Division 1, California.

March 9, 1948.

Hearing Granted May 6, 1948.

1. Contracts ⚷329, 346(2)

A cause of action does not accrue upon a promise to pay "when able" until such condition is performed, and, hence, performance of such condition must be pleaded and proved.

2. Appeal and error ⚷193(9)

Reviewing court may consider sufficiency of complaint to state cause of action although no demurrer was filed raising the question. Code Civ.Proc. § 434.

3. Pleading ⚷406(5)

Where complaint alleged a contract employing plaintiff as housekeeper at $75 per month, which contract was afterwards amended with consent of both parties by defendants agreeing to pay plaintiff whatever they could afford to pay upon promising to make up difference when their financial conditions improved, alleged defect in failing to allege in complaint the defendants' financial condition had improved to point where they could pay plaintiff money claimed to be owing was waived by defendants' failure to demur. Code Civ.Proc. § 434.

4. Appeal and error ⚷1039(2)

Where complaint alleged a contract employing plaintiff as housekeeper at $75 per month, which contract was afterwards amended with consent of both parties by defendants agreeing to pay plaintiff whatever they could afford to pay upon promising to make up difference when their financial condition improved, fact that by her amended complaint plaintiff stated that she "believes that defendants' financial condition did improve during the year 1945 to the point where they could pay her the money claimed to be owing" instead of alleging that defendants' financial condition "did" improve to such extent was not prejudicial to defendants, since actual facts were within defendants' knowledge. Code Civ.Proc. § 434.

5. Appeal and error ⚷1061(3)

Failure to formally rule on defendants' motion for nonsuit made at close of plaintiff's case, even if error, was harmless, where there was no merit in the motion.

6. Master and servant ⚷80(10)

Evidence supported finding that plaintiff was entitled to recover from defendants $5,970 as balance due on contract employing plaintiff as housekeeper at $75 per month, which contract was afterwards amended with consent of both parties by defendants agreeing to pay plaintiff whatever they could afford to pay upon promise to make up difference when their financial condition improved.

7. Appeal and error ⚷930(1)

On appeal, all conflicts in evidence must be resolved in respondent's favor, and all legitimate and reasonable inferences indulged to uphold the verdict.

8. Appeal and error ⚷989

Where verdict is attacked as unsupported by the evidence, appellate court's power begins and ends with determination whether there is any substantial evidence, contradicted or uncontradicted, which will support verdict.

9. Appeal and error ⚷996

When two or more inferences can reasonably be deduced from the facts, reviewing court may not substitute its deductions for those of trial court.

10. Limitation of actions ⚷197(1)

In action to recover balance allegedly due on contract employing plaintiff as housekeeper at $75 per month, which contract was allegedly amended with consent of both parties by defendants agreeing to pay plaintiff whatever they could afford to pay upon promising to pay difference when their financial condition improved, where question whether defendants' financial condition improved more than two years before filing of complaint, so that action was barred by statute of limitations was left to jury, evidence supported finding, implied in jury's entry of judgment for plaintiff, that the financial improvement with ability to pay occurred less than two years before filing of complaint. Code Civ.Proc. § 339, subd. 1.

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* Subsequent opinion 199 P.2d 929.

11. Husband and wife ⚷235(3)

Where action to recover amounts allegedly due on contract employing plaintiff as housekeeper was brought against both husband and wife, instruction as given properly covered subject of husband's liability in event jury found that contract was solely between plaintiff and defendant wife. Civ.Code, § 167.

12. Appeal and error ⚷882(12)

Defendants could not complain of instruction presenting issue as to whether plaintiff agreed to accept less than $75 per month as payment in full for her services as housekeeper on ground that it presented a "false issue" to jury in that it told jury that if plaintiff did not so intend to commit herself the original agreement to pay plaintiff $75 per month continued in force, where defendants presented such issue by their answer.

13. Master and servant ⚷80(14)

An instruction stating an issue to be determined was whether defendants did "agree, or lead plaintiff to believe," that when their financial condition improved they would pay plaintiff the difference between monetary consideration originally agreed upon for her services as housekeeper and amount actually paid her during the years that she served them was not subject to objection that quoted clause in effect told jury that plaintiff's belief concerning what agreement was, was the determining factor.

14. Master and servant ⚷80(14)

In action to recover balance allegedly due on contract employing plaintiff as housekeeper at $75 per month, which contract was allegedly amended with consent of both parties by defendants agreeing to pay plaintiff whatever they could afford to pay upon promising to make up difference when their financial condition improved, instruction presenting issue as to whether defendant wife made agreement to keep plaintiff in her home as long as defendants were indebted to plaintiff was authorized by evidence.

15. Master and servant ⚷80(14)

In action to recover balance allegedly due on contract employing plaintiff as housekeeper at $75 per month, which contract was allegedly amended with consent of both parties by defendants agreeing to pay plaintiff whatever they could afford to pay upon promising to make up difference when their financial condition improved, instruction presenting issue as to whether there was "an implied understanding between plaintiff and defendants that plaintiff would cancel her debt to them provided they never sent her away from their home" was authorized by evidence.

16. Master and servant ⚷80(14)

In action to recover balance allegedly due on contract employing plaintiff as housekeeper, instructions presenting issues as to whether plaintiff and defendants performed all of the conditions of the agreement on their part to be performed were not objectionable on ground that they sounded in damages.

17. Master and servant ⚷80(14)

In action to recover balance allegedly due on contract employing plaintiff as housekeeper at $75 per month, which contract was allegedly amended with consent of both parties by defendants agreeing to pay plaintiff whatever they could afford to pay upon promising to make up difference when their financial conditions improved, instruction presenting issue as to whether plaintiff has "been fully compensated in accordance with whatever agreement was entered into" was pertinent.

18. Appeal and error ⚷1170(1)

Even if any technical error appeared in pleadings, instructions, admission of evidence, ruling of trial court, or in matter of procedure, such error would not require reversal, where District Court of Appeal was not of the opinion after examination of entire cause, including evidence, that judgment resulted in miscarriage of justice. Const. art. 6, § 4½.

Appeal from Superior Court, San Mateo County; Clark Clement, Judge.

Action by Josephine Horacek against Victor B. Smith and Florence Smith, his wife, on a contract of employment. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Freed & Freed and Eli Freed, all of San Francisco (William F. Cleary, of San Francisco, of counsel), for appellants.

E. C. Mahoney, of Burlingame, for respondent.

WARD, Justice.

This is an appeal from a judgment on a jury verdict for plaintiff in the sum of $5,970.00 in an action based upon a contract of employment made on or about October 24, 1928.

The original complaint alleges: "That plaintiff entered upon her employment under said contract and duly performed all of the conditions on her part. That about the month of August, 1930, defendants advised plaintiff that they had met with financial reverses and could no longer pay her $75.00 per month but that if she would continue to serve them at whatever they could afford to pay, they would make up the difference when their financial conditions improve. That for about five years thereafter plaintiff continued to serve said defendants in accordance with said contract of employment, during which time defendants paid her an average of about $12.00 per month. That thereafter, for about five years, plaintiff served said defendants in accordance with said original contract, during which time she received no monetary consideration whatever. That during this latter period, defendants promised plaintiff that if she would continue to serve them, they would never send her away from their home and that they would, when advanced age prevented her from working, see that she had room and board in their house, and whatever else she needed, for the balance of her natural life. That plaintiff relied on this promise and continued to serve defendants in the capacity of housekeeper to about January, 1945. That for the last period of service, consisting of about five years defendants paid small amounts to plaintiff at irregular intervals, which in all would average about $12.00 monthly. That in January, 1945, defendants advised plaintiff that they had no further use for her services and at that time packed her belongings and ejected her from her room, and have ever since prevented her from carrying out her contract and from occupying a room at their aforesaid premises. That plaintiff then demanded the back wages that accrued to her since August, 1930, approximately $11,600.00, but defendants refused and still refuse to pay said amount, to her damage in the said sum of $11,600.00."

By their answer defendants set forth that "on or about the 1st day of July 1930, the defendants engaged the services of plaintiff as a housekeeper for compensation consisting of food and lodging and $75.00 per month." As a separate defense they allege that during the depression they informed plaintiff that it was impossible for them to continue to pay plaintiff $75.00 per month; that plaintiff's wages were successively reduced $10.00 per month at intervals of 3 or 4 months until in 1933 defendants paid plaintiff $25.00 per month in addition to food and lodging; that said reductions were made after prior notice to plaintiff who accepted them as final; that defendants never held themselves out as obligating themselves to make up the amount of the reductions; that in the middle of 1933 their financial affairs required the renting of their Hillsborough home and moving to an apartment in San Francisco, at which time they notified plaintiff that they would no longer require her services, but because of plaintiff's protestations they informed her that she could live with them but that they did not require her services and could not afford to pay her any regular salary; that plaintiff thereafter lived with defendants with full knowledge as to her compensation; that plaintiff left defendants' home in August 1936; that in February, 1937, plaintiff solicited of defendants to again enter their home; upon plaintiff's pleading, defendants told her they "would provide her with food and lodging and pay her such sums as they believed they were able for such services as the plaintiff might be able to render from time to time"; plaintiff reentered defendants' home but her services were sporadic because of her health; that January 9, 1945, plaintiff accepted employment elsewhere but left some of her belongings in defendants' home; that August 31, 1945, plaintiff removed said belongings; and "that the said defendants first learned of the alleged claim of the plaintiff herein and of her demands in relation thereto, in a letter to said defendant Victor B. Smith, from plaintiff's attorney, E. C. Mahoney, dated the 19th day of October 1945; that all obligations of the said defendants arising from any and all agreements and relationships with the plaintiff herein have been duly performed." Another separate defense sets forth in addition to the foregoing that on the occasions when defendants told plaintiff that they had no need for her services, she became upset, and they therefore acquiesced in plaintiff's continued sharing of their home more nearly in the status of a member of defendants' family; "that the plaintiff is therefore now estopped in her attempts to establish any such supposed claims or rights in her behalf now belatedly alleged to have existed or arisen out of said relationship between the plaintiff and the defendants." A final separate defense alleges that the action is barred by Code of Civil Procedure, sections 339(1) and 434.

During the trial the sufficiency of the complaint was discussed by counsel. With leave of court the complaint was amended to include the following allegations: "That about the month of December, 1944, defendant Florence Smith, advised plaintiff that after the first of the coming year the income of defendants would be materially increased and that they would then be in a position to pay her whatever was owing to her. That plaintiff relied upon the foregoing representations and believes that defendants' financial condition did improve during the year 1945 to the point where they could pay her the money claimed to be owing."

[1] Defendants' argument that no cause of action was pleaded or proved is based upon the rule that no cause of action accrues upon a promise to pay "when able" until said condition is performed; hence performance of such condition must be pleaded and proved. They cite Van Buskirk v. Kuhns, 1913, 164 Cal. 472, 129 P. 587, 44 L.R.A.,N.S., 710, Ann.Cas. 1914B, 932. The complaint in that action alleged that the defendant borrowed money which was to be repaid whenever he "should be able to do so." In reversing a judgment for plaintiff for the amount loaned, the court first holds that the statute of limitations does not run until the debtor is able to pay since no cause of action accrues until the condition of the debtor's ability to pay has been performed. The court then rules that the very fact that prevents the statute of limitations from running also prevents plaintiff from maintaining his action—plaintiff was required to plead the debtor's ability to pay as a prerequisite to maintaining his action. Accord, Rodgers v. Byers, 127 Cal. 528, 60 P. 42. The Van Buskirk case has been followed in Gause v. Pacific Gas & Electric Co., 60 Cal.App. 360, 368, 212 P. 922 (conditional agreement to furnish water); Cantwell v. Gage, 111 Cal.App. 209, 212, 295 P. 375 (premium payable after oil well came in) and Maurer v. Bernardo, 118 Cal.App. 290, 294, 5 P.2d 36 (promise to pay debt when financially able); see, also, Goodfellow v. Goodfellow, 219 Cal. 548, 554, 555, 27 P.2d 898.

[2] Here, as in the Van Buskirk case, it is proper for the reviewing court to consider the sufficiency of the complaint to state a cause of action although no demurrer was filed raising the question. Code Civ.Proc. sec. 434. Unlike the Van Buskirk case, the present complaint, as amended, alleges that plaintiff was advised that after the first of 1945 "the income of defendants would be materially increased and that they would then be in a position to pay her whatever was owing to her."

[3, 4] Defendants urge that plaintiff's pleading is defective in failing to allege that the defendants' financial condition did improve during the year 1945 to the point where they could pay plaintiff the money claimed to be owing, and in predicating plaintiff's alleged belief wholly on a

statement alleged to have been made in December, 1944, when according to plaintiff's pleading defendants' financial condition had not so improved. Any insufficiency in plaintiff's pleading in this respect could have been corrected had the matter been brought to the trial court's attention. Unlike the objection that the complaint fails to state a cause of action, the defect urged by defendants is waived by their failure to demur. Code Civ.Proc. sec. 434; Berryman v. Quinlan, 29 Cal. App.2d 608, 85 P.2d 202. That no prejudice resulted to defendants from the fact that by her amended complaint plaintiff stated that she "believes that defendants' financial condition did improve during the year 1945 to the point where they could pay her the money claimed to be owing" appears from the circumstance that the actual facts were within defendants' knowledge. 41 Am.Jur., p. 316, sec 40; Swars v. Council of the City of Vallejo, 64 Cal. App.2d 858, 149 P.2d 397.

Before leaving the question of the sufficiency of the complaint, it may be observed that neither the Van Buskirk case nor any other case cited consider the question as to what allegations are required in order to satisfy the requirement that where a conditional promise is set forth in a pleading, performance of the condition must be pleaded. Two sections of the Code of Civil Procedure are helpful: (Sec. 452) "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Sec. 457) "In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance."

[5] At the close of plaintiff's case a **motion for nonsuit was made directed to plaintiff's failure to plead or prove defendants' ability to pay.** Thereafter counsel for defendants stated: "I would like the case tried to completion." The discussion thereon resulted in further proceeding with the case, defendants' presentation of the defense and the amendment previously referred to. The trial court's failure to formally rule upon said motion, even if error, was harmless since there was no merit in the motion. Reclamation Dist. No. 535 v. Clark, 155 Cal. 345, 100 P. 1091.

At the conclusion of the trial the jury was instructed that "A promise to 'pay a debt when able' is conditional and the statute of limitations does not commence to run until the debtor is able to pay * * * it is incumbent upon the defendants to show when they had the ability to pay in order to establish the date from which the statute commenced running." That the jury was capable of understanding such instructions and applying same to the evidence is presumed. 24 Cal.Jur., p. 795, sec. 73. It must also be presumed that the jury did apply this instruction as it considered the evidence which established the following sequence of events: In October, 1928, plaintiff first went to the Smith residence in San Mateo County, where defendant Florence Smith employed her as housekeeper on behalf of her father-in-law, J. K. Smith. Plaintiff was to receive $75.00 a month, plus board and room. On the first of July, 1930, J. K. Smith died, but the defendants continued to live in the premises at 984 Baileyana Road, and for the remainder of 1930 paid plaintiff $75.00 a month. In this respect Mrs. Smith testified on cross-examination: "She was left to us the same as the house. She had been in my home when my father-in-law was there, and she continued on. Q. You inherited her? * * * A. That is right. Q. * * * why didn't you fire her? A. Because of her great affection for me and my children." Defendants have two daughters, Byra Jean and Betty, and a son, "J. K." Plaintiff testified that in 1931 she received checks for $25.00 each month, but when faced with cancelled checks produced by defendants which showed that in 1931 she was generally paid $65.00 a month, she testified on cross-examination that she began receiving $25.00 a month "about 1932 * * *. Maybe the end of 1932." When plaintiff's wages were reduced, plaintiff testified that Mrs. Smith said, "Josephine, I couldn't pay you any more $75.00 a month." Plaintiff testified: "I told Mrs. Smith she could pay me less than $75.00 and when the time would Mr. Smith be promoted he could pay me the difference. Q. And did Mrs. Smith say anything to that? A. She go on the telephone again and she came back and she said, 'Josephine, would you make it $25.00?' * * * A. I said, 'Yes.'" In April, 1934, defendants leased the Hillsborough residence with option to buy, and moved to San Francisco, where they provided plaintiff with a room, but paid her $12.00 a month. The change was made for financial reasons; at this time no conversation was held between the parties as to any accumulated credit due plaintiff. In San Francisco plaintiff had sacro-iliac trouble. In May, 1935, the Smiths moved back to Hillsborough as their tenant failed in his payments. Plaintiff had her old room; she received $12.00 a month. Plaintiff's deposition brings out that sometime in 1936 plaintiff asked defendants for money—"I said they don't pay me nothing, and I called $12 nothing." The evidence shows that in October, 1936, plaintiff went to the Community Hospital. According to plaintiff, Mrs. Smith attempted to have her committed to an insane asylum. Plaintiff's explanation of Mrs. Smith's conduct is found in her testimony that "when I ask for money, she want put me in crazy house." Mrs. Smith described plaintiff as being "high hysterical" at this time. Later in 1936, after plaintiff was released from the hospital, she visited relatives in Southern California and in Chicago; about June, 1937, she took a room at the St. Matthews Hotel in San Mateo, and after seeing one of the Smith children in the street returned to the Smith residence for mail. Plaintiff testified that defendants asked her to stay, so she remained, but she received no pay until 1941. In this connection she testified: "Q. When you had your conversation with Mr. Smith in your room, was anything said about your wages that you would be paid when you came back to work? A. * * * I should come back and start to work on the old basis. Q. Did he use those words? A. Yes sir." Mrs. Smith testified that a man from Twin Pines in Belmont who had examined plaintiff when she was hospitalized told her not to rehire plaintiff, but when plaintiff returned in June, 1937, "and she said it was her home and she loved us and our house and wanted to come back and against my husband's judgment I went to her and told her 'yes' * * * and I told her our circumstances had not improved and we couldn't afford to pay her * * *." One of the most extensively described conversations occurred in August, 1940, prior to the wedding of defendants' daughter Betty. Plaintiff testified that Mrs. Smith gave her instructions as to what had to be done for the wedding. Plaintiff replied, "Mrs. Smith * * * you tell me everything what has to be done, but you don't say one word about any money." Mrs. Smith said, "Josephine, are you going to expose me now?" Mrs. Smith's version of what happened lends some support to plaintiff's testimony: "* * * I went into the kitchen and in tirades she told me all the things she had done for years and I asked her then what was the matter and I said, 'I don't know how I can go on, I don't know what to do,' then she said, 'You say nothing about money,' I said, 'Listen, Mr. Smith is going to pay you, are you going to continue on like this so all the neighbors know the condition in our home?' There was nothing more said when she heard she was going to get paid." Plaintiff testified that after the wedding (1940–1941) Mrs. Smith became ill—"Nervous disorder. They called it fits, I think." From 1941 throughout 1944, plaintiff received $15 a month, plus uniforms, board and room. In December, 1941—around Christmas—Mrs. Smith brought two roses to plaintiff who was sick in bed, and made the following promise to plaintiff. "Josephine, I am going to make you nice drapes and we are going to put you Venetian blinds in your room and fix it nice and we are going to build you a hot house and make a door right there from your room, so you will be able to be with your flowers."

When questioned further, plaintiff testified: "Q. Now after December 1941, did you ever make any demand on Mr. or Mrs. Smith for any accumulated back wages? A. 1940. Q. You are referring to your testimony about Betty's wedding? A, Yes sir. Q. That is the only time? A. Mrs. Smith feel rather badly and I was afraid to mention it again." Plaintiff testified that in December, 1944, Mrs. Smith told plaintiff "there would be big changes and Mr. Smith is going to be promoted." From January to August of 1945, plaintiff worked in the home of defendants' oldest daughter, Byra Jean, her husband, and their children. They paid her $75.00 a month plus special checks averaging $15.00 a month. On August 12, 1945, plaintiff returned to Hillsborough and found that her bedroom was being used by defendants. Plaintiff testified that Mrs. Smith said, "I never promised you anything. I didn't give you anything and you was a fool you done it." Plaintiff further testified that she was told to leave by the end of the month (August) at which time Mr. Smith would leave for South America. Apparently after plaintiff's cries and tears, defendants told plaintiff she could stay two more months while Mr. Smith was in South America. Mrs. Smith said she was going to stay with Byra Jean. Plaintiff testified that she told defendants that she could not stay in the Hillsborough house—"Everything will haunt me here." Mrs. Smith testified that when plaintiff saw her room being painted over she asked "Why you done this to me" and became very excited and would not listen to defendants' explanation for their conduct. Mrs. Smith told her "You are a fool, make peace with yourself." A good summary of what happened appears in the following testimony of Byra Jean: "I followed Josephine in her room and when she saw that the bed was gone, she went into a rage, throwing her purse across the room and she had a bag of preserved fruit which she dropped and she became hysterical and I tried to soothe her. She wanted to know what she had done that my family was putting her out. I told her the family was not putting her out. Mother came into the room and tried to soothe her too, during which time she brought a letter * * *." The letter referred to was produced by plaintiff on her direct examination and reads in part: "I would never send you from my home." It was signed, "Florence Smith." The letter is dated January 26, 1945.

Mr. Smith's testimony was primarily directed to the question whether defendants were financially able to pay plaintiff the amount she sought. He testified that from 1931 to about 1935 he received $225 a month; from 1935 through 1936 he received $350 a month; from 1937 through 1940 he received $400 a month; from 1941 through 1944 he received $500 a month; April 16, 1944, he began getting $550 a month; and November 1, 1945, he became entitled to $700 a month. He added that the $400 he received in December 1936 went further than $700 in 1946. He also testified that defendants had no money with which to pay plaintiff.

Defendants cite Nevills v. Moore Min. Co., 135 Cal. 561, 67 P. 1054, in which the Supreme Court held that it could not say that the trial court erred in finding that there was neither an express nor an implied agreement between alleged partners for alleged services. It is also noted that ambiguous and uncertain terms of a promise must be interpreted in the sense that the promisor believed the promisee understood it. Civil Code, sec. 1649. In this case the ambiguity and uncertainty is not in the words of the promisor but rather in the testimony of plaintiff.

The judgment in the present action finds support in the pleadings, which allege that plaintiff agreed with defendants to act as a servant for the sum of $75 per month plus board and room. The pleadings also show that for about fifteen years prior to 1945 plaintiff received less than $75 per month.

Defendants devote considerable attention to the improbability of plaintiff's story in which discrepancies appear relative to dates and statements. It is suggested that plaintiff's testimony is not based upon definite and certain statements but rather it is an epitomization of facts which to a great extent must be based upon surmise. However, the following testimony appears:

"Q. This was the beginning of 1932? * * *

"Q. Did you hear Mrs. Smith mention the fact that when Mr. Smith's salary would be increased to whatever it would be, that at that point of time he would make up the difference over the years between twenty five and fifty dollars a month? A. (Plaintiff) Yes, sir.

"Q. That was mentioned? A. Yes, sir.

"Q. Who mentioned that? A. Mrs. Smith. * * *

"Q. * * * did you have any conversation with Mr. or Mrs. Smith at that time (1937) regarding payment for your services? A. Well, Mr. Smith this time said everything will be just like before. * * *

"Q. When you had your conversation with Mr. Smith in your room, was anything said about your wages that you would be paid when you came back to work? A. I should come back and start to work on the old basis.

"Q. Did he use those words? A. Yes sir."

Defendants summarize the evidence on appeal in a form that might have had an effect upon a jury. Defendants refer to Mrs. Smith's denial of some of plaintiff's testimony; that plaintiff did not keep a record of the amounts claimed to be due and failed to remind defendants of the amount due—and to actions of plaintiff from which an inference might be drawn that plaintiff did not continue her housekeeping upon an understanding that defendants would make up the difference between the amount paid and the agreed monthly salary. Defendants lay stress upon the fact that plaintiff at one time left the home for a hospital and that on no occasion was plaintiff ejected from the Smith home. Defendants also argue that under no circumstances was Mr. Smith liable, even though the reporter's transcript contains the testimony just quoted: "Well, Mr. Smith this time said everything will be just like before. * * * Q. What did he [Mr. Smith] say? A. I should come back * * * I should come back and start to work on the old basis."

[6-9] A discussion of all the evidentiary points raised would merely double this lengthy opinion, and would be of no avail in view of this court's determination that there is a mass of contradicted but substantial evidence, which, if believed, supports the verdict. It is sufficient to quote from Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 13, 47 P.2d 462, 468: "'In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'"

[10] Defendants' contention that the action is barred by the limitation of actions statute, Code of Civil Procedure sec. 339, subdivision 1, is based upon the contention that if the evidence does show the attainment of ability to pay plaintiff's claim, that such ability was attained more than two years prior to the filing of the action. The complaint was filed April 17, 1946, which was less than two years from November 1, 1945, the date when, according to his own testimony, Mr. Smith's salary was increased to $700 per month. The question whether defendants' financial condition improved more than two years before the filing of the complaint was left to the jury. The jury impliedly found that the financial improvement with ability to pay occurred less than two years before the filing of the complaint. There is sufficient evidence to support such finding.

[11] Defendant Victor B. Smith objects to the refusal of the court to give an instruction to the effect that a husband is not liable for the contracts of his wife made

after marriage unless secured by a pledge or mortgage of the community property executed by the husband. Civil Code, sec. 167. The applicability of such an instruction depends upon the existence of a contract solely between plaintiff and defendant Florence Smith. Such does not appear to be the case here since the answer alleges that defendants—as distinguished from Florence Smith alone—engaged the services of plaintiff as a housekeeper; that defendants were unable to pay $75.00 per month, and that defendants reduced plaintiff's compensation. Furthermore, the propriety of such an instruction as proposed by defendants need not be determined here in view of the fact that the trial court covered the subject in the following instruction: "In any case, before Plaintiff is entitled to any recovery against both defendants you must find that each of them consented to the terms of the contract; one cannot be made to stand on a contract to which he never consented. If you find that only Mrs. Smith entered into a contract with Plaintiff, and that Mr. Smith did not enter into a contract with Plaintiff, Mr. Smith cannot be held liable on the contract of his wife, unless he thereafter confirmed the same or accepted the benefits thereof."

Defendants describe certain instructions as "vicious" and argue that taken as a whole the court authorized and invited the jury to award a sum of money commensurate with their sympathy for plaintiff. These instructions, which were apparently prepared by the trial judge, read: "It is not necessary that you find whether plaintiff entered into a contract with defendants in which they agreed to hire her as a housekeeper and pay her $75.00 a month and furnish room and board as this is admitted in the answer of the defendants. There are other issues to be determined, however, as follows: 1. Did plaintiff agree at any time after the hiring to accept less than $75.00 a month as payment in full for the monetary consideration agreed upon with defendants. 2. Did defendants agree, or lead plaintiff to believe, that when their financial condition improved they would pay plaintiff the difference between the monetary consideration originally agreed upon and the amount actually paid her during the years that she served them. 3. Did the defendant, Florence Smith, make an agreement to keep plaintiff in her home as long as defendants were indebted to plaintiff. 4. Was there an implied understanding between plaintiff and defendants that plaintiff would cancel her debt to them provided they never sent her away from their home. 5. Did plaintiff perform all of the conditions of her agreement on her part to be performed. 6. Did defendants perform all of the conditions of their agreement on their part to be performed. 7. Has plaintiff been fully compensated in accordance with whatever agreement was entered into."

[12] Subdivision 1 stated that an issue to be determined was whether plaintiff agreed to accept less than $75 as payment in full. Defendants argue that it told the jury "that if plaintiff did not so intend to commit herself the original agreement to pay plaintiff $75.00 per month continued in force and effect" and presented a "false issue" to the jury. Defendants forget that they presented this issue by their answer.

[13] Subdivision 2 stated that an issue to be determined was whether defendants did "agree, or lead plaintiff to believe, that when their financial condition improved they would pay plaintiff the difference between the monetary consideration originally agreed upon and the amount actually paid her during the years that she served them." Defendants contend that the fault lies in the clause "or lead plaintiff to believe," since "this clause, in effect, told the jury that plaintiff's belief concerning what the agreement was, was the determining factor." Defendants' statement does not seem quite accurate. The instruction merely gives effect to Restatement, Contracts, sec. 5: "* * * a promise in a contract must be stated in such words either oral or written, or must be inferred wholly or partly from such conduct, as justifies the promisee in understanding that the promisor intended to make a promise."

[14] As to subdivision 3, which stated that an issue in the case was "Did the defendant, Florence Smith, make an agree-

ment to keep plaintiff in her home as long as defendants were indebted to plaintiff," defendants urge that there is no evidence that Mrs. Smith ever agreed to keep plaintiff in her home. This issue was raised in the pleadings; plaintiff testified that Mrs. Smith promised to care for plaintiff; in addition there is the letter heretofore mentioned. An instruction on the subject was therefore warranted. It is difficult to find any merit in defendants' assertion that the instruction implies that if the jury "determined that Mrs. Smith had made such an agreement, they should decide the case in plaintiff's favor."

[15] Subdivision 4 stated that an issue in the case was whether there was "an implied understanding between plaintiff and defendants that plaintiff would cancel her debt to them provided they never sent her away from their home." Just as the original agreement could have been discharged by the making of a contract by which plaintiff would receive less compensation, so it could have been discharged by the making of an agreement to compensate plaintiff by providing her with a home in her old age. Restatement, Contracts, sec. 408. Defendants argument that the jury was told that an affirmative finding on this issue warranted them in deciding the case in plaintiff's favor lacks merit.

[16] As to subdivisions 5 and 6, relating to whether plaintiff and defendants respectively had performed the conditions on their part to be performed, defendants urge that they sound in damages. Plaintiff correctly responds that there is no mention of damages in these instructions. Such instructions are common in all contract actions. Defendants' argument that "the court also told the jury that the agreement mentioned in subdivision numbered 3 and the implied understanding mentioned in subdivision numbered 4 could be considered by the jury as conditions of defendants' agreement on their part to be performed, which, if not performed by them, would entitle plaintiff to have a verdict against defendants * * *" does not appear to justify a reversal. It is just as true that under the instruction if the jury found against plaintiff as to subdivision 1, they could not return a verdict for her.

[17] Subdivision 7 stated than an issue to be determined was whether plaintiff has "been fully compensated in accordance with whatever agreement was entered into." The very words defendants challenge, namely, the reference to "whatever agreement was entered into," establish the pertinency of this instruction.

[18] If any technical error appears in the pleadings, instructions, admission of evidence, the ruling of the trial court, or in the matter of procedure, this court is not of the opinion after an examination of the entire cause, including the evidence, that the judgment resulted in a miscarriage of justice. Const.Calif., art. VI, sec. 4½.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

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84 Cal.App.2d 383

SIEGELL v. YORK et al.

Civ. 16031.

District Court of Appeal, Second District,
Division 1, California.
March 16, 1948.

1. Appeal and error 🔑931(1)

On appeal from judgment by trial court sitting without jury in favor of defendant, appellate court must view evidence in a light most favorable to defendant.

2. Appeal and error 🔑994(3)

Mere fact that admitted circumstances make story of witnesses seem improbable will not justify reversal by appellate tribunal upon ground that verdict is contrary to evidence.

3. Appeal and error 🔑1010(1)

Evidence failed to show that finding of trial court sitting without jury that head-on collision between jeep driven by plaintiff's deceased and defendants' truck was caused by negligence of deceased in permitting jeep to swerve across center line into truck and not by negligence of driver of defendants' truck was definitely refuted by undisputed evidence of physical facts.

4. Appeal and error ⚷1008(1)
Automobiles ⚷242(8)

Presumption that plaintiff's decedent, while operating jeep which collided with defendants' truck was exercising requisite degree of care for his own safety and was driving on right-hand side of road was indirect evidence which would prevail unless overcome by satisfactory evidence, but, upon direct evidence of eyewitness being introduced to establish as fact, conduct on deceased's part at variance with presumption, there was created a conflict in evidence, and determination whether such direct evidence overcame presumption was for trial court. Code Civ.Proc. §§ 1957, 1963, subds. 4, 33.

5. Appeal and error ⚷1008(1)

Where ultimate fact in case is found from substantial evidence, it cannot be said as matter of law that any presumption will prevail.

6. Appeal and error ⚷989

Where attack is made upon judgment on ground that it is unsupported by the evidence, power of reviewing court is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support judgment rendered.

7. Appeal and error ⚷996

Fact that contradictory inferences can reasonably be drawn from facts in evidence does not authorize appellate tribunal to substitute other inferences from those drawn by arbiter of facts, since all intendments are in favor of judgment arrived at on conflicting evidence.

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Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Goldie Siegell against Ray York and others, to recover for damages for alleged wrongful death of plaintiff's husband, Bennie Siegell, as result of collision between army "jeep" operated by deceased and a truck operated by named defendant and owned by the other defendants. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Lyons & Lyons and Harry Lyons, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff instituted this action to recover damages for the alleged wrongful death of her husband, Bennie Siegell, which occurred on July 23, 1945 as the result of a collision between an army "jeep" operated by the deceased, a member of the armed forces of the United States, and a truck operated by the defendant York and owned by the other defendants.

By her first amended complaint, plaintiff alleged that defendant York was operating the truck as an employee of his codefendants; that he so negligently operated said truck as to cause it to collide with the automobile operated by the deceased, Siegell, resulting in injuries to the latter as the result of which he died.

By their answer, defendants denied the negligence alleged, and as an affirmative defense pleaded contributory negligence on the part of the deceased.

Upon the issues thus framed, the cause proceeded to trial before the court sitting without a jury, following which the court found that the defendant York was not guilty of negligence, and that the collision was due to the manner in which the deceased operated the vehicle which he was driving. Judgment was accordingly entered against plaintiff and in favor of defendants. From such judgment plaintiff prosecutes this appeal.

The accident occurred about 10 o'clock in the morning on what was known as the "county" road on the Muroc Army Air Base, and running from the main portion of the base in a northerly and southerly direction to a point where it curves about a 110 degree angle to the right and then runs generally in an easterly and westerly direction. The road has a width of 24 to 26 feet at the curve.

It is conceded by all parties hereto that there are but two possible alternatives as to the cause of the collision which is the basis of this action, viz., (a) either the truck crossed over the center of the highway and struck the "jeep", or (b) the "jeep" swerved or skidded across the center line of the road and into the truck.

[1] Stating the evidence in a light most favorable to respondents, as we are required to do following a judgment in their favor, we find in the record testimony given by the respondent York that as the two vehicles approached the point of impact, he observed the "jeep" about 300 yards north of that point, and that his truck was then 100 yards south thereof, traveling 20 to 25 miles per hour; that from that point up to the collision his truck was at all times on its proper side of the road. This testimony, if believed by the court, would warrant an inference that the "jeep" was traveling twice as fast as the truck. Respondent York also testified that when he first observed the "jeep" it was traveling on the right hand side of the road, but that when the "jeep" was just, maybe 10 feet or 20 feet in front of me and suddenly it swerved to the left". That when the "jeep" "crossed over to the wrong side of the road" it was traveling "I think about 35 miles an hour—between 35 and 40."

Appellant produced testimony in conflict with the foregoing. One of her witnesses testified that "on the curve the truck * * * he was crowding the center of the road at the curve. I could see that"; that "the truck seemed to be holding the center of the road. What I mean is, he was hogging the road * * *".

In response to a question as to where the collision occurred, the witness replied, "Yes, and Siegell's jeep at the time of the accident, judging *by the matter that had fallen off from the bottom of his jeep and the flesh,* his jeep hit on the truck at approximately two to two and a half feet from the center of the road on his side * * *." (Emphasis added.) Manifestly, the testimony just quoted possessed little if any probative force, based as it was on the location of the flesh and debris which the witness observed in the road following the accident. As respondents comment in their brief, "There can be no doubt but that the impact was of great force for the left front wheel of the 'jeep' was thrown 15 to 20 feet into the air and thereafter the force of the jeep was such that it scraped along the entire left side of the truck, and it is readily inferred *that the debris which McKinney observed dropped from the 'jeep' as it veered to its right after striking the truck."* This witness observed the truck for less than a minute, and he did not see it until it was within 25 feet from the point of the collision; that "* * * the truck seemed to be holding the center of the road. What I mean is, he was hogging the road, but I didn't notice any sharp turns before the collision". The witness also testified that respondent York's truck was slowing down at the time he observed it.

Another witness testified for appellant that he observed both vehicles prior to and at the time of the collision; that the deceased was "on the right side"; that as the respondent driver of the truck approached the point of impact he "was off his side of the road"; that he was "onto Siegell's side. He was crowding Siegell". This witness, however, very definitely testified that the "jeep" struck the truck, and that respondent York's truck was on its proper side of the road. He also admitted that after the accident he had stated in substance that as the "jeep" turned into the curve, the deceased "seemed to lose control". Reference to the diagram attached to plaintiff's Exhibit 1 indicates that this witness placed the point of impact in the exact center of the road.

With reference to the claims advanced by both appellant and respondents, that some of the evidence given on behalf of the respective parties is inherently improbable because the so-called physical facts, supported by mathematical calculations, clearly demonstrate that the accident occurred by reason of the negligence of the other party thereto, we are not greatly impressed with these arguments and therefore do not here set them forth. As was said in Nagamatsu v. Roher, 10 Cal.App.2d 752, 755, 756, 53 P.2d 174, 175, "there is no possibility of mathematical exactness in such testimony as to the position and speed of another car. As is well known, such estimates of speed and distance are only approximations and in the nature of things could not be exact. * * * As has been frequently pointed out in cases of this nature, such arguments are unreliable because they fail to take into account the human element * * *. 'Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred'." See also Fischer v. Keen, 43 Cal.App.2d 244, 250, 110 P.2d 693, and Shannon v. Thomas, 57 Cal.App.2d 187, 195, 134 P.2d 522.

[2, 3] In support of her contention that the finding of the trial court that there was no negligence or carelessness on the part of respondent York is definitely refuted by the undisputed evidence of the physical facts, appellant refers us to the cases of Austin v. Newton, 46 Cal.App. 493, 497, 189 P. 471, 472, and Chase v. Jonkey, 12 Cal.App.2d 365, 369, 55 P.2d 1229. But in both of the cited cases the evidence of the physical facts was undisputed, while in the case at bar they are in dispute, and reasonable minds might well draw different conclusions, depending upon whether appellant's or respondent's version thereof be adopted. It is noteworthy also that in the first-cited case, after stating that "when the *undisputed* circumstances show that the story told by a litigant and his witnesses cannot by any possibility be true, or when their testimony is inherently impossible, the appellate court should not hesitate to reverse the judgment, * * *" the court proceeds as follows:

"On the other hand, as an appellate court, it is our bounden duty to exercise great care and caution in applying the tests of common sense and common knowledge of physical laws to a given state of facts. Common experience and observation teach us that strange and astonishing things sometimes happen in the world of physical phenonema, and accidents sometimes appear to happen in manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; and the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal upon the ground that the verdict is contrary to the evidence. Stokes v. Metropolitan Street Ry. Co., 173 Mo.App. 676, 160 S.W. 46. Unless, therefore, we can say that, under the undisputed physical facts, the accident could not possibly have been due to defendant's negligence as alleged in the complaint, we must affirm the judgment. It is not sufficient that the story told by plaintiff and his witnesses may be improbable. It is for the jury or the trial judge to weigh and balance probabilities. We cannot reverse upon the ground that the finding of negligence is contrary to the evidence unless we can see that the fact as found contravenes recognized physical laws, and that therefore it is impossible that the accident could have been due to the negligence alleged in the complaint."

Finally, appellant asserts that the presumptions that the deceased took ordinary care of his own concerns (Code Civ.Proc. section 1963, subd. 4), and that he obeyed the law (Code Civ.Proc. section 1963, subd. 33) have not been overcome by satisfactory evidence.

[4, 5] Concededly, there was present in this case the presumption that decedent, while operating the "jeep", was at all times exercising the requisite degree and amount of care for his own safety, and that he was obedient to such provisions of the law or universal custom as required him to drive on the right hand side of the road. Such presumptions are a species of indirect evidence (Code Civ.Proc. sec. 1957), and will prevail in and control the deliberations of a jury or in the determination of a trial judge unless they are overcome by satisfac-

tory evidence. But when, as in the case now engaging our attention, direct evidence of an eyewitness was introduced to establish as a fact conduct and behavior on the part of the deceased at variance with and contrary to the presumptions, there was thereby created a conflict in the evidence, and the determination as to whether such direct evidence overcame the presumptions was peculiarly within the province of the trial court. When the ultimate fact is found from substantial evidence it cannot be said as a matter of law that any presumption will prevail. Taylor v. Taylor, 66 Cal.App.2d 390, 397, 152 P.2d 480.

[6, 7] We have carefully examined the record and are unable to find therein anything from which it could justly be said that the testimony of respondent York as to the immediate circumstances surrounding the fatal accident should be strictured as improbable or inherently unbelievable. True, there was a sharp conflict in the evidence, and had a judgment been rendered for the appellant it could be sustained. But that is not the test on appeal. Legion of authority supports the statement that when an attack is made upon a judgment on the ground that it is unsupported by the evidence, the power of the reviewing courts is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the judgment rendered. Therefore, on an appeal from a judgment for defendant in an action for damages, all conflicts in the evidence must be resolved in favor of the prevailing party. Because it is the rule that all intendments are in favor of the judgment arrived at upon conflicting evidence, the fact that contradictory inferences can reasonably be drawn from the facts in evidence does not authorize an appellate tribunal to substitute other inferences for those drawn by the constitutional and statutory arbiter of facts. Juchert v. California Water Service Co., 16 Cal.2d 500, 503, 106 P.2d 886.

We find no error in the record. The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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84 Cal.App.2d 339

ANGELL v. ANGELL.

Civ. 13533.

District Court of Appeal, First District,
Division 1, California.
March 15, 1948.

Rehearing Denied April 14, 1948.
Hearing Denied May 13, 1948.

1. Divorce 🔑156

Where party seeking a final decree of divorce cannot negative cohabitation during the year following entry of interlocutory decree, he should proceed by motion supported by affidavit in explanation of cohabitation. Civ.Code, § 132; Rules of Superior Court, rule 26.

2. Divorce 🔑156

Where after entry of interlocutory decree the parties have cohabited, entry of final decree of divorce is not a mere ministerial act, but becomes a judicial act in the performance of which trial court may exercise its discretion. Civ.Code, § 132; Rules of Superior Court, rule 26.

3. Divorce 🔑156

Where a reconciliation based on unconditional forgiveness is effected before entry of final decree of divorce, trial court should deny such a decree to either party, but mere cohabitation where reconciliation has not in fact been effected, does not prevent trial court from granting final decree. Civ.Code, § 132.

4. Divorce 🔑156

The state is interested in saving the marriage and principal purpose of requiring the one year period to elapse between entry of interlocutory and final decrees of divorce is to give the parties an opportunity to compose their difficulties and effect a reconciliation. Civ.Code, § 132.

5. Contracts 🔑108(2)

An agreement by which innocent spouse after obtaining interlocutory decree of divorce consents to again try living with offending spouse on condition that if during the year he demonstrates that he will not again commit marital offense which caused separation, she will forgive him, but that if he again commits such offense, she will secure final decree is not contrary to public policy.

6. Divorce ⚿156, 184(10)

Whether agreement to resume cohabitation after entry of interlocutory decree of divorce is one of unconditional forgiveness so as to preclude entry of final decree or is conditional so as to warrant granting of final decree is a question of fact and trial court's determination thereof is conclusive if the evidence or reasonable inferences therefrom are conflicting, but where the evidence and inferences therefrom are all one way, trial court has no discretion to refuse the relief warranted by such evidence. Civ.Code, § 132.

7. Courts ⚿28

Where there is a legal right to relief under certain facts and the existence of such facts is not questioned, a court having jurisdiction has no discretion to refuse the relief.

8. Divorce ⚿156

Where uncontradicted evidence established that wife after obtaining interlocutory decree of divorce on ground of brutal treatment by husband while intoxicated consented to resume cohabitation only upon condition that husband should not drink any alcoholic beverage for one year and husband a few months later again started to drink and treated wife in a brutal fashion, whereupon wife moved into a separate bedroom which she occupied thereafter, refusal to grant wife a final decree of divorce more than one year after entry of interlocutory decree was abuse of discretion. Civ.Code, § 132.

WARD J., dissenting.

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Suit for divorce by L. Angell against Charles Angell, wherein an interlocutory decree of divorce was entered. From an order denying her motion for a final decree of divorce, plaintiff appeals.

Order reversed.

John Paul Jones, of Oakland, for appellant.

Augustin Donovan and Louis B. DeAvila, both of Oakland, for respondent.

PETERS, Presiding Justice.

Plaintiff appeals from a minute order of the trial court denying her written noticed motion for a final decree of divorce, which motion was made after the expiration of more than one year from the date of the entry of the interlocutory. The facts are uncontradicted and are as follows:

On July 23, 1945, plaintiff filed a complaint for divorce against defendant on the ground of extreme cruelty. The action was contested by defendant. On January 8, 1946, after a trial, the court determined that plaintiff was entitled to a divorce and directed her counsel to prepare findings. Such findings were prepared, signed and filed February 5, 1946. An examination of those findings discloses that there are no children of this marriage; that the wife waived her right to her share of the community property; that she asked for and secured no alimony; that the divorce was granted because of most brutal attacks made upon the plaintiff by the defendant while in an intoxicated condition, and that these acts of cruelty had occurred over a considerable length of time.

More than one year after the entry of the interlocutory decree and on March 4, 1947, the plaintiff filed and served her motion for entry of a final decree of divorce. The motion was accompanied by an affidavit, and, at the hearing of the motion, plaintiff supported the affidavit by oral evidence. The defendant made no counter-showing by affidavit or otherwise. At the conclusion of the hearing on the motion it was denied by the trial judge from the bench. From the minute order based on such denial plaintiff appeals, contending that the trial court abused its discretion in denying her motion for the entry of the final decree.

As already pointed out, the record shows that defendant had been guilty of many acts of cruelty toward plaintiff while defendant was intoxicated. The record also shows that shortly after the trial and the submission of the case, the defendant came to see the plaintiff. He told her that he had learned his lesson and that if she would take him back he would promise not to drink again. Plaintiff told defendant that she could not rely upon his promises, that he had broken them before, and that she had gone through too much with him to again take the chance of living with him. Defendant, and several relatives and friends of the parties, thereafter approached the plaintiff on several occasions and tried to induce her to become reconciled with defendant, but she was adamant in her refusal. Finally, a representative of the organization known as Alcoholics Anonymous called upon her. He told plaintiff that defendant had joined the organization and was attending classes; that the defendant was making a sincere effort to conquer the liquor habit; that Alcoholics Anonymous had effected cures in about sixty-five per cent of such cases, but that the chances of securing a cure would be much enhanced if defendant had a normal home life, and if she would cooperate. Under these various pressures plaintiff agreed to discuss a resumption of marital relations based upon a conditional forgiveness if defendant would have prepared a formal contract. Defendant secured the assistance of an independent attorney, not one of the attorneys then and now representing the parties, who drafted such a formal contract. That contract was signed and acknowledged on January 12, 1946. The contract recites that plaintiff has obtained an interlocutory decree (it had not yet been entered) and would be entitled to a final decree in one year; that the parties, in good faith, desire "to make an attempt at a reconciliation," and provides that plaintiff will permit defendant to return to and live with her, on certain terms and conditions. Defendant agreed "that he will not during a period of one year from the date of the making of this agreement, ingest any alcoholic drink, beverage or stimulant"; that if, during this year, he should breach this promise, he would waive all objections to plaintiff securing her final decree, and he further agreed that in such event his wife was to be free to secure such final decree as if there "had been no reconciliation, conditional or otherwise." The plaintiff agreed that, if defendant abided by the agreement, at the end of the year she would cause the divorce action to be dismissed.

The record shows that the parties thereupon resumed marital relations. The defendant attended classes given by Alcoholics Anonymous and refrained from the use of intoxicants until May 25, 1946, when he again started to drink and again treated plaintiff in a most cruel and brutal fashion. Plaintiff immediately told defendant that he had breached the agreement, and moved into a separate bedroom, and ordered defendant from her house. Defendant refused to leave and since that date, on many occasions, has returned to the house drunk and quarrelsome and, on several occasions, has hit and otherwise brutally abused plaintiff. Since May 25, 1946, plaintiff has occupied a room separate from defendant.

Not one word of this evidence was contradicted. Defendant did not personally appear, although served with the notice of motion and its accompanying affidavit, at the hearing of the motion, but the attorney who had represented him during the divorce proceedings and who is one of the attorneys representing him on this appeal, was present in court on that occasion. He did not challenge any of the evidence and offered none on behalf of his client, simply ascertaining from plaintiff for the record that he had not prepared the contract.

[1-5] On this evidence we are of the opinion that the plaintiff made out a case for the granting of the final decree of divorce, and that the trial court abused its discretion in refusing to grant her that decree. Section 132 of the Civil Code provides that one year after the entry of the interlocutory, the court, on motion of either party or on its own motion, "may enter the final judgment granting the divorce." Rule XXVI of the rules of the Superior Court requires the petitioning party to support his or her application for a final decree with an affidavit setting forth, among other things, that after the interlocutory the "parties have not become reconciled" and that "said parties have not lived or cohabited together." There can be no doubt that, in cases where the petitioning party cannot aver that there has not been cohabitation

during the year, the proper procedure is to proceed by motion supported by an affidavit in explanation of the cohabitation. Lane v. Superior Court, 104 Cal.App. 340, 285 P. 860; Helbush v. Helbush, 209 Cal. 758, 290 P. 18. There can also be no doubt that, where, after the entry of the interlocutory the parties have cohabited, the entry of the final decree is not a mere ministerial act but becomes a judicial act in the performance of which the trial court may use its discretion. Lane v. Superior Court, supra, 104 Cal.App. 340, at page 345, 285 P. 860. The Lane case discusses these principles at some length. What is said there need not be repeated here. Suffice it to say that that case, the Helbush case and others (see Chester v. Chester, 76 Cal.App.2d 265, 172 P.2d 924; Peters v. Peters, 16 Cal.App.2d 383, 60 P.2d 313) have established the law to be as follows: If a reconciliation based on an unconditional forgiveness is effected before the entry of a final decree the trial court should deny such a decree to either party. (See many cases collected Bajakian v. Bajakian, 57 R.I. 470, 190 A. 461, 109 A.L.R. 1001, 1005, 1007.) But mere cohabitation where a reconciliation had not in fact been effected will not prevent the trial court from granting the final decree. Helbush v. Helbush, supra. The real question in each case is whether the innocent party has in fact unconditionally forgiven the guilty one and resumed marital relations with that party. If so, he or she has lost the right to secure a final decree. But it must be remembered that the main purpose of requiring the one-year period to elapse between the entry of the interlocutory and final decrees is to give the parties an opportunity to think the matter over, to compose their difficulties, and to effect a reconciliation. Lane v. Superior Court, supra, 104 Cal.App. 340, at page 346, 285 P. 860. The state is interested in saving the marriage, if possible. That purpose would seldom be effectual if the innocent party could not dare try to effect a reconciliation at the peril of losing the right to secure a final decree. It is in the public interest for the courts to encourage persons who have secured an interlocutory to become reconciled. There is nothing against public policy in the innocent person saying, in effect, to the guilty one "I won't forgive you, I will try living with you again, and if during this year you demonstrate that you will not again commit the marital offense that has caused our separation, I will then forgive you, but if during this year you again commit that offense I know that it will be hopeless and I will secure my final decree." Such agreements, I repeat, are in accord with public policy.

[6, 7] Whether an agreement is an unconditional one of forgiveness, and therefore justifies the denial of the final decree, or is a conditional one, and therefore warrants the granting of the final decree, is a question of fact. If the evidence, or the reasonable inferences therefrom, is conflicting, the determination of the question by the trial court, in accordance with elementary principles, is conclusive on the appellate court. Thus in the Lane case, supra, the main case relied upon by respondent, the appellate court went to great pains to point out that there was ample evidence to show that there was an express or implied agreement to become unconditionally reconciled. It was, therefore, held that the order of the trial court denying the final decree was within the discretionary powers of the trial court. In the Helbush case, supra, the evidence again was conflicting. There was evidence that, although the parties had resumed marital relations, there had not been an unconditional forgiveness. The Supreme Court, therefore, held that the action of the trial court in granting the final decree was within its discretion and could not be disturbed on appeal. But where the evidence, and the inferences therefrom, are all one way, the trial court has no discretion to refuse the relief warranted by such evidence. As was said in O'Connell v. Superior Court, 74 Cal.App. 350, 353, 240 P. 294, 295: "Where there is a legal right to relief under certain facts, and the existence of such facts is not questioned, a court having jurisdiction has no discretion to refuse the relief."

[8] In the present case the evidence demonstrates to a certainty that there was no unconditional forgiveness of the marital offense. Quite to the contrary, the evidence demonstrates that plaintiff refused to for-

give the defendant unless he refrained from drinking for a year. That was expressed in language and acts too clear to be questioned. The resumption of marital relations was based on the express agreement of the parties that the reconciliation should be conditional. There is not one word of evidence to the contrary, and defendant does not contend that there is. Defendant contents himself with the mere assertion that where parties resume marital relations whether the final decree shall be granted rests in the "discretion" of the trial court. But that does not mean at the whim or caprice of the trial court. It means a legal discretion, guided by law. When the law is clear the only discretion is to follow the law. Cargnani v. Cargnani, 16 Cal.App. 96, 116 P. 306. If the plaintiff did not make out a clear case entitling her to the final decree in this proceeding, there never could be a case where the denial of the final decree would amount to an abuse of discretion. That is not the law.

There being no evidence and no inference from the evidence to support the implied finding that the forgiveness here involved was unconditional, and the uncontradicted evidence showing that the forgiveness was conditional, we are of the opinion that the action of the trial court in refusing to grant the final decree was an abuse of discretion.

The order appealed from is reversed.

BRAY, J., concurs.

WARD, Justice.

I dissent.

The reconciliation of estranged spouses before or after an interlocutory decree is in accord with the accepted judicial policy of protecting marital status. In the majority opinion the evidence has been revalued and because no other witness appeared to contest the motion it is held: "There being no evidence and no inference from the evidence to support the implied finding that the forgiveness here involved was unconditional, and the uncontradicted evidence showing that the forgiveness was conditional, we are of the opinion that the action of the trial court in refusing to grant the final decree was an abuse of discretion."

The trial judge was justified in denying plaintiff's motion for a final decree upon either of two grounds: 1. If the trial judge disbelieved the whole or an essential part of the testimony of plaintiff, presented in support of her motion, including the agreement, then the judgment rendered against plaintiff in this case was proper. The issuance of a final decree is discretionary with the trial court. 2. The fact, standing alone, that the return of the spouses to marital relations is conditional, does not justify the issuance of a final decree. Whatever the conditions may be, the trial court must have the right to pass upon the propriety thereof. (9 Cal.Jur., pp. 767-768, sec. 116.) Instances of proper conditions are too numerous to mention (17 Am. Jur., pp. 211-212, sec. 116), but "A party to an action for divorce is not entitled to have a final decree entered when to do so would be a flagrant abuse of the principles of equity and of the due administration of justice." (9 Cal.Jur., p. 768, sec. 117).

In this case the parties entered into a written agreement that the husband would abstain from alcoholic liquor or that "he will waive all legal objection to the obtaining" of a final decree of divorce by the wife. In brief, plaintiff's position is that she would live in the same abode with the right to defendant of marital relations, but she reserved the right of forgiveness. The husband agreed in writing that if the wife decided his conduct was not all that she desired he would not oppose the issuance of a final decree of divorce. This contract attempted to bestow upon the wife an unfair advantage if there should be a difference of opinion relative to the conduct of the husband. Such a contract would permit parties to enjoy marital relations for over eleven months and then upon the whim or caprice of one spouse obtain a final decree irrespective of the declaration of law or the views of the courts on the merits of the motion.

It is not permissible that parties by the terms of a contract may provide that if future disputable questions arise one side will be refused the right to submit the matter to a court of justice. One essential element of a contract is that it must have a lawful object. (Civil Code, sec. 1550, subd.

3.) Any contract the object of which is to take away the right of the court to decide an issue over which it has jurisdiction, such as to agree that one party in a divorce proceeding will make no defense, is void. Loveren v. Loveren, 106 Cal. 509, 39 P. 801; Beard v. Beard, 65 Cal. 354, 4 P. 229; Pereira v.Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880, 134 Am.St.Rep. 107. Even in contracts adjusting property rights the court may approve or disapprove. Hill v. Hill, 23 Cal.2d 82, 142 P.2d 417; Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15.

To epitomize: 1. The determination of the facts was a question for the trial judge. He observed and heard the plaintiff testify. I am unable to say that he abused his discretion. 2. Irrespective of the truthfulness of the testimony of plaintiff, the contract is void. Its object is unlawful, namely, to take away from the court its function to determine the propriety of the issuance of the final decree.

The judgment denying plaintiff a final decree of divorce should be affirmed.

Rehearing denied; WARD, J., dissenting.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.

WEST KEY NUMBER SYSTEM

84 Cal.App.2d 663

FEDERATED INCOME PROPERTIES v. HART.

Civ. 16119.

District Court of Appeal, Second District, Division 1, California.

March 31, 1948.

Rehearing Denied April 22, 1948.

Hearing Denied May 27, 1948.

1. Specific performance 🔑121(3)

Evidence authorized denial of specific performance of contract to sell realty on ground that correspondence between parties was uncertain as to oil interest to be reserved by vendor.

2. Trial 🔑377(2)

Where evidence supported findings that contract to sell realty was too uncertain to be specifically enforced, refusal to reopen case for evidence of value of the realty was proper.

3. Witnesses 🔑204(2)

Where defendant did not appear as witness, either directly or by deposition, court properly excluded as privileged, letters from defendant to witness who was defendant's attorney during negotiations for contract, specific performance of which was sought.

4. Specific performance 🔑28(1), 31

An action for specific performance of contract must fail unless the contract is shown to be complete and certain.

5. Contracts 🔑18

If offer is too indefinite for court to decide just what it means and fix exactly the legal liability of the parties, its acceptance cannot result in an enforceable agreement.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Federated Income Properties against G. A. Hart for specific performance of contract to sell realty. From a judgment for defendant, plaintiff appeals.

Affirmed.

James M. Gammon, of Los Angeles, for appellant.

Henry O. Wackerbarth, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment in an action for specific performance.

The complaint alleges in substance that plaintiff agreed to buy and defendant to sell certain real property; that plaintiff performed and that defendant refused to perform. The court found for the defendant and judgment was entered accordingly.

It is contended on appeal that the evidence "does not support the findings of the court to the effect that no agreement was entered into between the parties". Also that the court erred "in refusing to allow the plaintiff to introduce the two letters from the defendant to her attorney" and that the court's refusal to "reopen the case for the presentation of evidence as to the value of the property", was error.

The record reveals that Ted Shaw carried on a correspondence with defendant, who lived in the east, regarding the purchase of certain property in California owned by defendant; that the first communication was a "postcard" from Shaw to defendant which, according to respondent's brief, was written June 24, 1945, and stated, "that he was informed that certain tax deeded property was for sale by a quit claim deed and that he had a client who was interested in it if he could be given more information." That from said date and until about the middle of the following November, eighteen or twenty communications were exchanged between them concerning the transaction.

It would serve no useful purpose to set forth the correspondence. It is sufficient to note that the offers and counter offers related in part to a reservation by the seller of an oil interest and, as pointed out by respondent, "The correspondence between the parties in this action is indefinite and uncertain in that it cannot be ascertained therefrom:

"1. Whether Hart was to retain (1) 25% of the oil rights in the property to be conveyed, or (2) 25% of the oil produced therefrom, or (3) 25% of the land owner's royalty.

"2. Whether an oil lease was to be negotiated as a part of the transaction.

"3. The terms of the suggested oil lease."

[1-3] The court found "that no agreement, either oral or in writing, was entered into between the parties hereto for the purchase and sale of the real property described in paragraph II of plaintiff's complaint." The evidence supports the findings. This being true, there was nothing to be gained in reopening the case. Nor was it erroneous to exclude as privileged the two letters from defendant to the witness Smith who was defendant's attorney during the negotiations. The defendant did not appear as a witness, either directly or by deposition.

[4, 5] It is well settled that an action for specific performance must fail unless the contract upon which it is based is shown to be complete and certain. Breckinridge v. Crocker, 78 Cal. 529, 21 P. 179; Cooperative Ass'n v. Phillips, 56 Cal. 539; 23 Cal. Jur. 429 et seq. "If the offer is in any case so indefinite as to make it impossible for a court to decide just what it means, and to fix exactly the legal liability of the parties, its acceptance cannot result in an enforceable agreement." 17 C.J.S., Contracts, § 36.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

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84 Cal.App.2d 552

ROINC v. VENLAUR CORPORATION et al.
VENLAUR CORPORATION v. PRICE et al.
Civ. 15879.

District Court of Appeal, Second District, Division 2, California.
March 25, 1948.

1. Appeal and error 🔑1010(1)

A judgment supported by substantial evidence will not be reversed.

2. Contracts 🔑175(3)

In action against lessee of lots in commercial center for cost of paving and other improvements wherein lessee cross-complained against real estate brokers who had negotiated lease, evidence sustained finding that liability assumed by brokers with respect to improvements was limited by letter to paving cost of $500, and was not enlarged by subsequent correspondence. Civ. Code, §§ 1638, 1639, 1648, 1649.

3. Evidence 🔑448, 461(1)

Testimony may be introduced to explain an ambiguous contract in an effort to ascertain intention of the parties but parol evidence is not admissible to vary the terms of a writing which is certain in fixing obligations of the parties.

4. Evidence 🔑460(1)

A letter by brokers reciting agreement to pay costs of paving street set aside in lease of described property between named parties, and to deposit approximate cost of paving with named party, and subsequent letter confirming prior agreement were not ambiguous so as to require admission of parol proof of intent.

5. Contracts ⟹175(2)

Attorney's testimony offered by lessee to show sense in which parties understood language of letter by which brokers assumed liability for cost of certain paving and by which brokers had allegedly assumed obligations of lessee with respect to additional improvements was properly excluded because failing to disclose consideration for alleged assumption of additional liability, particularly where contract would not have been enforcible by reason of limitations and statute of frauds. Code Civ. Proc. §§ 339, 1861; Civ. Code, § 1624, subd. 2.

6. Evidence ⟹448, 457

A written contract may be examined and its sense ascertained by evidence other than writing itself when doubt arises upon true meaning of the contract and parol evidence may be admitted to show that terms used have a special technical, and peculiar meaning to the contracting parties. Code Civ.Proc. § 1861.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Roinc, a corporation, against Venlaur Corporation to recover certain improvement costs wherein defendant filed a cross-complaint against R. A. Rowan & Company, and others. From judgment denying relief sought by cross-complaint, the Venlaur corporation appealed.

Affirmed.

Gerald Bridges, of Los Angeles, for appellant.

George Manns and Hill, Morgan & Farrer, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

The questions for decision are (1) whether letter No. 1 written by respondents expresses their total obligation to appellant; (2) whether it was so modified by their letter No. 2 written seven months later as thereby to enlarge their debt to appellant; (3) whether the court erred in excluding appellant's offer of parol evidence to prove that letter No. 2 was intended as such modification of letter No. 1.

Respondents as real estate brokers in the city of Los Angeles formulated a plan for the development of certain lots situate at the northwest corner of Ventura and Laurel Canyon boulevards. Their purpose was to create a first-class commercial or shopping center on Ventura boulevard with a spacious parking area in the rear of the stores for the benefit of the patrons who visit the shops. Lots 15 and 16 belonged to Victor H. Davis. Lot 15 has a 220 foot frontage on Ventura and lot 16 adjoins it on the north. Lots 14 to 9 inclusive lie to the west of lots 15 and 16 and their owners will be referred to as "other owners."

September 18, 1940, respondents negotiated a 50-year lease on lots 15 and 16 by Davis to appellant. Paragraph Twelfth thereof provided that Davis and the other owners "propose to create certain vehicular parking areas and private streets by the granting of reciprocal easements over the above described premises" for their common benefit. Lots 9, 10, 13 and 14 except the south 180 feet thereof were to be the parking area. Across lots 9 to 14 inclusive a private street 40 feet wide would extend from the west side of lot 16 to the western boundary of lot 9 and for a total distance of 150 feet along the eastern boundary of lot 14 at the rear of lot 16. To make the means of ingress and egress to the parking areas complete it was provided (1) that a 45-foot street should extend from Ventura northward through lot 9 to the 40-foot private street, and (2) a street 50 feet wide would extend along the northerly boundary of lot 16 to the 40-foot street on lot 14. Appellant agreed to pave at its own expense the 50-foot street across lot 16 within three months from the date of the agreement between Davis and the other owners with respect to the vehicular parks and private streets.

On September 27, 1940, respondents wrote a letter to appellant as follows:

"As per verbal understanding the undersigned agree to pay the cost of paving the street, as per map attached hereto, set aside in that certain lease dated September 18, 1940, covering the property described as follows:

"Lots Fifteen (15) and Sixteen (16) Tract 4541, in the City and County of Los Angeles, State of California, as per Map Book 49, Page 33, Records of said Los Angeles County;

between Victor H. Davis and Euda M. Davis as lessor and Venlaur Corporation as lessee at the time and under the conditions provided for in said lease.

"We further agree to deposit a sum equal to the approximate cost of said paving with the R. A. Rowan & Company and to procure for you a letter to the effect that they will fulfill all of the obligations as set forth herein."

Eleven days thereafter R. A. Rowan & Company wrote appellant with reference to the foregoing promise of respondents and advised appellant that the Rowan Company had on deposit "The sum of $500 to defray the cost of said paving" which sum would be paid "to the Venlaur Corporation, upon demand and at such time as the Venlaur Corporation can show written evidence of the completion of said paving and payment therefor, an amount equal to the cost of said paving. In the event the cost of said paving, as evidenced by receipted bills therefor shall exceed $500 Mr. S. H. Price and Mr. Leonard Woodward have further agreed to any cost in excess of $500 for this paving."

September Letter Interpreted

From respondents' September letter followed by that of Rowan Company to appellant no meaning is fairly deducible other than that respondents agreed "to pay cost of paving the street" along the north side of lot 16 and to deposit the approximate cost of such paving with the Rowan company. An enlargement of respondents' obligation beyond payment of the paving cost would require a distortion of the writings. Their intention was emphasized by the understanding of the Rowan company expressed in its communication to appellant which retained the writing without protesting that it did not accurately state the agreement. The language of a contract governs its interpretation. (Civ.Code, sec. 1638.) The intention of the parties to a written contract is to be ascertained from the writing alone, if possible. (Ibid., sec. 1639.) A contract extends only to those things concerning which it appears the parties intended to contract. (Ibid., sec. 1648.) And if it is in any sense uncertain it must be interpreted in the sense in which the promisor believed, at the time, that the promisee believed it. (Ibid., sec. 1649.)

The instant controversy arose out of the subsequent agreement and letters of the parties. In April, 1941, an agreement was prepared by the attorneys of Rowan & Company whereby the owners and lessees of the commercial center granted reciprocal easements contemplated by the Davis lease in order to create and establish the vehicular park and the private streets. By that instrument, herein referred to as the "parking agreement," it was provided that (a) the cost of "paving and grading the areas * * * shall be borne by the owners in proportion to the amount of such areas lying within their respective parcels"; (b) "the cost of paving and grading the area * * * and *the cost of constructing retaining walls and of curbing and fencing shall be borne by the owners,"* subject to specified leases "in proportion to the frontage on Ventura boulevard of their respective parcels * * *; provided further that *the portion of such cost * * * chargeable to Davis* (lessor of appellant) * * * *shall be borne by Venlaur Corporation as lessee."* By paragraph 3 of the parking agreement the parties "except Davis and Dedeyne, owners of portions of lots 11, 12, 15, and 16" appointed Roinc, a California corporation, "to contract for the paving of the areas" defined in the writing.

Following the execution of the parking agreement appellant's attorney, evidently intending to avoid the growth of a suspicion in the minds of respondents that they had been released from their September promise by appellant's new covenant in the parking agreement, requested them to renew their pledge to relieve appellant of the obligation contained in the last above italicized passage. To this end such attorney prepared the following letter to appellant and caused respondents to sign it.

"* * * April 25, 1941.

* * * "In connection with that certain parking agreement dated April 28, 1941, executed by you, it is understood and agreed that the cost of said work, as per previous agreement, shall be paid by the undersigned.

"You now have in your files a letter from the R. A. Rowan & Co. stating that the sum of Five Hundred ($500) Dollars is being held by them to pay for this work."

When the work had been finished in January, 1943, as provided by the parking agreement, appellent was billed for the sum of $2,168.41 as its proportionate share, and two years later it requested respondents to pay that sum. The latter denied liability, claiming their obligation to be limited to the cost of paving merely the street over lot 16. Roinc filed the instant action against appellant and recovered the amount of its claim, but appellant was denied relief on its cross-complaint against respondents for any sum in excess of the $500 as promised by their September letter. Of this part of the judgment Venlaur demands a reversal.

Respondents' Obligation Not Enlarged By The 1941 Writings.

[1, 2] Under the doctrine that a judgment will not be reversed where there is substantial evidence to support it, appellant enters these portals with slender support. The documents in evidence indicate no intention of respondents to pay more than the "cost of paving." If appellant's officers had entertained any notion that respondents' obligation covered the cost of appellant's share of merely the paving of all the streets to be constructed on the commercial area they would have sounded an alarm on receipt of the Rowan letter. While the area to be paved over lot 16 is 8,750 square feet, the total area contemplated at that time to be paved was in excess of 111,000 square feet. The streets comprising such area were under discussion by all the parties at the time of and prior to the Rowan letter. The scheme was practically consummated by the execution of the parking agreement. If respondents had believed that they were obligated to deposit the "approximate cost" of paving 111,000 square feet of streets, to say nothing of the construction of the fencing, curbing and retaining walls, would they have left a mere $500 with Rowan as "the approximate cost" thereof? And would appellant's officers have sat complacently by without indicating its opinion that $500 was but a fraction of the readily estimated amount to be paid by respondents pursuant to their September letter?

The parking agreement required the owners to pay the cost of "paving and grading" and "the *cost of constructing retaining walls and of curbing and fencing*" in proportion to their respective frontages on Ventura boulevard, but pursuant to its lease appellant assumed the charges to be made against the Davis lots. Respondents' letter of April 25, 1941, to Venlaur did not extend their obligation. Their statement was that "the cost of said work *as per previous agreement*" shall be paid by respondents, and again they reminded appellant that it had the Rowan letter to the effect that $500 was on deposit "to pay for this work." With the parking agreement executed, the area theretofore "contemplated" for paving, grading, fencing and curbing became an actuality. With such a definite program and its several obligations it is inconceivable that respondents could have intended by their letter to assume Venlaur's share of the construction to be done under that agreement. If appellant had in mind that respondents were to pay its share of the cost of such work why did not its officers then protest that not only was the deposit inadequate but also that respondents were laboring under an illusion in thinking that the share of their obligation as defined in their September letter was so slight that $500 would approximate it?

The Bridges' Letter: Price's Answer

But still another document was attached to appellant's cross-complaint and received in evidence. It is the letter of appellant's attorney Bridges written to respondents three days after their April letter. By that document Bridges apparently attempted to commit respondents to an acquiescence that they had by their letter of April 25 assumed Venlaur's obligation to pay for "the original cost of paving and grading and cost of constructing retaining walls and of curbing and fencing" by saying that those items "are to be paid by you pursuant to the agreement contained in the letter from the Rowan Company of October 8, 1940." He did not mention respondents' own letter of September. He then concluded by saying: "Thus it is our understanding that all of the obligations of Venlaur Corporation set forth in paragraph V * * * of said agreement, are to be paid and performed by you." The court found upon substantial evidence that this letter was never received, read by or communicated to either respondent prior to February 9, 1945.

However, respondents did make reply to Bridges under date of March 1, 1945. Mr. Price was the author of that writing and his explanation of its phraseology removed the apparent admission of an enlargement of their debt. He wrote: "Neither of the undersigned, the brokers in the deal, ever agreed to pay for any other work than the original cost of paving and grading the street and *cost of construction of retaining walls and curbing and fencing* of that part of the land leased to Venlaur that was to be used for a street and/or easement." After reminding Bridges of the statement of the paving company which had done the work to the effect that the cost of paving the street with an area of about 8,000 square feet amounted to $400, the letter concluded with the admonition: "If you pay the Rowan Company any sum over $500 we do not propose to reimburse you for any such sum." Mr. Price testified that his inclusion of the "cost of construction of retaining walls and curbing and fencing" was his mistake and written without having before him the September letter. But, notwithstanding his "mistake" the language of their reply to Bridges clearly discloses that respondents still adhered to the September letter as the expression of their agreement with appellant with reference to their claim that the paving of the "proposed street easement" would not exceed $500. Upon the issue of the ambiguity of respondents' September letter the trial court determined from the writings that there was no uncertainty in its terms and that their obligation was limited to "the cost of paving the private street," stipulated to have been $500.

One more significant fact indicates the slow development of appellant's intention to modify its original agreement with respondents to collect from them the cost of the mere paving of the strip over lot 16. While Roinc had demanded payment by appellant of its debt in January, 1943, for the construction work done in the commercial center, the latter did not request payment from respondents of any sum for two years thereafter. In view of that fact and of the incontestably clear statement of respondents in their letter of September 27, 1940, the trial court's finding that respondents' agreement was that contained in such letter is supported by substantial evidence.

No Error In Rejecting Parol Proof

[3] Appellant contends that the several letters of respondents above discussed are ambiguous and therefore testimony should have been received to show the intention of the parties. Its offer of such testimony was properly rejected. It was established that the letters were not ambiguous but that the one of September 1940 states a definite promise, not altered by the others. It is conceded to be the law that when an ambiguous contract is the basis of an action testimony may be introduced to explain it, whereby to ascertain the intention of the parties. But it is also elemental that when a trial court finds from the very writing relied upon for recovery that there is no ambiguity, then nothing on that score remains for the jury's determination. When the questioned writing is certain in fixing the obligations of the obligor, parol evidence is not admissible to vary its terms.

[4] In its effort to maintain its contention appellant has cited California Employment Stabilization Comm. v. Walters, 64 Cal.App.2d 554, 149 P.2d 17; Derrer v. Keeler Gold Mines, 63 Cal.App.2d 606, 610, 147 P.2d 102; Eldora Oil Co. v. Gibson, 201 Cal. 231, 236, 256 P. 550; Moore v. Borgfeldt, 96 Cal.App. 306, 273 P. 1114; Gottlieb v. Tait's Inc., 97 Cal.App. 235, 275 P. 446, to establish what its rights would have been had the court found the writing ambiguous. They are not illuminating. In

each of them there was either an ambiguity or a doubt as to the exact sense in which a word or words had been used. Hence the court properly admitted testimony of the circumstances to enable it intelligently to interpret the agreement under consideration; or it involved a parol agreement which had been performed in the place of a written contract, or the circumstances were such as to require parol proof of the intention of the parties. In the instant case the trial court determined that there was neither ambiguity in the September letter in the light of the other writing nor a lack of clarity in the meaning of the terms used in that letter.

Appellant says that it relies "particularly upon the April letter." But the contract was made by the September letter, as evidently found by the court to have been a special inducement to appellant to execute the Davis lease. The April letter was clearly a reassurance that respondents would do as they had previously agreed concerning the 50-foot strip notwithstanding that appellant had by the parking agreement promised to do more. Because in September 1940 the payment of the cost of paving the 50-foot strip was the total burden assumed by respondents on behalf of appellant it does not follow as a natural or necessary sequitur that in April their generosity or their zeal to effect the consummation of the commercial center had gained such proportions as to oblige them to consent to pay all obligations assumed by appellant. If Price participated in the negotiations for the parking agreement he did so to earn his brokerage, not to pay the debts incurred or assumed by appellant. That agreement did not "change" Venlaur's obligation from that assumed in the Davis lease but imposed additional burdens upon appellant which dealt with a number of individual lessors who were under no obligation to Davis. Appellant proceeds upon the assumption that respondents signed the April letter because they had concluded to enlarge their obligation on behalf of Venlaur. There is no basis for such assumption. It is not a reasonable interpretation of the April letter to say that respondents signed it as a guarantee that they would in due season pay "Venlaur's proportionate cost of the work to be performed under the parking agreement." While by the parking agreement appellant assumed the obligation to pay the share of the expenses of the improvements specified in that instrument chargeable to its own lessor (Davis), yet from the writings and the testimony the court found that respondents did not assume appellant's new burden.

Parol To Show Sense Of Agreement.

[5, 6] Appellant contends that its offers of attorney Bridges' testimony should have been received to "show the sense in which the parties understood" the language of the September letter; that it would prove that such witness's declarations at the conferences of the parties would show that respondents understood they were assuming appellant's obligation under the parking agreement and that Bridges then stated that respondents would give appellant a letter as evidence of such understanding. Such offer was properly excluded. It did not disclose a consideration for the asserted offer of Mr. Price; the contract that would have been made thereby would not have been enforcible by reason of the two-year statute of limitations (Code of Civ. Proc., sec. 339) and would have violated the statute of frauds (Civ.Code, sec. 1624, subd. 2). Special pleas of respondent supported objections based upon those grounds. Appellant cites in support of such contention Body-Steffner Company v. Flotill Products, 63 Cal.App.2d 555, 561, 147 P.2d 84. No principle is expounded by that decision other than that contained in section 1861 of the Code of Civil Procedure. The meaning of that decision as well as of the code section is that the language of a written contract may be examined and its sense ascertained by evidence other than the writing itself "when doubt arises" upon the true meaning of the instrument. The trial court did not entertain a doubt as to the purposes of any word in the September letter. It is a matter of common occurrence that terms in common use are used in writings which have a local or technical significance and require evidence explanatory thereof to derive the proper construction, as provided

by the last cited code section. Such was the situation in the Steffner case. Of course where a phrase indicates that it is used "to distinguish this type of contract" from others, parol is admitted to show that it had a "special, technical, definite and peculiar meaning" to the contracting parties.

Judgment affirmed.

McCOMB and WILSON, JJ., concur.

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84 Cal.App.2d 482

WEBER v. PURDY.

Civ. 3575.

District Court of Appeal, Fourth District, California.

March 23, 1948.

Venue 🔑63

Defendant's motion for change of venue of child custody case to county of defendant's residence was properly denied, where defendant failed to comply with superior court's rule providing that a memorandum of points and authorities relied on must be served and filed with notice of motion. Code Civ.Proc. § 395; Rules of Superior Court, rule 19.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Carl A. Weber against Edith Weber Purdy for an adjudication that plaintiff was entitled to the care, custody and control of children of the parties. From an order denying defendant's motion for change of venue, the defendant appeals.

Order affirmed.

Kendall, Howell & Deadrich, of Bakersfield, for appellant.

Dorris, Fleharty & Phillips, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying the defendant's motion for a change of venue.

The complaint alleges that the plaintiff and defendant are the parents of three minor children; that for more than a year prior to December, 1945, they all resided in Kern County; that in December, 1945, the defendant deserted and abandoned the plaintiff and said children; that these children have remained with the plaintiff in Kern County; that the defendant obtained a decree of divorce from the plaintiff in Nevada in March or April, 1946, which decree contains no provision respecting the care, custody and control of said minor children; that the defendant has remarried and since the divorce decree has resided in Marin County or in counties other than the county of Kern; that plaintiff is a fit and proper person to have the care, custody and control of these children; and that the defendant is not a fit and proper person to have such care, custody and control. The prayer is that the care, custody and control of these children be awarded to the plaintiff.

The defendant filed a demurrer and also a motion for change of venue to Marin County with her affidavit which recites only that she has a meritorious defense to the action, and that she was at the time the action was begun, and ever since has been, a resident of the county of Marin. No memorandum of points and authorities were served or filed.

The court denied the motion for a change of venue and this appeal followed. The only point raised is that the order was erroneously entered since section 395 of the Code of Civil Procedure provides that the county of defendant's residence is the proper place for the action to be tried. The respondent relies on the appellant's failure to comply with Rule XIX of the Rules of the Superior Court, which provides that a memorandum of points and authorities relied on must be served and filed with the notice of motion. Under almost exactly similar circumstances the Supreme Court in Butterfield v. Butterfield, 1 Cal.2d 227, 34

P.2d 145, affirmed an order denying a motion for change of venue. It was there said: "Appellant had a statutory right to a change of venue upon a proper showing of grounds therefor; and the rule requiring points and authorities is a reasonable provision in furtherance of the statutory purpose. No possible hardship can fall upon the party who must comply with the rule; and appellant makes no claim to that effect."

Under authority of that case, the order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

84 Cal.App.2d 483

BAINES et al. v. ZUIEBACK.

Civ. 15931.

District Court of Appeal, Second District, Division 3, California.

March 23, 1948.

As Modified on Denial of Rehearing April 20, 1948.

1. Appeal and error ⊂⇒989

The power of a reviewing court begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted, that will support the trial court's findings and such principle is applicable in a case to which the rule of clear and convincing proof applies as it is in other cases.

2. Appeal and error ⊂⇒995

The rule that evidence, in order to establish a particular fact, must be clear and convincing, is a rule of evidence directed to trial courts, and not to appellate courts.

3. Appeal and error ⊂⇒1010(1)

Whether evidence is clear and convincing must be determined by the trial court, and the District Court of Appeal must accept that determination as conclusive if there is substantial evidence to support it.

4. Reformation of Instruments ⊂⇒45(1)

In order to justify a court in decreeing reformation of an instrument on ground of a mistake, the proof of the mistake must be clear, convincing, and satisfactory to the court, but a mere conflict of testimony as to the mistake does not necessitate a denial of the relief.

5. Appeal and error ⊂⇒1009(3)

In a suit for reformation of an instrument on ground of mistake, trial court's decision on question of mistake, based on a conflict of evidence, is conclusive.

6. Reformation of Instruments ⊂⇒45(9)

In suit to reform a sublease because of alleged mistake, evidence sustained findings that a mistake was made by an attorney drawing sublease in not incorporating rental provisions of oral agreement, and that defendant knew of the mistake but plaintiffs did not, and would not have signed the sublease if they had known of the mistake. Civ.Code, § 3399.

7. Reformation of Instruments ⊂⇒19(1)

The mistake of one of the parties alone is not sufficient ground for reformation of a contract. Civ.Code, § 3399.

8. Reformation of Instruments ⊂⇒19(1)

Where defendant knew at time of execution of sublease by plaintiffs, that, through mistake, rental provisions were omitted from the sublease, reformation of the lease could be had, notwithstanding that the mistake was not mutual. Civ.Code, § 3399.

9. Reformation of Instruments ⊂⇒17(1)

Plaintiff's negligence in not reading sublease before signing it, was no bar to reformation of the lease because of mistake in omission of rental provisions agreed on under oral contract. Civ.Code, §§ 3399, 3543.

10. Reformation of Instruments ⊂⇒25

Provision in lease requiring lessee to obtain lessor's consent to a sublease did not prevent reformation of a sublease, which had been approved by the lessor, so that sublease would comply with terms of oral agreement, where lessor was fully advised of the terms of the oral agreement before sublease was signed. Civ.Code, § 3399.

11. Reformation of Instruments ⚷29

The "rights" referred to in statutory provision permitting reformation of a contract so far as it can be done without prejudice to "rights" acquired by third persons, in good faith and for value, are rights acquired by a bona fide purchaser for value from one of the parties to the instruments sought to be reformed after execution of the instruments. Civ.Code, § 3399.

12. Parties ⚷51(4)

Only when a complete determination of a controversy cannot be had without the presence of a party must the court order him to be brought in. Code Civ.Proc. § 389.

13. Parties ⚷51(4)

Generally a court will not order a new party defendant brought in unless the presence of the new party is necessary to the determination of the action. Code Civ. Proc. § 389.

14. Parties ⚷21

Only the persons whose interest in subject matter will be affected by the decree are "indispensable parties". Code Civ.Proc. § 389.

See Words and Phrases, Permanent Edition, for all other definitions of "Indispensable Parties".

15. Reformation of Instruments ⚷33

In action by lessee against sublessee to reform sublease which, because of mistake, did not contain agreed rental provisions, original lessor was not an "indispensable party" though original lease required lessor's approval of any sublease. Code Civ. Proc. § 389.

◆

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Suit by Reuben Baines and others against Rudolph Zuieback to reform a sublease. From a judgment for plaintiffs, defendant appeals.

Judgment affirmed.

Boone & Satchell, of Long Beach, for appellant.

Newton M. Todd and Max Z. Wisot, both of Long Beach, for respondents.

VALLEE, Justice pro tem.

Appeal by defendant from a judgment for plaintiffs in a suit to reform a sublease.

Plaintiffs are lessees under a written lease made July 24, 1941, for a term of ten years from September 1, 1941, of improved real property in Long Beach. The lease provides for payment as rental of a sum "equal to seven percent (7%) on all sales and business transacted (as hereinafter defined) by Lessees on the premises, plus seven percent (7%) of any and all rentals received by Lessees from their Sub-Lessees, if any * * *," with a minimum monthly rental of: $450 on October 1, 1941, and for 58 months thereafter; $500 on September 1, 1946, and for 58 months thereafter; and $1.00 on August 1, 1951.

The lease provides that the "Lessees shall not have the right to assign the within lease, nor sublet the demised premises, in whole or in part, without first obtaining the written consent of the Lessor. The Lessor covenants and agrees that she will not unreasonably nor arbitrarily withhold such consent, it being understood that Lessor may withhold her consent in the event that the nature of the business of the proposed sub-lease or assignee *if* of the type or types which will compete with Lessor's other tenants in said building, of which the demised premises is a part."

About March 21, 1945, the plaintiffs and the defendant made an oral agreement whereby the plaintiffs agreed to sublease to defendant the street level portion of the premises covered by the original lease for a term of five years, seven months and thirty days, commencing January 1, 1946, and terminating August 30, 1951, and whereby the defendant agreed to pay the plaintiffs, either a sum equal to seven per cent of all sales and business transacted on the part of the premises agreed to be sublet, or the full minimum rental provided in the original lease, whichever amount might be greater, and, in addition thereto, the defendant agreed to pay to the plaintiffs the sum of $300 per month for the first eight months and the sum of $250 a month for the remainder of the term of the sublease.

On March 21, 1945, the plaintiffs signed a sublease in writing to the defendant of the portion of the demised premises covered by the oral agreement, for a term of five years, seven months and thirty days, commencing January 1, 1946. The written sublease provided for the payment, as rental, of "a sum equal to seven percent on all sales and business transacted (as defined in the Master Lease on said premises hereinafter more particularly mentioned) by sub-lessees on the premises, plus seven per-cent of any and all rentals received by the *sub*-lessee from his sublessee, if any * * *," with a minimum monthly rental of: $750 on February 1, 1946, and for six months thereafter; $750 on September 1, 1946, and for 58 months thereafter; and $1 on August 1, 1951.

On March 21, 1945, the original lessor consented in writing to the sublease of the part of the premises covered by the written sublease for a term commencing January 1, 1946, and expiring August 30, 1951, on the following conditions: (1) That the seven per cent rental provided in the original lease should be computed on the basis of sales and business transacted by the sublessee in the sublet premises plus seven per cent of any and all rentals received by the sublessors from the remaining portion of the demised premises; (2) that the sublease be expressly made subject to the master lease; and (3) that the original lessor be relieved of all further liability, if any, for interim repairs to the demised premises.

The complaint alleged, and the court found, that the sublease, as executed, did not truly express the intention of the parties and that it was executed by the mistake of the plaintiffs in that it did not provide that the defendant pay to the plaintiffs either a sum equal to seven per cent of all sales and business transacted on the sublet part of the premises, or the full minimum rental provided in the original lease, whichever amount might be greater, and, in addition thereto, that the defendant pay to the plaintiffs the sum of $300 per month for the first eight months and the sum of $250 per month for the remainder of the term of the sublease.

The court further found that the mistake was known by the defendant at the time of the execution of the sublease and was not known by the plaintiffs, that the defendant failed to inform the plaintiffs of the mistake or to make it known to them, and that the plaintiffs would not have entered into the sublease if they had known that it did not contain the rental provisions provided for in the oral agreement.

The judgment reformed the sublease in conformity with the findings and awarded the plaintiffs $1,800, or $300 a month due under the reformed sublease for the six months prior to September, 1946, and decreed that the defendant should account to the plaintiffs for any rental due under the sublease, as reformed, for the month of August, 1946, and each subsequent month of the term of the sublease. Defendant appealed from the judgment.

Appellant asserts: (1) That there was no clear and convincing evidence of mistake known but undisclosed, and that there was evidence that respondents knew and comprehended the questioned provisions of the sublease at the time it was signed by them; (2) that mistake of one of the parties alone is not sufficient grounds for reformation; (3) that the court should not revise the sublease without first having made the original lessor a party to the action.

[1-5] In view of appellant's contentions, it is not necessary to recite the evidence. Suffice it to say, the evidence supports the findings in all particulars. Appellant's first point resolves itself into a concession that there is evidence of mistake known to appellant but not disclosed to respondents but that such evidence is

not clear and convincing. Appellant overlooks the principle of law that the power of a reviewing court begins and ends with a determination as to whether there is any substantial evidence, contradicted, or uncontradicted, which will support the findings of the trial court. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183. The principle is applicable in a case to which the rule of clear and convincing proof applies as it is in other cases. The statement found in many cases that to establish a particular fact the evidence must be clear and convincing is a rule of evidence directed to the trial courts. Ward v. Waterman, 85 Cal. 488, 503, 24 P. 930; Brison v. Brison, 90 Cal. 323, 334, 27 P. 186; Mahoney v. Bostwick, 96 Cal. 53, 58, 30 P. 1020, 31 Am.St.Rep. 175; Sullivan v. Moorhead, 99 Cal. 157, 161, 33 P. 796; Sherman v. Sandell, 106 Cal. 373, 375, 39 P. 797; Ford v. Ford, 44 Cal.App. 415, 418, 186 P. 164; Alvarez v. Ritter, 67 Cal.App.2d 574, 577, 155 P.2d 83; Bisno v. Herzberg, 75 Cal. App.2d 235, 237, 170 P.2d 973. Cf. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 445, 159 P.2d 958. Whether the evidence is clear and convincing must be determined by the trial court and this court must accept that determination as conclusive if there is substantial evidence to support it. Beeler v. American Trust Co., 24 Cal. 2d 1, 7, 147 P.2d 583; Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732; Couts v. Winston, 153 Cal. 686, 688, 96 P. 357. As stated in Sullivan v. Moorhead, supra, at page 161 of 99 Cal., at page, 797 of 33P.: "Although the rule is that, in order to justify a court in decreeing the reformation of an instrument on the ground of a mistake, the proof of the mistake must be clear, convincing, and satisfactory to the court, yet a mere conflict of testimony as to the mistake does not necessitate a denial of the relief. Hutchinson v. Ainsworth, 73 Cal. 452, 15 P. 82, [2 Am.St.Rep. 823]; Wilson v. Moriarty, 88 Cal. [207], 211, 26 P. 85. And the decision of the trial court upon such conflict of evidence is conclusive upon this court. Brison v. Brison, 90 Cal. [323], 334, 27 P. 186."

[6] The evidence established: That before the written sublease was signed by the parties they orally agreed that appellant was to pay respondents, as rental, $300 per month for the first eight months and $250 a month for the next five years over and above seven per cent of sales, or the minimum fixed rental which the original lease required respondents to pay their lessor, whichever amount might be greater; that a mistake was made by the attorney who drew the written sublease in not incorporating the rental provisions of the oral agreement in the written sublease; that appellant knew of the mistake and knew that the written sublease did not embody the rental provisions of the oral agreement; that respondents did not read the sublease before signing it, because appellant was hurrying them and because they relied upon the attorney who drew the instrument; that respondents signed the sublease thinking that it incorporated all of the terms of the oral agreement; that respondents would not have signed the sublease had they known that it did not contain the rental provisions orally agreed to; that appellant did not take possession of the sublet premises until January 21, 1946; that respondents did not discover the mistake until April 13, 1946, when they immediately made demand upon appellant for its correction; that the sublease, as written, did not net respondents anything over and above what they were obligated to pay their lessor under the terms of the lease of July 24, 1941. It was for the trial court to say whether this evidence was clear and convincing.

[7] Appellant next says that mistake of one of the parties alone is not sufficient ground for reformation. Respondents, as they must, concede that this is a correct statement of the law. Civil Code, sec. 3399; Meyerstein v. Burke, 193 Cal. 105, 108, 222 P. 810; National Automobile Ins. Co. v. Industrial Accident Commission, 27 Cal.App.2d 225, 227, 80 P.2d 1024. Respondents' answer is that the trial court found that the sublease was executed by respondents by mistake in that they believed that it embodied the terms of the

oral agreement; that the mistake was known to appellant; that this is sufficient under the law to support a decree of reformation.

Civil Code section 3399 provides: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, * * *."

In Wilson v. Moriarty, 88 Cal. 207, 26 P. 85, where the facts were almost identical with those here, the court said at page 212 of 88 Cal., at page 86 of 26 P.: "The only fraud necessary to sustain the judgment is such as may be inferred from the failure of the defendant to correct the mistake of the plaintiff, known to or suspected by the former at the time of the execution of the lease. This is all that is required by section 3399 of the Civil Code. Higgins v. Parsons, 65 Cal. 280, 3 P. 881; Cleghorn v. Zumwalt, 83 Cal. [155], 156, 23 P. 294." (See Annotation, 26 A.L.R. 492.)

[8] Whether appellant knew or suspected respondents' mistake was not susceptible of direct proof, except by the testimony of appellant. The mistake of respondents was clearly established. The circumstances and appellant's own testimony tended to prove that he "knew or suspected" it. The evidence showed that appellant approached respondents in an effort to acquire their store; that appellant knew the terms of the original lease; that respondents orally agreed to sublease to appellant at a rental of $300 per month for the first eight months and $250 per month for the next five years over and above what they, respondents, were required to pay under the original lease; that appellant orally accepted the offer; that respondents, in the presence of appellant, told the attorney who drew the sublease the terms of the oral agreement to be embodied in the writing; that appellant stated that that was the agreement; that appellant read the written sublease after it was typed and before it was signed by respondents; that when respondents discovered the mistake, the attorney who had drawn the instrument for them approached appellant in an effort to get him to rectify the mistake; that appellant did not then deny that a "horrible mistake" had been made, or that respondents were supposed to make a profit as a result of the sublease, or that, as the sublease had been written, respondents were not going to make any profit. Appellant testified that he read and understood the sublease before he signed it. This evidence is sufficient to support the finding that the mistake was known by the defendant at the time of the execution of the sublease.

[9] Appellant argues that respondents did not read the sublease; that respondent Reuben Baines is a business man of many years' experience; that if the sublease did not express respondents' intention it was due to his negligence and that the maxim, "Where one of two innocent persons must suffer by the act or a third, he, by whose negligence it happened, must be the sufferer" (Civil Code, sec. 3543), applies and precludes reformation. The argument is without merit. Negligence in not reading the instrument before signing is not a bar to reformation. (California Packing Corp. v. Larsen, 187 Cal. 610, 614, 203 P. 102; Travelli v. Bowman, 150 Cal. 587, 591, 89 P. 347; Payne v. California Union Fire Insurance Co., 129 Cal.App. 582, 587, 19 P.2d 40; Hercules Gasoline Co. v. Security Ins. Co., 122 Cal.App. 499, 503, 10 P.2d 128; Cantlay v. Olds & Stoller Inter-Exchange, 119 Cal.App. 605, 619, 7 P.2d 395; 5 Williston on Contracts 4340, sec. 1548, n. 6; Anno., 45 A.L.R. 700, 703.)

Appellant's final contention is that the sublease should not be reformed because the original lessor is not a party to the action. At the close of the case, after all of the testimony was in, appellant moved the court for an order that the original lessor be joined as a party. The motion was denied. Appellant argues that reformation, without first having obtained the written consent of the original lessor, interferes with, is prejudicial to, and breaches her contractual rights, and that reformation should not be decreed without giving her an opportunity to be heard and to protect her rights. Appellant does not refer us to any direct authority upon the point.

[10] The evidence established that before the sublease was signed, the original lessor and her attorney were fully advised of the terms of the oral agreement between the parties to the sublease. Under the original lease the lessor receives seven per cent of the rents collected by respondents from subtenants. Under the sublease she received seven per cent of the gross sales made by appellant. As we have stated, the original lessor consented in writing to a sublease to appellant subject to the conditions imposed. These conditions were in the sublease before it was reformed. The decree of reformation does not affect the conditions imposed by the lessor.

[11] Appellant says that Civil Code section 3399 permits reformation only "so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." The rights referred to are rights acquired by a bona fide purchaser for value from one of the parties to the instrument sought to be reformed after the execution of the instrument. (Cf. Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 648, 52 P.2d 237; Mountain Club v. Pinney, 67 Cal.App. 225, 234, 227 P. 630; Tomas v. Vaughn, 63 Cal.App.2d 188, 194, 146 P.2d 499; Black v. Richfield Oil Corporation, D. C., 41 F.Supp. 988, 995. See, Anno.: 44 A.L.R. 78; 102 A.L.R. 825.) The rights of the original lessor were not acquired under the sublease.

Code of Civil Procedure section 389 provides: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, * * *."

[12,13] It is only when a complete determination of the controversy cannot be had without the "presence" of a party that the court "must" order him brought in. The general rule is that the court will not order a new party defendant brought in unless the presence of the new party is necessary to the determination of the action. East Riverside Irr. Dist. v. Holcomb, 126 Cal. 315, 320, 58 P. 817; Ambassador Petroleum Company v. Superior Court, 208 Cal. 667, 673, 284 P. 445.

In support of his contention in this behalf, appellant cites O'Connor v. Irvine, 74 Cal. 435, 16 P. 236, 239, and Wilson v. Shea, 194 Cal. 653, 229 P. 945. Neither case bears upon the question. The O'Connor case was a suit to have a trust declared. The plaintiff did not join one of the beneficiaries of the alleged trust as a party to the action. The decree of the trial court adjudged that the plaintiff was trustee of property of the unnamed beneficiary. The decree was reversed because generally "in suits between cestui que trust and trustees, all the parties interested should be before the court" and a complete determination of the controversy could not be had without prejudice to the rights of the beneficiary who was not a party to the suit. The distinction between that case and this is obvious. The Wilson case was a suit for reformation. The written contract was between Brown and several defendants. Wilson, the plaintiff, sued, alleging that Brown was his undisclosed agent. He did not join Brown as a party to the suit. As one reason for denying reformation, the court held that Brown should have been joined as a party. The court said at page 658 of 194 Cal., at page 946 of 229 P.: "C. N. Brown, although he appears on the face of said contract to be one of the principals thereto and to be the only party in fact with whom the written engagements of the defendants were made, is not made a party to this action wherein the plaintiff seeks to have his own name inserted and his own alleged rights and interests substituted for the name and rights and interests and obligations of said C. N. Brown as stated therein." In the present case the original lessor was not a party to the sublease.

Buck Auto Carriage & Implement Co. v. Tietge, 174 Iowa 103, 156 N.W. 313, 315, was a suit to reform a written assignment by a lessee of a lease. The assignee agreed to pay the rental provided by the lease and a monthly bonus to the lessee assignor. The lessee assignor brought the suit. Hubbell, the original lessor, was not joined as a party. The assignee-defendant contended that reformation of the assignment could not be had without Hubbell being joined as a party. The court held at page 315 of 156 N.W.: "The controversy as to the reformation of the assignment is between the plaintiff and defendant, and we think can be adjudicated without prejudice to the rights of Hubbell. The Hubbells had the right to receive a monthly rent of $138.33, and this was paid by plaintiff while it held the lease. Mr. Tietge agreed to pay it from April 1, 1910, and has done so. Neither plaintiff nor defendant are seeking any rescission of their contract, but plaintiff is seeking an enforcement of the real contract. But, preliminary thereto, it asks a reformation. We think the trial court had the power to render the decree without the Hubbells being in court." Cf. Ward v. Waterman, 85 Cal. 488, 500, 24 P. 930.

[14, 15] A complete determination of the controversy can be had without the presence of the original lessor. The controversy as to reformation of the sublease is solely between respondents and appellant. It is only the persons whose interest in the subject matter will be affected by the decree, who are indispensable parties. 22 Cal.Jur. p. 720, sec. 9; Cantlay v. Olds & Stoller Inter-Exchange, 119 Cal.App. 605, 617, 7 P.2d 395. The original lessor is not affected or prejudiced in any way by the decree. Hence, she is not an indispensable party to a determination of the issues between the respondents and appellant. Furthermore, defendant did not raise the question of a defect in parties defendant by demurrer or answer, and must be deemed to have waived the objection. (20 Cal.Jur. 576.)

Judgment affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

84 Cal.App.2d 521

TAYLOR v. WRIGHT et al.

Civ. 13469.

District Court of Appeal, First District, Division 1, California.

March 24, 1948.

1. Theaters and shows ⚿3

Horse Racing Board has power to suspend a race horse trainer on proof of presence of stimulants in horse for which trainer is responsible under statute providing that a trainer shall be an absolute insurer of condition of horses entered in a race. Administrative Code, tit. 4, § 1930.

2. Theaters and shows ⚿3

Rule of Horse Racing Board providing that a trainer shall be absolute insurer of condition of horses entered in a race in which there is wagering regardless of acts of third parties, and that he may be suspended if tests show presence of stimulants is not unreasonable, arbitrary or capricious. Administrative Code, tit. 4, § 1930.

◆

Appeal from Superior Court, San Francisco County; Herbert C. Kaufman, Judge.

Proceeding by Jack Taylor against Loyd Wright, Dwight Murphy and Nion Tucker, as members of the California Horse Racing Board, for a writ of mandate ordering defendant to restore to petitioner full enjoyment of a license suspended by the Board. From judgment for petitioner, defendants appeal.

Reversed.

Fred N. Howser, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for appellants.

Harrison W. Call, of San Francisco, for respondent.

WARD, Justice.

This appeal raises the same question involved in Sandstrom v. Cal. Horse Racing Board, Cal.Sup., 189 P.2d 17, namely, the validity of Rule 313 of the Rules of Racing of the California Horse Racing Board (tit. 4, Cal.Adm.Code, sec. 1930) which provides in part: "The trainer shall be the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties. Should the chemical * * * or other tests, prove positive, showing the presence of any narcotic * * * or drug of any kind or description, the Trainer of the horse may be suspended or ruled off * * * in the discretion of the Board."

As in the Sandstrom case the present appeal is prosecuted by the members of the California Horse Racing Board from a judgment in a mandamus proceeding ordering them to restore to the trainer the full enjoyment of his license which the board had suspended on the ground of violation of said Rule 313.

Respondent's petition for mandate filed in the lower court shows that on May 16, 1946, he was a duly licensed race horse trainer of a horse named "Red Beard"; that at a hearing held said day the racing steward of one of the California race tracks informed him that the urine test taken from "Red Beard" on May 10, 1946, after winning a race at the track, had reacted positively to a benzedrine test showing the presence of benzedrine in the urine of said horse; that on June 14, 1946, a notice of time and place of hearing from the secretary of the California Horse Racing Board was mailed respondent notifying him that a hearing would be held on June 24, 1946, to determine whether his license should be suspended or revoked upon the ground that the analysis of urine taken from the horse, after running in the race, proved positive, showing the presence of benzedrine (amphetarine), and that said horse had "been trained by you at said time and place in violation of Rule 313 of the Rules of Racing adopted by the California Horse Racing Board." Pursuant to the notice a hearing was conducted. On July 26, 1946, the commission ordered the trainer's license suspended for a period of six months from May 16, 1946, and on August 1, 1946, notice of this action was mailed him, stating: "The grounds for such action are that you violated Rule No. 313 of the Rules of Racing of the California Horse Racing Board."

Attached to respondent's petition was a transcript of testimony taken at the June 24, 1946, hearing; whereas, attached to appellant's amendment to answer and return to alternative writ of mandate and to petition for writ of mandate, was a transcript of proceedings before the steward representing the board on May 16, 1946.

Neither before the lower court nor this court has it been disputed that respondent was trainer of the horse nor that the analysis of urine taken from the horse showed the presence of benzadrine. Thus the only factual elements which must exist to bring Rule No. 313 of the Rules of Racing into operation (Sandstrom v. Cal. Horse Racing Board, supra, page 20 of 189 P.2d) are present. The trial court reached the conclusion that "Rule 313 of the Rules of Racing so far as it purports to make the trainer or the owner or any other persons the absolute insurer of and responsible for the condition of the horses entered in a race regardless of the acts of third parties is invalid and beyond the power of the respondents, and respondent Board to make and enforce."

[1, 2] Irrespective of the views of any one or more of the three justices of this court (see dissenting opinions in Sandstrom v. Cal. Horse Racing Board, supra), the trial court's conclusion is not the law of California. The majority opinion in the Sandstrom case held at page 23 of 189 P.2d: "* * * it is not unreasonable, arbitrary or capricious to provide that the trainer guarantee the condition of a horse running in a race upon the results of which there is wagering." "The delegation of authority here considered has constitutional support."

In view of the foregoing, other points raised by appellants need not be considered. The judgment of the superior court in the mandamus proceeding is hereby reversed.

PETERS, P. J., and BRAY, J., concur.

84 Cal.App.2d 513

PEOPLE v. CALDERONE.

Cr. 709.

District Court of Appeal, Fourth District, California.

March 23, 1948.

1. Criminal law ⚿511(2)

In prosecution for conspiracy to commit robbery based on testimony of accomplices, corroborative evidence was sufficient to connect defendant with commission of the offense since statute providing for corroboration of accomplice testimony does not require that such evidence establish defendant's guilt independent of the testimony of the accomplice. Pen.Code, §§ 182, 213, 1111.

2. Criminal law ⚿680(1)

Order of proof in criminal trial is usually within discretion of trial court.

3. Criminal law ⚿680(1)

In prosecution for conspiracy to commit robbery based on testimony of accomplices, where other evidence sufficiently connected defendant with offense charged and no motion to strike was made, court could, in its discretion, permit testimony of accomplices before other evidence connecting defendant with the offense charged was introduced. Pen.Code, §§ 182, 213, 1111.

4. Criminal law ⚿1174(1)

In prosecution for conspiracy to commit robbery, oral charge that it was duty of jurors to agree on a verdict if they could do so without "doing violence" to their own individual conscience was not prejudicial error in view of further instructions. Pen. Code, §§ 182, 213.

5. Criminal law ⚿996(1)

Fact that judgment has been pronounced and time has elapsed since defendant has been found guilty does not preclude trial court from fixing the degree of an offense. Pen.Code, §§ 182, 213, 1168.

6. Criminal law ⚿995(3)

The statute penalizing conspiracy does not divide the offense into degrees, and a trial court's finding that defendant was guilty of conspiracy in the first degree was unwarranted and disregarded as surplusage. Pen.Code, §§ 182, 213.

7. Conspiracy ⚿28

Defendants who unsuccessfully attempted robbery without arms could not be convicted for conspiracy to commit robbery of the first degree merely because of the presence, unknown to them, of a revolver belonging to another conspirator in a glove compartment of automobile some distance from the scene of the crime. Pen.Code, §§ 182, 211a, 213.

8. Criminal law ⚿1184

Where evidence sustained judgment and commitment of trial court for conspiracy to commit mere robbery, but not a robbery of the first degree, District Court of Appeal, pursuant to its power to modify judgments, could strike from the judgment the words "of the first degree" and affirm the conviction as modified. Pen.Code, §§ 211a, 1260.

Appeal from Superior Court, San Diego County; Dean Sherry, Judge.

Sam Calderone was convicted of conspiracy to commit robbery in the first degree, and he appeals.

Modified, and as modified affirmed.

T. T. Crittendon and G. A. Malette, both of San Diego, for appellant.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen. and James Don Keller, Dist. Atty. and Roland F. DeFere, Deputy Dist. Atty., both of San Diego, for respondent.

MARKS, Justice.

Defendant was convicted of the crime of conspiracy to commit robbery and was sentenced to confinement in the penitentiary. After sentence was pronounced he was returned to the court which then found that the robbery involved was in the first degree.

Allen Smith Renick, Joseph Rock and defendant were jointly charged with conspiracy to commit robbery. The evidence shows they met on a street in the city of

San Diego on July 2, 1947, and agreed to rob the office of the San Diego Gas and Electric Company in National City on the morning of Monday, July 9, 1947. Renick was an employee of the company. He was to obtain a key to the office so that entry could be made by Rock and defendant, because Renick was known and would have been recognized by other employees. The entry was to be made at an early hour, and when employees arrived and had opened the safe the two were to complete the robbery.

The three were jointly charged with the conspiracy, and Renick and Rock, after pleading guilty, testified for the People. Defendant denied the conspiracy and denied having any connection with carrying it out. We gather from the testimony of Renick and Rock that Renick in his own automobile picked up Rock and defendant at their respective hotels in San Diego between 6 and 7 o'clock on the morning of July 9th and that the three drove to National City. Rock and defendant, using the key furnished by Renick, entered the rear door of the office at about 7:30 A. M., and waited in a rear room until several employees arrived, the employees entering through the front door. Defendant remarked that there were too many employees present and he and Rock left through the rear door and joined Renick in his automobile which was parked about a block and a half away. After the car had proceeded four or five blocks, defendant took off a coat, hat, gloves and dark glasses and left them in the car when he alighted from it. Renick and Rock were arrested shortly thereafter. Officers found the coat, hat, gloves and dark glasses in the car. They also found a loaded revolver in the glove compartment. Rock and defendant denied any knowledge of this weapon. There is no evidence to the contrary and nothing to indicate that either of them were armed with any weapon when they entered or departed from the office. The revolver had not been removed from the glove compartment by any of the conspirators.

Renick testified that he went to the hotel in San Diego in which defendant was living, before 7 o'clock on the morning of July 9, and asked the clerk to call defendant; that Renick then left the hotel and that defendant joined him about ten minutes later. The hotel clerk testified to the request of Renick, the telephone to defendant's room and that defendant came into the lobby a few minutes later and left the hotel. He could not fix the date of this occurrence other than it was some time during the first two weeks of July.

Mary Jane O'Shea was one of the employees of the San Diego Gas and Electric Company who entered the front door of the office on the morning of July 9th. She testified that she saw the rear door closing and went to it and tried to open it; that it was held on the outside; that she finally jerked it open and saw two men on the other side; that one of them resembled defendant in size and coloring; that he wore a coat, hat, gloves and dark glasses; that the coat found by the officers in the Renick car resembled the coat worn by this man and that the hat was similar.

[1] Defendant suggests there was no sufficient corroboration of the testimony of the accomplices. This is without merit as all that is required is that the corroborative evidence "tend to connect the defendant with the commission of the offense" (Sec. 1111, Penal Code; People v. Morton, 139 Cal. 719, 73 P. 609) and it is not required that such evidence establish defendant's guilt independent of the testimony of the accomplice. Here the corroborative evidence sufficiently connected defendant with the commission of the crime.

[2, 3] Renick and Rock were permitted to testify before other evidence was introduced. Defendant objected to their testimony at that time. The objections were overruled with the express provision that counsel might move to strike their testimony in the event that other evidence failed to connect defendant with the offense charged. No such motion was made and the other evidence sufficiently connected defendant with the entry. Order of proof is usually a matter within the discretion of the trial court and we find no error in the rulings of the trial court in this respect.

During the course of its deliberations the jury returned to the court and asked for further instructions. During the colloquy that followed the trial judge remarked that

"It is the duty of jurors to agree on a verdict if they can do so without *doing violence* to their own individual conscience." (Emphasis ours.) A juror then said: "May I ask what you mean by great violence to our conscience, and how great is the violence?" The trial judge then re-read an instruction which contained the following: "It is the duty *to* (of) jurors to deliberate and consult together with a view to reaching an agreement if they can without violence to their individual understanding of the evidence and the law as given you in instructions by the Court."

[4] As thus modified and explained, we do not believe the first quoted language of the trial court was prejudicial to defendant.

Defendant, Renick and Rock were charged with conspiracy to commit robbery without specifying the degree of the robbery. Renick and Rock entered pleas of guilty and the jury found defendant guilty as charged without specifying the degree of the robbery.

The reporter's transcript shows that defendant was first sentenced to confinement in the state penitentiary for the term prescribed by law and that the degree of the attempted robbery was not then determined nor was it determined by the verdict. It further appears that later the same afternoon defendant was returned to court and the trial judge amended the prior judgment as follows: "It is the judgment of the Court that the conspiracy of which the defendant here stands convicted was for the purpose of committing a first degree robbery. The degree of the offense of conspiracy involved in this case and of which this defendant stands convicted is therefore fixed at this time by the Court as first-degree conspiracy."

[5] The defendant now complains of this procedure and urges that there was no power in the trial court to change the judgment once pronounced on defendant. As the only change made was to fix a degree of the crime, this argument is answered by the the case of People v. Hammond, 26 Cal. App.2d 145, 78 P.2d 1172. In that case the defendant was sentenced to life imprisonment but the trial court failed to fix the degree of the murder of which he was convicted. It was there held that the court might fix the degree of the murder twenty years after the conviction and sentence. A hearing was denied by the Supreme Court.

[6] Conspiracy is not divided into degrees (Sec. 182, Penal Code) so the trial court's finding that defendant was guilty of conspiracy in the first degree was unwarranted and should be disregarded as surplusage. The only importance of the finding that defendant conspired with others to commit robbery in the first degree is to aid in determining his minimum sentence.

Section 182 of the Penal Code fixes the penalty for conspiracy to commit a felony at the same punishment, which is prescribed for the felony. Section 213 of the Penal Code fixes the penalty for robbery in the first degree at imprisonment in the state prison for not less than five years and for robbery in the second degree for not less than one year.

The Attorney General argues that the portion of the amended judgment finding defendant guilty of the robbery which he conspired to commit was robbery *in the first degree,* is surplusage and may be disregarded as such for the reason that the trial court does not determine the term of imprisonment. Sec. 1168 Penal Code. This is fixed by another authority. In support of this argument he cites People v. Clement, 97 Cal.App. 238, 275 P. 511, 512.

In the Clement case the appealing defendant, and another, were accused in the first count of an information with robbery in the first degree, and in a second count with conspiracy to commit robbery in the same manner as alleged in the first count, that is robbery in the first degree. The jury found the defendant not guilty of robbery, and guilty of conspiracy to commit robbery as charged in the second count of the information, but did not directly find the degree of the robbery. This was urged as error and in deciding the question it was said:

"Neither was it necessary to fix the degree in order that the term of imprisonment of appellant be known.

"Whether the robbery be first or second degree, the maximum term is the same, to wit: life. Pen.Code, § 213. The same maximum term, therefore, applies to conspiracy to commit robbery of either degree. By Pen. Code, § 182, a conspiracy to commit a felony is made punishable in the same manner and to the same extent as provided for the punishment of the commission of the said felony. The maximum term being fixed and definite, the indeterminate sentence law applies, and the prison board has power to fix the sentence of appellant under Pen.Code, § 1168. (citing cases.)

"No minimum term, however, is prescribed by the Penal Code, in either section 213 or section 182, for conspiracy to commit robbery without regard to degree. Robbery of the first degree is punishable by imprisonment for not less than five years, and of the second degree for not less than one year. Pen.Code, § 213. What the minimum term would be in such a case, and where, if at all, it is prescribed, we need not decide upon this appeal."

In the foregoing opinion the fact that Section 213 of the Penal Code does provide minimum terms of imprisonment for both degrees of robbery was evidently overlooked.

The correctness of the ultimate decision in the Clement case cannot be questioned under its facts. The defendant was charged with, and found guilty of conspiracy to commit robbery in the first degree. Therefore his minimum sentence was easily ascertainable. Sec. 213, Penal Code. In the instant case the defendant was neither charged with, nor found guilty of robbery in the first degree. The degree of the robbery does not appear in the record other than in the amended judgment of the Court. Therefore, it is incumbent upon us to discuss the evidence bearing on the degree of the attempted robbery involved in the conspiracy.

Section 182 of the Penal Code contains the following: "If two or more persons conspire: 1. To commit any crime; * * *. They are punishable as follows: * * *".

The conspiracy was entered into on July 2, 1947, and there is not one word in the record indicating that the conspirators contemplated armed robbery. Of course, if the overt act on July 9th had been "perpetrated by torture or by a person being armed with a dangerous or deadly weapon * * *" (Sec, 211a, Penal Code) the failure to contemplate robbery in the first degree in the original conspiracy could avail them nothing.

[7] Rock and defendant made the entry. They were not armed and did not know of the presence of the revolver in the glove compartment of Renick's car. While they are chargeable with all the acts of their co-conspirator we hardly can agree that the presence of the revolver in the glove compartment of the automobile some distance away from the place of entry is sufficient to show that the robbery was "perpetrated * * * by a person being armed with a dangerous or deadly weapon * * *." Sec. 211a, Penal Code. It follows, therefore, that it was not robbery in the first degree. See People v. Lain, 57 Cal.App.2d 123, 134 P.2d 284.

[8] The judgment and commitment of the trial court, as amended, are modified by striking out the words "of the first degree" following the word "robbery" (Sec. 1260, Penal Code) and as so modified are affirmed.

BARNARD, P. J. and GRIFFIN, J., concur.

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84 Cal.App.2d 575

LOS ANGELES COUNTY v. SECURITY FIRST NAT. BANK OF LOS ANGELES.

Civ. 16186.

District Court of Appeal, Second District, Division 2, California.
March 25, 1948.

1. Paupers 🔑40

At common law, in absence of fraud in procuring relief, a recipient of charity from state was under no obligation to repay governmental agency disbursing such charity nor was estate of such pauper under obligation to make reimbursement, notwithstanding that indigent at time charities were furnished owned property, but such rule was changed by statute. Welfare and Institutions Code, § 2603.

2. Paupers ⇨40

Under statute, recipient of county charity becomes liable to county for value of goods and services rendered upon acquiring property. Welfare and Institutions Code, § 2603.

3. Paupers ⇨40

Under statute, such person as may have received relief as an indigent shall be liable for payment therefor after he becomes owner of property, and suit shall be brought to recover value of such relief. Welfare and Institutions Code, § 2603.

4. Limitation of actions ⇨58(1)

Since county's action against recipient of county charity to recover value of goods and services rendered upon recipient acquiring property is based upon statutory liability, statute of limitations does not begin to run until such property has been acquired by recipient. Welfare and Institutions Code, § 2603.

5. Paupers ⇨40

Under statute, county has legal right to proceed against indigent for value of goods and services rendered upon indigent acquiring property, and is not required to elect between it and any other remedy. Welfare and Institutions Code, § 2603.

6. Paupers ⇨40

County's cause of action to recover against estate of decedent for value of goods and services rendered to decedent during lifetime as a charity is based upon statutory liability, and, hence, county is not required to present its claim to executor before bringing suit thereon. Welfare and Institutions Code, § 2603; Probate Code, §§ 707, 716.

7. Executors and administrators ⇨224

Under statute, all claims arising upon contract must be filed with personal representative within time limit in the notice, but a law-imposed obligation may be enforced by suit without necessity of first filing claim therefor with personal representative. Probate Code, § 707.

8. Pleading ⇨214(1)

A demurrer reaches only the contents of a pleading and such matters as may be comprehended by doctrine of judicial notice.

9. Limitation of actions ⇨178

Complaint by county seeking to recover value of goods and services rendered decedent during her lifetime as an indigent, though showing that aid had been furnished more than four years prior to filing of complaint, did not show on its face that four-year statute of limitations had run, so as to be subject to demurrer, in absence of showing that decedent had gained financial ability to reimburse county more than four years prior to filing of the complaint. Gen.Laws Supp.1933, Act 5815; Welfare and Institutions Code, §§ 2007, 2165, 2222, 2223, 2223.5, 2227, 2576, 2600, 2603; Code Civ.Proc. §§ 337, 338.

10. Limitation of actions ⇨180(1)

A demurrer based on ground that complaint shows by its allegations that it is barred by statute of limitations does not lie if pleading merely shows that action may have been barred.

11. Pleading ⇨34(1)

Pleadings must be reasonably interpreted, and each part must be given meaning to which context entitles it, and it must be read as a whole with a view to substantial justice between the parties.

12. Limitation of actions ⇨1

Statutes of limitations are designed to prevent resurgence of stale claims after lapse of long periods of time as result of which loss of papers, disappearance of witnesses, and feeble recollections make ineffectual or extremely difficult a fair presentation of the case.

13. Limitation of actions ⇨5(1)

Where facts relied upon leave it clearly in doubt whether case is within statute of limitations pleaded, court should not indulge a strained construction in order to support the plea.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by County of Los Angeles against Security First National Bank of Los Angeles, as executor for the estate of Lucille P. Hunt, deceased, upon rejected claim against estate of defendant's decedent. From default judgment for plaintiff upon defendant's refusal to answer after a special and general demurrer to complaint had been overruled, the defendant appeals.

Affirmed.

D. Chase Rich, of Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Robert L. Trapp, Deputy County Counsel, and Gerald G. Kelly, Deputy County Counsel, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

This is an action upon a rejected claim against the estate of decedent Hunt. During a portion of her lifetime the lady was an indigent resident of Los Angeles county, incapacitated by disease or accident and not supported by relatives or friends or by any one except respondent. While she was so incapacitated and indigent respondent provided her with hospitalization, medical attention, treatments, serums, and other services, in the amount of $2,920.29. In the course of administration of her estate of which she became possessed prior to her demise respondent exhibited at the place designated for the presentation of claims of creditors and filed with the clerk of the superior court its claim comprising an itemized list of the merchandise and services supplied to decedent in accordance with Act 5815, Deering's General Laws Supp.1933, and sections 2007, 2165, 2222, 2223, 2223.5, 2227, 2576, 2600 and 2603 of the Welfare and Institutions Code. Attached to the claim was decedent's agreement to pay the county the actual amount of such aid and relief and to reimburse respondent for all charges made for aid and relief under or pursuant to any or all laws of the state, past, present or future, at the rate fixed by the board of supervisors. Those laws also authorize aid or relief by counties to such persons or any of them. Such agreement includes a waiver of all statutes of limitation.

While conceding the validity of the waiver appellant contends that respondent's claim is based upon a "contract liability" rather than on a "statutory liability" and, inasmuch as the claim was filed two and one half months subsequent to the expiration of the six-month period for filing claims against the estate, that therefore "the complaint substantially fails to state a cause of action," citing People v. Osgood, 104 Cal.App. 133, 285 P. 753; County of San Luis Obispo v. Gage, 139 Cal. 398, 73 P. 174; Reay v. Heazelton, 128 Cal. 335, 60 P. 977; Code Civil Procedure, secs. 315, 317, 345.

The only special demurrer aimed at the complaint was that "the sums of $73.50, $2.50, $64.47 and $925.38 of the $2,920.29 sum of the claim are barred by the provisions of sections 337 and 338 of the Code of Civil Procedure." It was overruled as well as was the general demurrer. Appellant having declined to answer, judgment ensued for the full amount of the claim.

[1] The filing of the claim by respondent was unnecessary. The claim is based upon section 2603 of the Welfare and Institutions Code which is as follows: "If a person for the support of whom public moneys have been expended acquires property, the county shall have a claim against him to the amount of a reasonable charge for moneys so expended and such claim shall be enforced by action against him by the district attorney of the county on request of the board of supervisors. * * * The support of such indigent from public funds shall be deemed a ground for sale or encumbrance of his property under the provisions of section 1530 of the Probate Code." It was the rule at common law that in the absence of fraud in procuring relief a recipient of charity from the state was under no obligation to repay the governmental agency disbursing such charity; nor was the estate of such pauper under obligation to make reimbursement, notwithstanding that the indigent at the time the charities were furnished owned property. In re Dufek's Estate, 164 Minn. 55, 204 N.W. 469, 470; Montgomery County v. Gupton, 139 Mo. 303, 39 S.W. 447, 448, 40 S.W. 1094; Bremer County v. Curtis, 54

Iowa 72, 6 N.W. 135; Spokane County v. Arvin, 169 Wash. 349, 13 P.2d 1089, 1090; 48 C.J. 519, 520.

[2-6] Prior to the effective date of section 2603 the common law rule prevailed so generally that in the absence of a special statute no liability rested upon a recipient of public charity to reimburse the state and county for aid legitimately obtained. Alameda County v. Janssen, 16 Cal.2d 276, 283, 106 P.2d 11, 130 A.L.R. 1141. Such rule was changed by the last quoted statute, the validity of which has not heretofore been questioned before the appellate courts. However, many of such causes have been adjudicated by the appellate department of the superior court of Los Angeles county, whereby it has been held that (1) under section 2603 the recipient of county charity becomes liable to the county for the value of goods and services rendered upon acquiring property; (2) under the section and its antecedents (sec. 6, Act of 1901, Deering's General Laws, 1931, Act 5814, Deering's General Laws, 1933, Supplemental Act 5815) such person as may have received relief as an indigent shall be liable for payment therefor after he becomes the owner of property and suit shall be brought to recover the value of such relief; (3) since the county's action is based upon statutory liability the statute of limitations does not begin to run until such property has been acquired; (4) the county has the legal right to proceed against the indigent under section 2603 and is not required to elect between it and any other remedy; (5) since the cause of action is based upon statutory liability the county is not required by sections 707 and 716 of the Probate Code to present its claim to the executor before bringing suit thereon. Such decisions are intelligent and reasonable interpretations of the statute and consonant with sound public policy in the matter of alleviating suffering as well as of requiring every resident of the state to maintain himself when he is able to do so.

[7] The filing of the claim by respondent was harmless. No advantage was derived by it or lost to appellant by reason thereof. The filing of a claim against an estate is a matter regulated entirely by statute and not by agreement of the parties. Millar v. Millar, 51 Cal.App. 718, 728, 197 P. 811; Kagee v. Bencich, 27 Cal.App.2d 469, 471, 81 P.2d 265; People v. Hochwender, 20 Cal.2d 181, 183, 124 P.2d 823. It is pointed out in the Hochwender case, a suit for taxes, that section 707 of the Probate Code provides that all claims arising upon contract must be filed within the time limit in the notice, but that a law-imposed obligation may be enforced by suit without the necessity of filing a claim therefor with the personal representative of the obligor. See also Department of Social Welfare of State of California v. Stauffer, 56 Cal.App.2d 699, 702, 133 P.2d 692.

[8-10] In the instant case a default judgment was entered after the appellant had declined to answer the complaint, its demurrer having been overruled. A demurrer reaches only the contents of a pleading and such matters as may be comprehended by the doctrine of judicial notice. The mere furnishing of aid to an indigent creates only a contingent obligation to reimburse the county. The complaint does not disclose that such contingency had arisen. Hence it did not show on its face that the statute of limitations had run. Therefore the failure of the demurrer was certain. To be specific, decedent received aid between July 1, 1934, and July 31, 1942, the items of which are set forth in the exhibit attached to the pleading. During such period she was an indigent until she became possessed of sufficient financial ability to pay the county. The running of the statutory period does not extend the cause of action but merely bars the remedy. However, in order to plead a demurrer with effect it was essential that the complaint show that decedent had gained the financial ability to reimburse the county more than four years prior to the filing of the action. The pleading having failed to make such disclosure the demurrer was unavailing. A demurrer based on the ground that the complaint shows by its allegations that it is barred by the statute of limitations does not lie if the pleading merely shows that the action may have been barred. Vassere v. Joerger, 10 Cal.2d 689, 693, 76 P.2d 656; Antioch College of Yellow

Springs, Greene County, Ohio v. Barnhardt, 49 Cal.App.2d 171, 173, 121 P.2d 521.

[11-13] Pleadings must be reasonably interpreted; each part must be given the meaning to which the context entitles it and it must be read as a whole with a view to substantial justice between the parties. Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 42, 172 P.2d 867. Statutes of limitation are designed to prevent the resurgence of stale claims after the lapse of long periods of time as a result of which loss of papers, disappearance of witnesses, feeble recollections, make ineffectual or extremely difficult a fair presentation of the case. But they are not intended as defenses to just demands of comparatively recent origin. When the facts relied upon leave it clearly in doubt whether the case is within the statute pleaded courts should not indulge a strained construction in order to support the plea. McGrath v. Butte County, 30 Cal.App.2d 734, 738, 87 P.2d 381.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

* * *

84 Cal.App.2d 459

LUNSFORD v. STANDARD OIL CO. OF CALIFORNIA et al.

Civ. 3567.

District Court of Appeal, Fourth District, California.

March 22, 1948.

Hearing Denied May 20, 1948.

1. Negligence 🔑134(4)

Evidence authorized recovery by owner of oil truck and trailer from operators of oil storage tanks for negligence in permitting oil fumes to be ignited by fires under boilers, resulting in burning of truck and trailer.

2. Negligence 🔑136(27)

Driver of oil truck and trailer who knew that unusual amount of fumes was coming from his truck when loading oil from storage tanks was not contributorily negligent as matter of law in continuing to load, with result that truck and trailer were destroyed by fire when oil fumes came in contact with boiler fires in storage plant, where driver did not know that quantity of fumes was sufficient to make them dangerous, and there was evidence that some fumes came from another truck loaded a few minutes before.

3. Negligence 🔑138(3)

Where not all hidden dangers in loading oil into truck were obvious to truck driver, since driver did not know of danger from contact between boiler fires and unusual amount of oil fumes, and some conditions which made the situation hazardous were under control of storage tank operators, some of whose active or passive conduct, subsequent to those entering into conditions knowingly assumed by truck driver, may have been negligent, instruction that one does not assume a risk by negligence of another was warranted by evidence.

4. Negligence 🔑105

Where assumption of risk doctrine is applicable, the risk assumed is that known to the other party.

5. Appeal and error 🔑1064(1)

In instruction on assumption of risk, referring to assent or voluntary exposure to dangerous conduct or condition, concluding statement that one does not assume risk caused by negligence of another if there was such negligence by some defendant was not sufficiently misleading to justify reversal, though it did not indicate as forcibly as possible the distinction between negligence known to exist, risk of which is assumed, and negligence which is not assumed.

6. Trial 🔑296(2)

In action for destruction of truck and trailer by fire resulting from contact between oil fumes arising when truck was being loaded and boiler fires in oil storage plant, instruction correctly stating general duties of owner or occupant of premises to invitee was not improper as indicating that such duties overrode plaintiff's duty to protect his own property by stopping the loading operation which was creating the excessive vapors, where such instruction did not indicate that it was of controlling importance and other elements were covered in other instructions.

7. Trial ⚷295(1)

All instructions are to be taken together as a whole.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by B. L. Lunsford against Standard Oil Company of California and others for loss of tank truck and trailer destroyed by fire. From a judgment for plaintiff, defendants appeal.

Affirmed.

Borton, Petrini, Conron & Borton and Harvey, Johnston, Baker & Palmer, all of Bakersfield, for appellants.

West, Vizzard & Howden, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for the loss of a tank truck and trailer, which was destroyed by fire about four A.M. on August 21, 1945.

The Shell Oil Company maintained a crude oil pump station near Wasco, consisting of a small building with a boiler room to the east, an engine room to the west, and a small office near the center of its north side. This office had an outside door to the north and also doors opening into the boiler room and engine room. The engine room had doors on its north and south sides. The boiler room had doors on its north and south sides and also two doors on its east side. Two of its doors, the one on the north and one of those on the east, were near the northeast corner of the building. One function of the boiler room was to heat crude oil so that it could be conveniently loaded. Some 400 feet southerly from this building were two storage tanks. Underground pipes supplied oil to these tanks and fed oil by gravity to a loading outlet situated 83 feet northeasterly from the northeast corner of the boiler room and 93 feet from the nearest boiler. This loading outlet was separated from the pump station grounds by a wire fence. The loading outlet was raised and oil was loaded in tank trucks by inserting a spout or funnel into the dome of the tank, attaching it to the loading outlet and turning on valves.

This loading and heating arrangement conformed to general custom and had been used for several years. The spouts or funnels, above referred to, were furnished by parties who hauled the oil and the length of spout needed depended upon the different trucks being used. There is evidence that the spout should reach to within a few inches of the bottom of the tank as otherwise the falling oil agitates the oil in the tank and causes more fumes to rise. Some years before, the Standard Oil Company had obtained from Shell the right to use one of these storage tanks with this loading outlet. Under a contract with Standard, Oilfields Trucking Company had charge of hauling this oil for Standard and furnished the spout or funnel which was here used. Oilfields Trucking Company employed the plaintiff Lunsford to do some of this hauling and Lunsford employed one Shields as driver of the truck in question.

On this night Shields had loaded and hauled three or four loads before the trip on which the fire occurred. He knew that fires were burning in the boiler room and that the doors to the boiler room were open. He testified that the spout he was using only reached a few inches into the dome of the tank and that the oil dropped about four feet. On each trip he noticed an unusual quantity of fumes rising from the tank as the oil went in, and these fumes were visible. On the preceding trip the fumes were so strong that he moved to the rear of the top of the tank, while the tank was filling, in order to avoid the smell. On the trip in question he opened the valves to let the oil flow in the tank and after checking various things, including his tires, he sat down in the cab of the truck and proceeded to make out a report form. He knew that it took about 20 minutes to fill the tank and about ten minutes after he had started the oil flowing the fire occurred. He testified "I just looked up and the whole country looked like it was on fire, whether

I just looked up or whether there was a noise or what, I don't know." There is no testimony or direct evidence as to where, when or how the fire first started. Shields ran when he first saw the fire and was not injured, but the truck and trailer were destroyed.

A verdict for $11,000 was returned in favor of the plaintiff and the defendants have appealed from the judgment which followed. The appellants first contend that the evidence is insufficient to support the verdict. It is argued that the cause of ignition of the vapors is left entirely to speculation and conjecture; that the excessive vapors here were not caused by them but were caused by the loading operations over which the respondent's driver had sole control; that Shields knew that these fumes were unusual in quantity; and that the record affirmatively shows that ignition was not caused by the boiler fires since the fireman in charge of these fires testified that the fire was coming in the northeast doors of the boiler room when he first saw it.

While the actual cause of ignition of these vapors was not shown by direct evidence an inference may fairly be drawn from the evidence as a whole that ignition resulted from these vapors coming into contact with the boiler fires. The engine on the truck and its lights were shut off, the static chain was attached, no flashlight was used, Shields did not smoke and did not strike a match, and all other possibilities of a spark or flame were pretty well eliminated.

While Shields recognized that an unusual quantity of fumes was coming from this tank, the amount was no greater than that on previous loads that night and there is no evidence that he recognized the amount as sufficient to be dangerous. There is some evidence justifying an inference of negligence on the part of defendants Campbell and Mason, who were in charge of the pump station at the time. Campbell was the fireman and Mason the engineer. They testified that some 20 or 30 minutes before the fire occurred, and while another truck was loading at this outlet, they went out on the north side of the building six or eight feet from the office door; that they then smelled fumes which were pretty strong; that they remarked about this to each other; that "We had never noticed them before being that strong"; that the north and east doors of the boiler room were open and stayed open; and that they presumed that the fumes came from the truck which was loading at the time.

Neither of these employees then went into the boiler room and thus could not have observed whether or not these unusual fumes had penetrated there. There is evidence that the operation of the boiler fires had a tendency to suck air in, both from the room and from outside of the room. After noticing these unusual fumes these employees went into the office and remained some 20 or 25 minutes. Campbell testified that he then went into the boiler room and as he entered the room he saw fire coming in the two doors at the northeast corner, that he ran out the south door and into the engine room where he found Mason putting out a fire in his broom. Mason testified that he first saw any fire when he was about in the center of the engine room; that he raised up and saw a flash of flame in the engine room towards the north engine-room door, and a flare "all on the outside"; that it lasted three or four seconds and his broom caught on fire; that the flames he saw were floating in the air; that after the flash disappeared Campbell came in and asked what happened; that they walked to the door and there was then no fire "except on the truck"; that he then moved his car which was parked 60 or 70 feet from the boiler room; that at one time this car was right in the middle of the floating flames; and that there was no fire around the station after the first flash. There was also evidence that about 250 panes of glass in the boiler room which had not been cracked before were cracked after the fire. Shields testified that when he first looked up and saw the fire it was thickest between the boiler room and the truck but there was fire in front of the truck and on the other side too; that it was "pretty thick between the truck and the boiler room" and only in streaks in front of the truck; that it was "solidest" between the truck and the engine room; and that he did not get a very good look at it "because I didn't stay around that long." There was testimony that there was a general custom in this business of closing boiler room doors when fumes were detected near the boilers and of shutting the fires off when gas vapors were detected in close proximity to the boilers.

[1] It appears that Campbell and Mason took no action when they detected unusual fumes a few minutes before the fire, and that they made no investigation to see whether or not these fumes were going into the boiler room although two open doors of the boiler room were closer to the loading outlet than was the point at which they were standing. There is no evidence as to the atmospheric condition that night except Campbell's testimony that there was "not much" breeze. Campbell and Mason knew, but Shields did not, that fumes from the preceding loading operation had come to within a few feet of the building with its open doors and open flames. Campbell's testimony that when he first observed any fire it was coming through the doors does not demonstrate that the fire originated outside of the building. This does not exclude the possibility that there had been gas fire in the room before Campbell entered it. It would seem reasonable that there must have been some sort of an explosion to crack the windows in the boiler room, this explosion would naturally come at the first ignition of fumes, and the fire coming into the room, observed by Campbell, may well have been other vapors burning which were being sucked into the rooms by the action of the fire under the boilers after the first explosion or ignition occurred. The evidence in its entirety, with the reasonable inferences therefrom, is sufficient to support the implied findings that the fire was caused by these vapors coming in contact with the flames in the boiler room, and that Campbell and Mason were guilty of negligence which permitted this to happen. The question was one of fact and it cannot be held that the evidence is not sufficient to support the verdict.

It is next contended that Shields was guilty of contributory negligence as a matter of law. It is argued that the uncontradicted evidence shows that the excessive vapors here were created by Shields' own loading operations; that knowing that the vapors were excessive he continued his loading operations without shutting off the oil or notifying Campbell or Mason; that he had been instructed by the respondent to stop loading and make a complaint whenever the fumes were excessive or dangerous in his judgment; that he failed to do either of these things; and that he knew all of the conditions and knew that they were dangerous. The respondent testified that he had instructed all his drivers that in the event they found vapors at any time in a quantity which in their judgment was dangerous they should shut off the oil, report the matter and have the condition remedied. While Shields testified that the fumes on this occasion were unusual in quantity he also testified that they had been about the same on his previous trips that evening. There is no evidence that he knew that the quantity of fumes was sufficient to make them dangerous, and his actions would indicate that he did not so consider them.

[2] While Shields knew that an unusual amount of fumes was coming from his truck it does not appear that he knew that the quantity was dangerous or sufficient to reach the boiler fires 93 feet away. He did not know that fumes from another truck, loaded a few minutes before, had reached at least to within a few feet of the boiler room. There was nothing to indicate to him that conditions were any different from those existing during his loading on previous trips. While it might well have been found, as a fact, that Shields was guilty of contributory negligence it cannot be held that such negligence appears as a matter of law. It cannot be here said that the evidence on this issue is without substantial conflict and that the only reasonable inference which could be drawn from the facts shown points unerringly to contributory negligence on the part of Shields. Urbano v. Market Street R. Co., 8 Cal.App.2d 22, 46 P.2d 817.

It is next contended that the respondent assumed the risk of losing his truck and trailer by fire since all of the conditions and dangers were known to his employee, who was in sole charge of loading the truck; that the appellants were entitled to have this defense covered by a proper instruction; that they submitted a correct instruction covering this theory; and that the court nullified the entire effect of the offered instruction by adding a sentence thereto. The respondent contends that the defense of assumption of risk was not pleaded. However, the case was tried by the appellants on that theory and an instruction was given, and the essential question here is as to whether prejudicial error may be said to have resulted from the sentence added to that instruction by the court. The instruction given reads as follows, the last sentence (emphasis ours) being the one added by the court:

"There is a legal principle commonly referred to by the term 'assumption of risk' which now will be explained to you:

"One is said to assume a risk when he freely, voluntarily and knowingly manifests his assent to a dangerous conduct or to the creation or maintenance of a dangerous condition, and voluntarily exposes himself or his property to that danger, or when he knows, or in the exercise of ordinary care would know, that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself or his property, or remains, or permits his property to remain within the area of danger.

"One who thus assumed a risk is not entitled to recover for damage which resulted from the dangerous condition or conduct to which he thus exposed his property. *One does not however, assume a risk caused by the negligence of another, if there was such negligence by some defendant.*"

[3] It is first argued that there is no basis in the evidence for the added sentence, relating to the possible negligence of another which would not be assumed, because there were here no hidden dangers or hazards which were not obvious to respondent and his driver, and that such an element could have no place here where the driver had complete charge of the loading, and the hazardous condition of vapors was knowingly caused and continued by the driver without any negligent act on the part of any of the appellants. This is sufficiently answered by what has already been said. All of the hidden dangers or hazards were not obvious to the driver, some of the conditions which made the situation hazardous were under the control of the appellants, and there were a number of active or passive acts on the part of the appellants which may have been negligent and which were subsequent to those entering into the conditions knowingly assumed by the respondent or his driver.

It is further argued that the situation here was different from that in the case of Hedding v. Pearson, 76 Cal.App.2d 481, 173 P.2d 382, 385, where the court said that under the facts there existing any instruction on assumed risk should have included a proviso that "while a person assumed the perils which are naturally incident to the position he has taken, he does not assume dangers which can come only from the negligent acts of another." It is argued that in the instant case the only claim of negligence on the part of appellants is that they did not warn Shields of a dangerous condition of which he was already well aware; that this was a fixed and passive negligence which Shields assumed because he knew all about it; that all cases where assumption of risk has been held inapplicable are cases where knowledge of current conditions was lacking or where the accident was caused by a future active negligence which the plaintiff was not bound to anticipate; that the instruction in question failed to make this distinction; and that it was misleading since the jury may have thought the last sentence related to any passive negligence which had created the original condition containing the risk assumed by the respondent and his driver, and thus the last sentence nullified and destroyed the effect of the previous part of the instruction.

[4, 5] It is well settled that where this doctrine is applicable the risk assumed is that known to the other party. Appellants' argument here is based on the assumption that any possible negligence on their part was passive, in connection with creating the general condition here, and that all of the conditions were known to and understood by the respondent and his driver. As we have already pointed out, this is not entirely true. If part of their acts were passive and known to the respondent, such as the open doors and the nearness of the boiler room to the loading outlet, another part was more active and not known to the respondent. This includes the failure, with knowledge that vapors had shortly before nearly reached to the building, to ascertain whether they were reaching the boiler room itself, the failure to shut the doors or if necessary to shut off the fires, and the failure to warn Shields of the unusual danger. While this instruction may not be a model in pointing out the difference between any negligent acts in creating the original condition, the risk of which is assumed by the other party who has knowledge of it, and subsequent negligence which is not known to or assumed by the other party, we think the objection raised is more technical than convincing under the facts here appearing. Throughout the evidence the acts relied on as constituting negligence on the part of the appellants were not those in connection with the installation and previous operation of this equipment, or which were known to the respondent, but were acts taking place just before this particular loading commenced and shortly thereafter, and which were not known to the respondent or his driver. The part of the instruction given as requested by the appellants included a reference to the more passive kind of negligence which was involved in the physical conditions as they had existed, and which was known to and assumed by the respondent. The instruction refers to a dangerous condition known to exist when a party knows, or should know, that the danger comes either from the condition or the conduct of another or from the condition, use or operation of property in a manner fully known to him. The instruction then goes on to state that one who thus assumes a risk is not entitled to recover for damage resulting from the dangerous condition or conduct to which he has knowingly exposed his property. The sentence added by the court then follows, stating that one does not, however, assume a risk caused by the negligence of another if there was such negligence. This indicates, although not as forcibly as might be possible, a distinction between this last sort of negligence which is not assumed and the negligence referred to in the earlier part of the instruction, which is assumed. It would be unreasonable to hold, under the facts of this case, that the jury could have failed to make this distinction or that it may have found for the respondent because of some passive negligence in creating the original setup without finding that any act of negligence had occurred on this occasion in addition to and beyond any that was known to and assumed by the respondent. Under the circumstances here appearing this instruction was not, in our opinion, sufficiently misleading to justify a reversal.

[6, 7] Appellants' final contention is that an instruction given by the court outlining the duties owed by the owner or occupant of property to an "invitee" was erroneous and misleading. This instruction is in the usual form and no complaint is made that it does not correctly state the law. It is argued, however, that the instruction was inapplicable here; that the condition of excessive vapors here was known to and caused by the respondent; that the emergency condition arose from the occupancy and control of the respondent and his employer Oilfields Trucking Company and not from any act of any appellant; that any hazardous condition was known to, increased by and continued by the respondent; and that to give an instruction that the appellants owed a duty to the respondent under these circumstances was to mislead the jury into believing that this duty overrode the manifest duty of the respondent to protect his own property by stopping the loading operation which was creating the excessive vapors. This contention is without merit. The instruction merely placed before the jury the general duties of the owner or occupant of these premises upon which the respondent and his driver had been invited. Madigan v. O. A. Hale & Co., 90 Cal.App. 151, 265 P. 574. Other elements were covered in other instructions, all of the instructions are to be taken together as a whole, and there is nothing in this instruction which could lead the jury to believe that it was of controlling importance or that it in any way overrode or did away with other issues otherwise covered and submitted to it.

This is a close case, and while from a factual standpoint it could have been decided the other way the evidence is not insufficient to support the verdict, and we find no prejudicial error in the instructions.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

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84 Cal.App.2d 592

KENNEY et al. v. WOLFF et al.

Civ. 13431.

District Court of Appeal, First District, Division 2, California.

March 26, 1948.

Rehearing Denied April 24, 1948.

Hearing Denied May 20, 1948.

1. Municipal corporations 🔑213

Where San Francisco, on acquisition of street railway system, took over company's employees under provision of San Francisco charter preserving existing employment classifications, civil service commission could not, in absence of some charter provision giving it the power, curtail employees' rights by requiring that employees file with the commission within 16 days protest against proposed classifications of employees, and therefore those employees who failed to file protests within 16 days were not barred from relief in the courts.

2. Municipal corporations 🔑217(3)

Provision of charter of San Francisco that prior to acquisition of a public utilities properties by city and county, "commission" shall submit a budget relating to such unified operation, refers to public utilities commission and not to civil service commission, and therefore civil service commission had no power under such provision to foreclose rights of employees of public utility after acquisition by a city and county of public utility's property, by requiring employees to file within 16 days, protests against proposed civil service classifications of employees.

See Words and Phrases, Permanent Edition, for all other definitions of "Commission".

3. Administrative law and procedure 🔑229, 483

Municipal corporations 🔑213

Rule of San Francisco's civil service commission providing that when commission has rendered its decision on any "original case", such ruling will not be reconsidered unless within 30 days after such ruling commission shall consent to reopen the case, did not apply to commission's classification of street railway companies' employees when San Francisco acquired company's street railway system, and therefore employee's failure to proceed under such rule when they were dissatisfied with commission's classification, did not constitute a failure to exhaust their administrative remedies, precluding resort to the courts.

4. Appeal and error 🔑882(3)

Appellant's theory which was inconsistent with theory urged at trial, could not be urged on appeal for the first time.

5. Municipal corporations 🔑213

In action by employees of street railway company, which was acquired by San Francisco, to compel civil service reclassification of employees on ground that they were placed in an inferior rank by San Francisco civil service commission, allegation that commission knowingly deprived employees of the places to which they were entitled, was a sufficient allegation that commission acted arbitrarily, fraudulently, capriciously or abused its discretion.

6. Municipal corporations 🔑213

On acquisition by San Francisco of street railway system, company's chief engineer who occupied top engineering position in company, should have been classified as a senior engineer by civil service commission rather than merely as an engineer subordinate to senior engineers.

7. Municipal corporations 🔑213

On acquisition by San Francisco of street railway system, company's chief clerk who occupied the highest clerical position in company's transportation department should have been classified by the civil service commission as chief clerk rather than merely as head clerk.

8. Municipal corporations ⚷213

On acquisition by San Francisco of street railway system company's chief clerk in its stores department who had charge of all clerical work in the department with a senior clerk typist, two other clerks and a foreman under him, was improperly classified by civil service commission as senior clerk and should have been classified as head clerk.

9. Municipal corporations ⚷213

On acquisition by San Francisco of street railway system company's chief inspector who had jurisdiction over all lines of company and jurisdiction over all inspectors was improperly classified by civil service commission as merely a senior inspector and should have been classified chief inspector.

10. Municipal corporations ⚷213

On acquisition by San Francisco of street railway system, company's assistant chief inspector who was subordinate only to the chief inspector, was improperly classified by civil service commission as inspector, where he was thereby placed in the same status as company's inspectors whom he had formerly supervised.

11. Municipal corporations ⚷213

On acquisition by San Francisco of street railway system, company's senior clerk-typist in transportation department was improperly classified by civil service commission and as a general clerk-typist, and should have been classified as senior clerk-typist.

12. Municipal corporations ⚷213

On acquisition by San Francisco of street railway system, company's stenographer who compiled reports of her own composition from information received from various foremen, and who did general and confidential stenographic work, was improperly classified by civil service commission in the lowest stenographic class and should have been classified as senior clerk-stenographer.

13. Municipal corporations ⚷213

On acquisition by San Francisco of street railway system, company's car house receivers who received all money turned in by conductors and bus operators, though properly classified by civil service commission as general clerks, were entitled to assurance that they would be continued in their specialized type of work.

◆

Appeal from Superior Court, San Francisco County; Thomas M. Foley, Judge.

Action by W. D. Kenney and others against Harry K. Wolff and others to compel petitioners' reclassification as civil service employees of the City and County of San Francisco, on ground that classifications in which they had been severally placed were inferior to those to which the petitioners were entitled. From a judgment for the petitioners, the respondents appeal.

Judgment affirmed.

John J. O'Toole, City Atty., and Bernard J. Ward, Jr., and Jack G. McBride, Deputy City Attys., all of San Francisco, for appellants.

Milton Marks and Morris Lowenthal, both of San Francisco, for respondents.

DOOLING, Justice.

The respondents on this appeal were all employed by the Market Street Railway Company at the time of the acquisition of its system by the City and County of San Francisco on September 29, 1944; and were all "blanketed in" to employment by the city and county as employees of the Municipal Railway, of which the previous Market Street Railway system upon its acquisition became a part. This was done pursuant to that part of section 125 of the San Francisco charter which reads:

"All persons employed in the operating service of any public utility hereafter acquired by the city and county, at the time the same is taken over by the city and county, and who shall have been so employed for at least one year prior to the date of such acquisition, shall be continued in their respective positions and shall be deemed appointed to such positions, under, and entitled to all the benefits of, the civil service provisions of this charter * * *."

The respondents were severally classified by the San Francisco Civil Service Commission for their employment by the city and county, each being placed in a certain classification which had theretofore been established by that commission for employees of the city and county. Respondents brought this action to compel their reclassification claiming that the classifications in which they had been severally placed were inferior in rank to the positions which they had occupied with the Market Street Railway Company, and hence that they had not been "continued in their respective positions" as required by the positive mandate of sec. 125 of the charter quoted above. The trial court gave judgment ordering their reclassification and from this judgment the city and county and its civil service commission have taken this appeal.

Certain points urged by the appellants necessitate an outline of the procedure followed by the civil service commission in its adoption of classifications of all employees of the Market Street Railway Company who were continued in the employment of the city and county when the Market Street Railway Company's system was taken over. By a notice dated June 14, 1944, that commission required a form of questionnaire giving information as to the employment status and history of each employee of the Market Street Railway Company to be filled out by each such employee and filed with the commission prior to July 1, 1944. The commission then adopted a tentative classification of all such employees under date of August 2, 1944 and thereupon notified all such employees that protests against such proposed classifications must be filed with the commission not later than August 14, 1944. On August 16, 1944 the commission heard such protests in a public meeting and on the latter date made an order extending the time for filing protests to 5 p. m. on August 18, 1944.

Some of the respondents on this appeal did file written protests within the time so fixed by the commission but most of them did not do so. Appellants argue here, as they did before the trial court, that those who failed to file protests are barred from relief in the courts by the failure to exhaust their administrative remedies, under the familiar rule exemplified in Abelleira v. District Court of Appeal, 17 Cal.2d 280, 291 et seq., 190 P.2d 942, 132 A.L.R. 715. That this is a novel attempt to invoke the doctrine of exhaustion of administrative remedies is obvious. The commission, if the argument is sound, could fix a short time limit (here not over sixteen days) within which a group of persons not yet employees of the city and county and not familiar with its classifications of employment must file protests against their tentative classifications for future employment by the city and county, under penalty of being forever barred from asserting the rights solemnly guaranteed to them by sec. 125 of the charter to be "continued in their respective positions".

[1] In the absence of some provision in the charter giving the civil service commission this power either expressly or by clear implication we cannot hold that it could thus curtail the rights expressly conferred upon respondents by sec. 125. Appellants point to sec. 119.1 of the charter which was adopted expressly to enable the city and county to acquire the Market Street Railway system. A portion of subdivision 3 of that section reads: "Prior to the acquisition of said operative properties, the commission shall submit * * * a budget relating to such unified operation * * *."

[2] We need not pause to determine whether the power to prepare a budget in advance of the acquisition of the properties would carry with it the extraordinary power to foreclose the rights of an employee of the public utility to be acquired, given him by sec. 125 of the charter, if he did not file a written protest before the acquisition, for the reason that the commission therein referred to is the public utilities commission by express definition of sec. 119.1 and not the civil service commission.

We have been pointed to no provision of the charter which we can construe as conferring this particular power on the civil service commission and we are satisfied that the failure of any employee of the Market Street Railway Company to file a protest to his proposed classification on or before August 18, 1944 does not bar him from a remedy in court if he has not in fact been continued in the position which he held with the Market Street Railway.

[3] Appellants also assert that respondents' failure to proceed under Rule 41 of the civil service commission constitutes a failure to exhaust their administrative remedies. By an amendment to the answer filed during the trial appellants pleaded Rule 41 in haec verba. That rule reads:

> "Original petitions, or original requests for rulings, must be filed in writing in the office of the Commission before 12 o'clock noon on Monday, and, when so filed, will be heard at the regular meeting to be held on the Wednesday next following. Persons filing such petitions or requests shall, without further notice, be present at such hearings. No oral request for ruling will be considered at a meeting.
>
> "When the Commission has rendered its decision on any original case, such ruling will not be reconsidered unless within thirty days after such ruling the Commission shall consent to reopen the case. Requests for permission to file detailed written petitions for such reconsideration must be made orally to the Commission, within such thirty days, at a regular meeting of the Commission. Any requests for reconsideration made otherwise shall be disregarded."

After pleading the rule the amendment to the answer continues: "That none of the petitioners * * * complied with Rule 41 of said Civil Service Commission, *that said appeal was available to them for a period of thirty (30) days after the Civil Service Commission acted upon their classification.*" (Italics ours.)

The italicized portion of the answer makes clear that the theory of this defense in the trial court was that under the second paragraph of Rule 41 above quoted respondents had thirty days after the original classification to request the commission for permission to file written petitions for reconsideration of their classifications. A reading of Rule 41 as a whole, however, makes it clear that the provision for reconsiderations applies only to "any original case"; and that the original cases therein referred to do not include the classification of Market Street Railway employees herein involved, but only the proceedings provided for in the first paragraph of Rule 41, i. e. actions had pursuant to "original petitions or original requests for rulings." So construed the rule deals with one subject and is consistent with itself. As appellants would have it construed the provision with regard to reconsiderations would cover a broader field than that covered by the first paragraph dealing with "original petitions, or original requests for rulings." The rule will not reasonably bear that construction.

[4] Appellants make the further argument, for the first time on appeal, that under the first paragraph of Rule 41 respondents might have filed an original petition with the civil service commission for a reclassification and that by not doing so they failed to exhaust their administrative remedies. This point was not made by the answer nor urged in the trial court. It is too late for appellants to raise it now. No rule is better settled than the one that a party having adopted one theory in the trial court is foreclosed from urging an inconsistent one on appeal. 2 Cal.Jur. 237.

The complaint alleged that "the respondents have knowingly deprived the following named plaintiffs and petitioners of the positions to which they are entitled pursuant to section 125 of the said charter and have knowingly * * * reclassified and demoted the said plaintiffs and petitioners to inferior and subordinate positions as follows * * *."

[5] The clerk's transcript contains no demurrer to the complaint, but appellants argue before us that it does not state a cause of action because it does not allege that the commission (quoting from appellants' brief) "acted arbitrarily, fraudulently, capriciously or abused its discretion." There may be some doubt under the language of section 125 of the charter, "shall be continued in their respective positions and shall be deemed appointed to such positions", whether the civil service commission has any discretion in classifying this class of employee. Respondents argue that it has not, but we find it unnecessary to decide that question in this case. Conceding that it has, an allegation that the commission *knowingly* deprived the petitioners of

the places to which they are entitled, etc., is sufficient. If the commission classified them in one position *knowing* that they were entitled to another, it acted arbitrarily and capriciously and it abused its discretion.

This brings us to the case on its merits. Section 125 of the San Francisco charter and its proper construction and application to employees of the Market Street Railway who were continued in the employment of the city and county has been before Division One of this court in Handlon v. Wolff, 72 Cal.App.2d 53, 164 P.2d 46. Because of its pertinence to the questions before us we quote extensively from pages 58, 59 of 72 Cal.App.2d, page 49, of 164 P.2d, of that opinion:

"In effect section 125 provides that if one has been employed for one year in an acquired utility such employee shall be deemed appointed to such position and entitled to 'all benefits' of the service under the municipality. 'Such position' if not the identical position should be interpreted as meaning a similar position in kind and degree—one that in salary, authority, duty, etc., is reasonably comparable to the employee's former position. If no comparable position exists then it appears that 'such position' by the terms of the charter is 'continued.' The 'position' in the private utility is adopted as a city position. The legislative or administrative means of continuing the employee in his position is a mechanical problem subordinate to the declaration in the freeholder's charter that he 'shall be continued' in his position.

"The portion of the peremptory writ which provides that Handlon is entitled to a position as 'Claims Agent Municipal Railway' from the date of the acquisition, and to enjoy the emoluments thereof, is based upon questions of fact: (1) Are there any positions in the civil service of the municipality which are comparable to that the petitioner held with the private utility? (2) Which position is most comparable to that held by petitioner with the private utility in which position insofar as possible, he is to be continued by the terms of the charter? There is substantial evidence to uphold the court's finding that the position of G 102 General Claims Agent, Municipal Railway was the one most similar to the position held by him in the private utility and the one to which he was entitled under section 125 of the charter.

"Under circumstances not identical but similar in determining the principle involved here, namely, the right of a governmental agency to reclassify, demote, suspend or expel, in Bruce v. Civil Service Board, 6 Cal.App.2d 633, 637, 45 P.2d 419, 421, the court said: 'A civil service commission derives its powers from the charter creating it and may not exercise any not directly given or necessarily implied from those conferred.' If Handlon had a right to the position of claims agent it was beyond the power of the commission to take that right away. Viner v. Civil Service Comm., 59 Cal.App.2d 458, 139 P.2d 88."

Appellants insist that the quoted language must be qualified to this extent, that in making its classifications the civil service commission is clothed with discretion and that the courts should not interfere with that classification if reasonable men might differ on the facts as to the propriety of the classifications under attack. Without deciding whether the commission has such a discretion in this particular type of case under sec. 125, but assuming for the purposes of this decision that it has, we believe that the evidence amply supports the judgment. The respondents testified in detail to their duties, and their questionnaires upon which the civil service commission acted were before the court. The description of the duties of the classifications in which the respondents had been placed and in which they sought to be placed were also before the court. Appellants have not given us the assistance of a detailed analysis of this evidence, contenting themselves with two brief quotations from the evidence of two of the respondents. The respondents on the other hand have assembled the evidence applicable to each respondent and demonstrated the unreasonableness of the commission's classifications and the reasonableness of the trial court's. In appellants' closing brief the accuracy of the summation of the evidence found in respondents' brief is not questioned.

A recitation of all of the evidence would extend this opinion to undue length. We notice the facts as to each respondent or class of respondents very briefly.

Will B. Bushnell.

[6] Bushnell was chief engineer of the Market Street Railway acting directly under the president and general manager and subordinate to no one else in the company. The civil service commission classified him as "F 410 Engineer." The trial court ordered him reclassified as "F 412 Senior Engineer." As "F 410 Engineer" he was subordinate to those in the class "F 412 Senior Engineer." Since he occupied the top engineering position in the Market Street Railway Company the arbitrary action of the civil service commission in demoting him to a subordinate engineering position is clear.

Earl G. Ryan.

[7] Ryan was chief clerk (transportation department) with the Market Street Railway. His classification as fixed by the commission was "B 234 Head Clerk." The court placed him in class "B 68 Chief Clerk." Witnesses for the appellants, including William H. Scott, general manager of the municipal railway, testified that Mr. Ryan occupied the highest clerical position in the transportation department. He was improperly classified in a subordinate clerical class and the court was justified in finding an abuse of discretion in such classification.

Earl Southard.

[8] Southard was chief clerk (stores department) with the Market Street Railway for 31 years. As such he had charge of all clerical work in his department with a senior clerk, senior clerk typist, two other clerks and a foreman under him. He was classified by the commission "B 228 Senior Clerk." The court ordered him reclassified "B 234 Head Clerk." Under the classification "B 234 Head Clerk" the occupant of that class "supervises a group of subordinates in clerical activities of more than routine nature, or performs unusually responsible clerical work within a department or subdivision thereof", while under "B 228 Senior Clerk" he "supervises a group of subordinates performing clerical duties, or performs responsible clerical work." Southard's duties with the Market Street Railway included the keeping of records on materials received, purchased and issued; the handling of all freight and express charges and material invoices and the breaking down of all supply costs for the purpose of fixing unit prices on all store requisitions; supervising the sale of scrap on which he set the prices and conducted the sales; and the supervision and responsibility for all inventories, material and supply records. He worked directly under the purchasing agent. That he (quoting from the duties of "B 234 Head Clerk") "performs unusually responsible clerical work" rather than (quoting from "B 228 Senior Clerk") "performs responsible clerical work" requires no great astuteness to determine.

Hobart G. Wilson.

[9] Wilson was chief inspector of the Market Street Railway. He had under him an assistant chief inspector, 33 inspectors, one starter and one track oiler. He had, as chief inspector, jurisdiction over all the lines of the Market Street Railway and jurisdiction over all of its inspectors. No similar position had theretofore existed in the municipal railway. He continued to perform the same duties for the municipal railway after the take-over. He was classified "S 122 Senior Inspector." This classification was newly created on September 30, 1944, and a part of the duties of an occupant of this class are described: "Under general direction is responsible for general supervision of a number of lines of the Municipal Railway." It was admitted on the trial that under this classification a position of chief inspector might at any time be created the occupant of which position would have supervision of all of the lines of the municipal railway and would be superior to Wilson as senior inspector. No such position now exists. The court directed that Wilson be classified "Chief Inspector." This guarantees him the continuance of his position

with no other inspector over him and the case falls well within the language of the court in Handlon v. Wolff, supra, 72 Cal. App.2d at page 58, 164 P.2d at page 49: "If no comparable position exists then it appears that 'such position' by the terms of the charter is 'continued.' The 'position' in the private utility is adopted as a city position."

Harry J. Reedy.

[10] Assistant chief inspector under the Market Street Railway subordinate to Wilson as chief inspector, he was classified "S 110 Inspector Municipal Railway", which put him in the same status as the inspectors of the Market Street Railway whom he had formerly supervised. The propriety of his reclassification by the court as "S 122 Senior Inspector", whereby he was restored to his previous position as directly subordinate to Wilson and superior to the other inspectors, is too obvious to require elaboration.

Eleanor M. Kenny.

[11] Senior clerk-typist in the transportation department of the Market Street Railway, Miss Kenny was classified "B 512 General Clerk-Typist." The court reclassified her "B 516 Senior Clerk-Typist." On the trial the attorney for appellants practically conceded the propriety of this reclassification as the following excerpt from the transcript makes clear:

"Q. (the Court) How about Miss Kenny?

"(Mr. Ward) We are not going to put in any defense on that. We will leave that to you."

Anita E. Rohlfs.

[12] Classified "B 408 General Clerk-Stenographer", the court reclassified Miss Rohlfs "B 412 Senior Clerk-Stenographer." As a part of her duties with the Market Street Railway she compiled for responsible officials of the company reports of her own composition from information that she received from various foremen, as well as doing general and confidential stenographic work. The classification in which she was originally placed was the lowest stenographic class and that in which the court ordered her placed properly took into account her more important, responsible and specialized duties with the Market Street Railway.

Car House Receivers.

[13] This comprises a group of seven respondents all performing similar duties. They were car house receivers for the Market Street Railway receiving all money turned in by conductors and bus operators, counting the same and accounting therefor, and preparing token sacks containing a given number of tokens and delivering them to bus operators and conductors for use on their runs. Prior to the acquisition of the Market Street Railway system car house receivers had for many years been classified as "inspector, municipal railway", a part of the duties of that class being described as "receives and accounts for cash turned in by conductors." Just before the acquisition of the Market Street Railway properties by the city and county the above quoted language was deleted from the description of the duties of inspector. These respondents were classified as "B 222, General Clerk." Without detailing them it will be sufficient to state that the duties of general clerk are extremely broad and intended to be applicable to a variety of positions throughout the entire municipal structure. Since the deletion of the duties of car house receiver from the inspector classification eligibles from the general clerk classification have been appointed as car house receivers and some inspectors who performed the duties of car house receiver before the deletion have been continued in that employment. These respondents originally sought reclassification as inspectors but after witnesses for appellants had testified that it was planned as soon as possible to fill all positions of car house receiver from the classification of general clerk these respondents asked only to be secured in the type of position which they had held under the Market Street Railway. The court ordered them reclassified as car house receivers. The only result of the judgment in their case is to insure that these respondents, who are engaged in a very specialized type of work, will be continued in that work and not transferred to some other of the multifarious duties

embodied in the general clerk's classification. This result would seem to be compelled by the language of sec. 125 that they be "continued in their respective positions."

Appellants make some complaint that respondents should have been limited in the trial court to the description of their duties given in their respective questionnaires. If it was error to receive additional evidence on this point appellants have not shown wherein it was prejudicial since they have not pointed out any case in which the facts recited in the questionnaire would not support the judgment rendered.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

WEST KEY NUMBER SYSTEM

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84 Cal.App.2d 569

LA FLEUR v. HERNANDEZ et al.

Civ. 16157.

District Court of Appeal, Second District, Division 2, California.

March 25, 1948.

Rehearing Denied April 6, 1948.

Hearing Denied May 20, 1948.

1. Automobiles ⇨245(8)

Whether truck driver proceeding at lawful rate of travel on concrete highway having three ten foot lanes and a seven foot shoulder, two and a half feet of which next to highway was packed oil and gravel covered with sand while remainder was soft dirt was negligent in failing to pull into center lane when he saw bicycle 150 feet ahead which minor was pumping on shoulder with companion sitting on crossbar and which was proceeding in same direction as truck or was negligent in failing to decelerate speed or in failing to stop, or in failing to sound horn was for jury.

2. Appeal and error ⇨1001(1)

Verdict supported by substantial evidence was conclusive on appellate court.

3. Automobiles ⇨162(7)

Truck driver on highway coming up behind children riding bicycle on shoulder of highway was justified in assuming that before returning to pavement from shoulder children would look first to ascertain whether a motor vehicle was approaching.

4. Automobiles ⇨162(7)

Truck driver while proceeding with care on highway and who ran over 10 year old bicyclist whose bicycle suddenly swerved toward pavement from shoulder on which bicyclist had been traveling in same direction as truck was not required to presume that bicyclist would be negligent or not intelligent.

5. Negligence ⇨136(29)

Unless a child is of exceedingly tender years, the measure of care required of it is usually left to jury for determination.

6. Negligence ⇨85(3)

Section of penal code providing that a child under age of 14 years is incapable of committing a crime was not applicable in civil action for death of child as basis for conclusive presumption that 10 year old child was incapable of contributory negligence. Pen.Code, § 26.

7. Trial ⇨194(16)

In action for death of 10 year old bicyclist on highway when bicycle suddenly swerved from shoulder of highway toward pavement and bicyclist was run over by truck traveling in same direction, instruction taking from jury question of what had been established and telling jury that an inference arose from accident as proved that truck driver was negligent and directing jury to seek out evidence that might outweigh such inferences and declaring it to be incumbent upon truck driver to rebut the inference was properly refused.

8. Automobiles ⇨246(60)

In action for death of 10 year old bicyclist on highway when bicyclist suddenly swerved from shoulder of highway toward pavement and bicyclist was run over by truck traveling in same direction, instruction advising jury that even though they should find that bicyclist came to his death by an accident they still must find that an inference arises that it resulted from the negligence of truck driver was properly refused.

9. Appeal and error ⚷1064(1)

In action for death of 10 year old bicyclist on highway when bicycle suddenly swerved from shoulder of highway toward pavement and bicyclist was run over by truck traveling in same direction, instruction stating doctrine that mere occurrence of an accident does not support an inference that any party was negligent was not prejudicial.

10. Automobiles ⚷223(7)

In action for death of 10 year old bicyclist on highway when bicycle suddenly swerved from shoulder of highway toward pavement and bicyclist was run over by truck, instruction properly imposed duty upon bicyclist to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision.

11. Appeal and error ⚷1064(1)

In action for death of 10 year old bicyclist on highway when bicycle suddenly swerved from shoulder of highway toward pavement and bicyclist was run over by truck, instruction consisting of statute forbidding any person to ride upon any portion of a vehicle not designed for use of passengers was not prejudicial to plaintiff whose decedent at time of accident was pumping a companion who sat on crossbar of bicycle. Vehicle Code, § 596.5.

12. Appeal and error ⚷882(12)

In action for death of 10 year old bicyclist when bicycle suddenly swerved from shoulder of highway toward pavement and bicyclist was run over by truck traveling in same direction, act of court in inserting sections 452, 671, 544, 528 and 596.5 of Vehicle Code made no material change in general import of plaintiff's requested instruction that a motorist's disregard of statute does not prevent his recovery unless disregard was a proximate cause of injury which, when presented by plaintiff, referred only to section 510 forbidding driving of a vehicle in violation of basic speed law, and was harmless. Vehicle Code, §§ 452, 510, 528, 544, 596.5 671.

13. Appeal and error ⚷882(12)

Plaintiff in death action could not on appeal attack a verdict resulting from an erroneous instruction proposed by him.

14. Appeal and error ⚷110

Order denying a new trial of death action was not appealable.

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Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Mike La Fleur against Henry Hernandez and Frank Rangel Lopez for death of plaintiff's son, Harold, deceased. From an adverse judgment, plaintiff appeals.

Judgment affirmed. Appeal from order denying new trial dismissed.

Joseph K. Coady, of Bellflower, for appellant.

Hunter & Liljestrom, of Los Angeles, for respondents.

MOORE, Presiding Justice.

Appellant sued for damages resulting from the death of his son Harold, age 10, alleged to have been caused by the negligence of respondents. From the judgment based upon a verdict he now demands a reversal on the grounds of (1) insufficiency of the evidence and (2) errors in giving and refusing instructions.

Evidence Sufficient

Lopez was the truck driver for Hernandez. Having arrived at Santa Ana from Brawley, 186 miles distant, with 13 tons of hay at 7 a. m. he set out for Hynes to make delivery of his cargo. While headed for his destination he drove at a speed of 25 miles per hour west on Orangethorpe boulevard. This is a concrete highway of three 10-foot lanes and a seven-foot shoulder on the north side, the south two and one half feet of which was packed oil and gravel covered with sand while the remainder was soft dirt. Visibility was perfect and no traffic came from the west. As Lopez approached Norwalk boulevard he observed Harold La Fleur about 500 feet ahead proceeding on his bicycle also towards the west on the pavement about one foot from the shoulder, with his companion Richard Murphy sitting on the crossbar. The truck maintained its course in the north lane about two feet south of the pavement's edge as the boys veered onto the shoulder when Lopez was 150 feet east of them. For a moment they traveled parallel to the pavement as Lopez watched them. Suddenly when the front of the truck was within five feet of them they swerved toward the south as though the wheel were caught in the dirt. The driver applied his brakes, turned toward the center, then back into the north lane and stopped within 115 feet. Between the time of applying the brakes and coming to a standstill Harold had fallen onto the pavement and his body crushed by the wheels of the truck or the trailer and Richard had arrived eight or ten feet north of the concrete and about four feet north of the bicycle which lay uninjured on the shoulder. The latter testified that he felt no bump against the bicycle before the accident.

[1, 2] There is no evidence contrary to the testimony that as the boys wheeled along on the shoulder about three feet from the pavement the bicycle made a sudden turn toward the pavement. Exactly what the occurrences were that then ensued is a matter for inference or conjecture. Whatever deduction the jury may have drawn with reference to the movements of the two boys it cannot be said that they were arbitrary in inferring that Lopez was not negligent. He was proceeding at a lawful rate of travel; while he was 150 feet behind them he observed them turn onto the shoulder. Whether he should have then pulled into the center lane or have decelerated his speed, or have stopped, or have sounded his horn, were questions to be determined by the jury. The implication of appellant's argument is that the truck hit the bicycle in the rear. No marks on either the pavement or the wheel support such contention. There was no condition which required the jury to determine the conduct of Lopez negligent as a matter of law. Considering the facts with all reasonable inferences therefrom there is substantial proof to support the verdict. This conclusion terminates the labors of this court upon that subject. Hinkle v. Southern Pacific Company, 12 Cal.2d 691, 695, 87 P.2d 349; Raggio v. Mallory, 10 Cal.2d 723, 728, 76 P.2d 660.

No Error in Refusing Instructions

[3-8] Requested instructions 1, 2, 3, 4 and 6 were included in the court's charge. Refused instruction 5 reads as follows: "Concerning the defense of contributory negligence that has been raised in this case, I instruct you that the law conclusively presumes that a child of the age of the plaintiff's child is incapable of contributory negligence." Such would have been error. Whether a child is guilty of contributory negligence is a question of fact for the jury. The driver of the truck was justified in assuming that before returning to the pavement from the shoulder the children would look first to ascertain whether a motor vehicle was approaching. Certainly there was no presumption that the driver while proceeding with care was required to indulge the presumptions that other persons using the highway would be negligent or not intelligent. Moeller v. Packard, 86 Cal.App. 459, 472, 261 P. 315; see Hoy v. Tornich, 199 Cal. 545, 554, 250 P. 565; Richardson v. Ribusso, 120 Cal.App. 641, 642, 8 P.2d 226. Unless a child is of exceedingly tender years the measure of care required of it is usually left to the jury for determination. Todd v. Orcutt, 42 Cal.App. 687, 690, 183 P. 963. Section 26 of the Penal Code providing that a child under the age of 14 is incapable of committing crime has no application in a civil action. Instruction 7 effectually takes from the jury the question of what has been established and tells the jury that an inference arises from the accident as proved that Lopez was negligent. It then directs the jury to seek out evidence that might outweigh such inference and declares that it was incumbent upon defendant to rebut the inference. This would have been clearly erroneous. Number 8 advises the jury that even though they should find that little Harold came to his death by an accident they still must find that an inference arises that it resulted from the negligence of defendant. This is an erroneous statement of the law.

Instructions Given not Prejudicially Erroneous

[9] Instruction 9 is a succinct statement of the doctrine that the mere occurrence of an accident does not support an inference that any party was negligent, as declared in Van Derhoof v. Chambon, 121 Cal.App. 118, 123, 8 P.2d 925, and Diamond v. Weyerhauser, 178 Cal. 540, 542, 174 P. 38. Number 10 is taken from BAJI * (59) and was approved in Stroud v. Hansen, 48 Cal. App.2d 556, 562, 120 P.2d 102. Numbers 11 and 12 are commonly used BAJI forms and were approved in Temple v. DeMirjian, 51 Cal.App.2d 559, 564, 125 P.2d 544.

[10] Number 13 reads as follows: "Plaintiff's son, as a bicycle rider, was not required to look back for vehicles approaching from behind to avoid collisions, or to avoid being run over from behind, *but, as I have already told you, a bicycle rider is required to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision.*" The italicized clause was supplied by the court and it states the law. (Vehicle Code, sec. 452.)

[11] Number 14 consists of section 596.5, Vehicle Code, which forbids any person to ride upon any portion of a vehicle not designed for the use of passengers. It is not apparent that it prejudiced appellant. See Flury v. Beeskau, 139 Cal.App. 398, 403, 33 P.2d 1033.

[12, 13] Number 15 was requested by appellant. It refers to violations of code sections as negligence per se and emphasizes that a motorist's disregard of a statute does not prevent his recovery unless it was a proximate cause of the injury he suffered. The act of the court in inserting sections "452, 671, 544, 528, and 596.5" of the Vehicle Code made no material change in the general import of the instruction, which when presented by appellant contained reference only to section 510 forbidding the driving of a vehicle in violation of the basic speed law. The doctrine announced by the instruction is its significant feature. The sections included by the court are other penal inhibitions. Moreover, under the doctrine of invited error appellant cannot attack a verdict resulting from an erroneous instruction proposed by him. Jentick v. Pacific Gas and Electric Company, 18 Cal.2d 117, 121, 114 P.2d 343. The slight modification of the instruction was harmless.

[14] In instructing on the doctrine of contributory negligence the court told the jury (1) that the conduct of a child is to be considered under the standard of conduct applicable to such child, and that the latter is not accountable for its acts to the same extent as one of mature years; (2) that a child is not held to the same standard of conduct as an adult, and (3) that it is only required to exercise that degree of care which ordinarily is exercised by one of like age, mental capacity and experience. The order denying a new trial not being appealable the attempted appeal therefrom is dismissed.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

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84 Cal.App.2d 541

In re PETERSON'S GUARDIANSHIP.

PETERSON v. WELLS FARGO BANK & UNION TRUST CO.

Civ. 13527.

District Court of Appeal, First District, Division 1, California.

March 25, 1948.

Hearing Denied May 20, 1948.

1. Insane persons 🔑33(1)

Where alleged nephew filed petition for his appointment as guardian of person and estate of alleged incompetent, copy of citation was served on alleged incompetent more than two weeks before date set for hearing and alleged incompetent filed answer, probate court regularly acquired jurisdiction of proceeding. Probate Code, § 1461.

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* California Jury Instructions, Civil.

2. Insane persons ⚷33(1)

Probate court, having acquired jurisdiction of proceeding for appointment of guardian for alleged incompetent, could order continuances and retain jurisdiction and control of proceedings at the several hearings had on various dates following the date for hearing arrived at by stipulation and order appointing a guardian could be amended by inserting the date of hearing. Code Civ.Proc. § 956a.

3. Insane persons ⚷33(1)

Where probate court regularly acquired jurisdiction of proceeding for appointment of guardian by personal service of citation on alleged incompetent, service of second citation after date for hearing arrived at by stipulation could be regarded as surplusage. Probate Code, § 1461.

4. Insane persons ⚷33(1)

Failure to comply strictly with statutory requirement that name and residence of relatives within the second degree be set forth in petition for appointment of guardian for incompetent and notice of proceedings mailed to them was not prejudicial to alleged incompetent where only relative within second degree residing in state died before first hearing on petition. Probate Code, § 1461.

5. Insane persons ⚷33(1)

Failure to produce at hearing alleged incompetent or medical certificate evidencing her physical inability to attend did not deprive court of jurisdiction to appoint a guardian, where counsel for alleged incompetent led court and opposing counsel to understand that he would produce alleged incompetent in court if necessary and if she was able to attend. Probate Code, § 1461.

6. Insane persons ⚷2

Evidence sustained trial court's finding of incompetency and inability by reason of age and weakness of mind to manage and care for person or property and consequent appointment of guardian of estate of incompetent. Probate Code, § 1461.

7. Insane persons ⚷33(2)

Appellate court may not disturb findings of lower court in proceeding for appointment of guardian for incompetent on ground that findings are not supported by the evidence, unless appellate court can conclude as matter of law that conclusions of trial court are unsupported by any evidence.

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Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the guardianship of the person and estate of Cora Stone Peterson, an incompetent person. From an order appointing Wells Fargo Bank & Union Trust Co. guardian of her estate, the alleged incompetent appeals.

Order amended and as amended affirmed.

James M. Hanley, of San Francisco, for appellant.

Harold C. Brown, Saul Perlis, Milton Marks and Morris Lowenthal, all of San Francisco, for respondent.

WARD, Justice.

Appellant seeks a reversal of an order appointing the Wells Fargo Bank & Union Trust Co., Guardian of the Estate of Cora Stone Peterson, an incompetent person, upon the ground of the court's lack of jurisdiction and the ground of insufficient evidentiary support.

Appellant contends that the several requirements of section 1461 of the Probate Code must be strictly followed before jurisdiction to appoint a guardian is acquired. No authority so holding has been cited, and the decisions of the Supreme Court concerned with said section do not support appellant's contention. Buchanan v. Superior Court, 209 Cal. 408, 287 P. 474; Guardianship of Waite, 14 Cal.2d 727, 97 P.2d 238; Guardianship of Andrews, 17 Cal.2d 500, 110 P.2d 399.

The decisions relied on by appellant hold that the requirement of section 1763 of the Code of Civil Procedure, the basis of section 1461 of the Probate Code, that "the clerk of the said court must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed" is jurisdictional. Snyder v. Superior Court, 206 Cal. 346, 274

P.337; Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635. A holding that a statutory requirement as to the giving of notice to an alleged incompetent is a prerequisite to the vesting of jurisdiction is not synonymous with a holding that the following requirements of section 1461 of the Probate Code are jurisdictional: (1) that the petition set forth "the names and residences, so far as they are known to the petitioner, of the relatives of the alleged insane or incompetent person within the second degree residing in this State;" (2) that "notice of the nature of the proceedings and of the time and place of the hearings shall be mailed * * * to each of such relatives"; (3) that a citation setting forth the time and place of hearing "shall be personally served on the alleged insane or incompetent person in the same manner as provided by law for service of summons at least five days before the time of hearing"; and (4) that 'Such person, if able to attend, must be produced at the hearing, and if not able to attend by reason of physical inability, such inability must be evidenced by the affidavit and certificate of a duly licensed physician or surgeon, or other duly licensed medical practitioner * * * to the effect that such patient is unable to attend, shall be prima facie evidence of that fact."

[1] On June 6, 1946, Bernal Burrows filed a petition for the appointment of himself as guardian of the person and estate of Cora Stone Peterson whom he alleged to be his aunt. A copy of a citation to Cora Stone Peterson dated June 6, 1946, informing her to show cause on June 24, 1946, why she should not be adjudged an incompetent person and why Bernal Burrows should not be appointed guardian, was personally served upon Cora Stone Peterson on June 7, 1946. The answer of the alleged incompetent was filed June 22, 1946; Compliance with Probate Code section 1461 was not questioned. From the foregoing it is apparent that the present proceeding is distinguishable from Snyder v. Superior Court, supra, and Grinbaum v. Superior Court, supra; here, jurisdiction was regularly obtained by the trial court.

[2, 3] The matter did not go immediately before the trial court. Additional pleadings were filed. According to statements made by counsel for respondent at the oral argument, continuances were duly had and the date of January 29, 1947, as the date for a hearing, was arrived at by stipulation. At the January 29, 1947 hearing, as at the hearings on February 6, 20 and 26, 1947, and March 13 and 21, 1947, the trial court retained jurisdiction and control of the proceedings. Halett v. Patrick, 49 Cal. 590; Guardianship of Lyle, 77 Cal.App.2d 153, 174 P.2d 906. The trial court's order may be amended by inserting the date "January 29, 1947," following the words "regularly to be heard on." Code Civ.Proc., sec. 956a. The fact that a second citation was served upon the alleged incompetent on January 31, 1947, may be regarded as surplusage.

[4, 5] That the requirements of Probate Code section 1461 were not strictly followed in no way prejudiced appellant. Although it is true that at the time of the filing of the petition her sister was living in an adjoining apartment and hence constituted a relative "within the second degree residing in this State" whose name and residence should be set forth in the petition and who should receive notice of the proceedings, she died in December, 1946, prior to any of the hearings below. There is abundant evidence that Cora Stone Lewis is a niece and hence related merely in the third degree. Probate Code, sec. 253. The requirement that the citation be personally served upon the incompetent was fully complied with by the service of June 7, 1946, referred to above. Lastly, as to the production of the alleged incompetent or of a medical certificate evidencing her physical inability, the record reveals that her counsel led both the court and opposing counsel to understand that "if it becomes necessary after you hear the testimony to have her here [counsel for the alleged incompetent] will bring her here. * * * If she is able, she is coming into court here. * * * I will have a talk with Mrs. Peterson, and then I will determine whether I am going to bring her to court."

[6] The trial court found that "Cora Stone Peterson is an incompetent person, and is by reason of old age and weakness of mind unable, unassisted, properly to manage

and care for herself or her property." Support for this finding is seen in the following evidence: Two of appellant's childhood friends testified that when they saw her on January 28, 1947, she told them she was not living in her own home—although she had lived there about thirty years—but that she lived two blocks down the street, and that she still went to sales with her sister—although the latter had died about two months prior to this conversation. They concluded that she was irrational and of unsound mind. Both the petitioner, Bernal Burrows, and his wife, Gertrude Burrows, described in detail appellant's untidiness and filth in caring for herself and her apartment. Bernal Burrows described his aunt as having an insane mind, as eating with her hands, as turning on gas and forgetting to light it, and as failing to recognize people. Two independent doctors appointed by the court to examine appellant reported that she should definitely have a guardian because of her "senile type of memory—a memory that is bad due to hardening of the arteries and senility; not just a slipping memory."

[7] Appellant called no witnesses. The only material conflict in the evidence appears from the testimony of a tenant and handyman of the incompetent that she talks intelligently, has good table manners, was a very good business woman, and comprehends things. "Before we can disturb the findings of the lower court upon the ground that they are not supported by the evidence, we must be able to conclude as a matter of law that there is no evidence at all to support the conclusions arrived at by the trial court." Guardianship of McConnell, 26 Cal.App.2d 102, 106, 78 P.2d 1043, 1045. The trial court's findings must stand.

Through the testimony and records produced by an auditor with the Wells Fargo bank and the testimony of Cora Stone Lewis it was brought out that she was authorized to make withdrawals or deposits in joint account No. 82414 of the incompetent and her sister; that on December 21, 1945, she withdrew $2,000 from said account and on the same day deposited $2,000 in her joint account with her mother, and that on September 23, 1945, the incompetent's property was transferred to Cora Stone Peterson and Cora Stone Lewis in joint tenancy. If such evidence was the sole evidence produced, there is authority that it would be insufficient to support an order finding appellant an incompetent person. Estate of Watson, 176 Cal. 342, 168 P. 341. Guardianship of Waite, 14 Cal.2d 727, 97 P.2d 238. However, unlike the Watson case, it cannot here be said that appellant's own testimony showed "a very complete knowledge of what her property was, and what she was doing and desired to do with it." Estate of Watson, supra, at page 345 of 176 Cal., page 343 of 168 P.: Appellant did not testify and there is ample evidence that she lacked such knowledge concerning her property. Furthermore, unlike the Waite case, the opinions of the doctors that appellant should have a guardian was derived from their observations concerning her memory of late events—from the date of her birth, in 1875, she was unable to compute her present age; she could not remember if she had paid her taxes. In the Waite case, the medical opinions as to "lack of judgment" and "intelligence defect" were based upon the alleged incompetent's poor business judgment and her third marriage to a man much younger than herself. In view of the doctors' additional testimony that the alleged incompetent was clear mentally; that she knew the nature of the transactions in which she engaged, and that she understood the nature and status of her property and also her relatives, it was held that the finding of incompetency was not supported by any substantial evidence. Guardianship of Waite, supra, pages 730, 731 of 14 Cal.2d, 97 P.2d 238.

The order from which the present appeal is taken, is amended by the insertion of the date "January 29, 1947," following the words "regularly to be heard on," and, as amended, is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

84 Cal.App.2d 547

PETERSON v. BURROWS.

Civ. 13574.

District Court of Appeal, First District,
Division 1, California.

March 25, 1948.

Hearing Denied May 25, 1948.

1. Insane persons 🔑33(1)

Where trial court had jurisdiction throughout proceedings for appointment of guardian of person and estate of alleged incompetent, testimony adduced at a particular hearing was properly considered in selecting a guardian of the person of incompetent.

2. Insane persons 🔑34

Where parents and spouse of alleged incompetent were dead, selection of a guardian of the person of incompetent rested in trial court's discretion. Probate Code, § 1404.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the guardianship of the person and estate of Cora Stone Peterson, an incompetent person. From an order appointing Gertrude Burrows guardian of her person, the alleged incompetent appeals.

Order amended and as amended affirmed.

James M. Hanley, of San Francisco, for appellant.

Harold C. Brown, Saul Perlis, Milton Marks and Morris Lowenthal, all of San Francisco, for respondent.

WARD, Justice.

Appeal from an order appointing Gertrude Burrows, guardian of the person of Cora Stone Peterson, entered approximately two months after an order appointing a guardian of the estate, this day affirmed. In re Guardianship of Peterson, Cal.App., 191 P.2d 98.

[1, 2] In view of this court's ruling that the trial court was vested with jurisdiction throughout the proceedings in the lower court, it is apparent that there is no merit to appellant's contention that testimony adduced at the hearing of January 29, 1947, should not be considered. It was at this time that Gertrude Burrows appeared as a witness. The trial court's order states: "That Gertrude Burrows, having appeared in Court, and being found to be a fit and proper person to be the Guardian of the Person of the said Cora Stone Peterson * * * is hereby appointed Guardian of the Person of Cora Stone Peterson * * *" Appellant's parents and spouse being dead, section 1404 of the Probate Code is not involved. The selection of a guardian of the person rested in the trial court's discretion, and no abuse of discretion is seen in the present case. Matter of Coburn, 165 Cal. 202, 218, 131 P. 352.

For the reasons stated in the main opinion, the order from which the present appeal is taken is amended by the insertion of the date, "January 29, 1947," following the words "regularly to be heard on," and, as amended, is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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84 Cal.App.2d 581

PEOPLE v. GOLDSTEIN.

Cr. 4173.

District Court of Appeal, Second District,
Division 2, California.

March 25, 1948.

Rehearing Denied April 2, 1948.

Hearing Denied April 22, 1948.

1. Criminal law 🔑1159(3)

On appeal in criminal case, reviewing court will not weigh conflicting evidence.

2. Criminal law 🔑1159(6)

Even where evidence is circumstantial, a judgment approved by trial court cannot be reversed on ground of insufficiency of evidence unless upon no hypothesis is there sufficient substantial evidence to support conclusion reached in trial court.

3. Criminal law 🔑1159(6)

Where circumstances of apprehension of accused and testimony of prosecutrix concerning antecedent events are consistent with guilt of accused, jury's implied finding of guilt will not be disturbed.

4. Larceny 🔑68(1)
Threats 🔑8

Whether victim of alleged extortion consented to the taking of money from her so as to constitute the offense extortion and not theft was a question of fact for jury. Pen.Code, §§ 518, 519.

5. Threats 🔑7

Evidence sustained conviction of extortion by means of threats of arrest and adverse publicity, though victim testified that defendant took the money out of her hand and there was no proof that victim had committed any crime. Pen.Code, §§ 518, 519.

6. Threats 🔑7

Evidence that defendant threatened to arrest victim of alleged extortion and publish defamatory matter concerning her unless he was paid stated amount on specified day, that he repeated the threats by telephone and appeared on appointed day to collect the money but was prevented by presence of police officers sustained conviction of attempted extortion. Pen.Code, §§ 518, 519.

7. Threats 🔑1(1)

Obtaining money by threatening to accuse victim of a crime constitutes "extortion", regardless of whether victim has actually committed any crime. Pen.Code, §§ 518, 519.

See Words and Phrases, Permanent Edition, for all other definitions of "Extortion".

8. Witnesses 🔑269(1,

Cross-examination of defendant merely reviewing matters developed upon his direct examination was proper. Pen.Code, § 1323.

9. Witnesses 🔑268(3)

Cross-examination may extend to the whole transaction of which the witness has on direct examination given a part and which occurred in immediate connection with the part he has related, and in which he must have been concerned or of which he may be reasonably supposed to have had knowledge. Pen.Code, § 1323.

10. Criminal law 🔑1171(3)

Remarks by prosecutor in argument to jury that defendant's conscience was guilty and that defendant declared himself to be a "cheater" were not prejudicial to defendant so as to warrant reversal of conviction.

11. Criminal law 🔑1037(1, 2)

Defendant, by not at the time objecting to allegedly prejudicial remarks of prosecutor in argument to jury and requesting instruction that they be disregarded, waived the alleged misconduct and could not rely thereon as ground for reversal of conviction, where any prejudice resulting from such remarks was curable by an instruction.

12. Criminal law 🔑1166½(12)

Where defense counsel exhibited to jury badge which arresting officer produced on cross-examination and testified he had shown to defendant, trial court's remark that badge of a different type, which officer produced on re-direct examination and testified was also used by police department, should be handed to jury in all fairness to them was not prejudicial to defendant. Const. art. 6, § 19.

13. Threats 🔑5

Information charging extortion and attempted extortion in language so appropriate as to make its meaning readily understandable by a person of common understanding was sufficient, though it did not set out the specific injury threatened in order to extort money. Pen.Code, § 950 and subd. 2.

14. Criminal law 🔑386

Defendant's prompt arrival after stranger, with whom victim of alleged extortion had previously talked by telephone several times, had made appointment by telephone to visit victim, his immediate discussion of topics previously discussed by telephone and use of the same words and phrases afforded sufficient foundation for victim to identify defendant as person with whom she had had the several telephone conversations.

15. Constitutional law ⚷266, 268
Criminal law ⚷713
Witnesses ⚷301

Cross-examination of defendant in prosecution for extortion and attempted extortion and remarks of prosecutor in argument to jury disclosed no denial of due process of law or violation of any other right guaranteed by federal constitution. U.S.C.A.Const. Amends. 5, 14.

16. Constitutional law ⚷257

The federal constitution guarantees observance of procedural standards in all courts for protection of rights of persons accused of crime. U.S.C.A.Const. Amends. 5, 14.

17. Criminal law ⚷1134(1, 3)

Where a federal right is specially asserted, when the issue of due process is advanced, appellate court must independently search the record and inquire whether such right was expressly or in substance and effect denied by trial court and even though rights guaranteed by federal constitution have not been specifically violated, appellate court must inquire whether the judgment rests on a fair and substantial basis. U.S.C.A.Const. Amends. 5, 14.

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Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Douglas Goldstein was convicted of extortion and attempted extortion and from the judgment of conviction and order denying his motion for new trial, he appeals.

Judgment and order affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was accused of grand theft in count 1 of the information, of extortion in count 2 and of attempted extortion in count 3. A jury acquitted him of count 1 which was a charge of grand theft based upon the same facts recited in count 2, but he was convicted of counts 2 and 3. His motion for a new trial having been denied he now appeals on the grounds (1) of the insufficiency of the evidence; (2) misconduct of the court and the district attorney; (3) insufficiency of the information; (4) violation of his rights to due process of law; (5) the court's rulings in permitting inflammatory and irrelevant matter based upon bias and prejudice; (6) denial of a new trial.

The People's Evidence.

In January, 1947, the prosecutrix resided with her son in a single apartment in the City of Los Angeles. Early in that month she answered the telephonic call of a man who identified himself as a friend of an officer known to her and who asserted knowledge of a physician who could bring relief from her sinus infection. Replying to her statement that she was going to have an operation and to her complaints of inability to be out of bed, he volunteered to call the next time he would be in the neighborhood. Thereafter and prior to January 31 he called her by telephone, each time called himself "Phil," inquired concerning her health and that of her mother and closed his unseen visit with the promise to "call on you the next time I am in the neighborhood."

On the last mentioned date about 10 a. m. the prosecutrix answered a knock at her door and for the first time met appellant. He introduced himself as Phil and said: "How are you feeling? I just spoke to you on the phone. I am in the neighborhood and I want to come in and talk to you." After she inquired about the doctor whom he had offered to recommend for her he abruptly asked who was the man that had just left her apartment. When she replied that it was her friend who had had breakfast with her he asked her how much money the friend had left. He then displayed a policeman's badge and said: "I am from the vice squad. Get your clothes on. You are going with me. Well, you will understand when we get down to the vice squad. Get dressed and come with me." While she was in the course of dressing preparatory to her visit to the vice squad appellant interrupted by walking into her room where he said: "I am going to do something nice for you. How much money do you have?" When she replied, "Thirty or forty dollars," he demanded it. She counted out $42 from her purse which appellant took from her hand, saying: "Why that is chicken feed * * * Ordinarily, knowing the people that you know, I should get a thousand dollars. Can you have me $300 in the morning? I know you have a son and you have a nice family * * * Can you have $300 for me in the morning?" After she told him that she knew no one but her family and would not see them until the week end, he replied: "Well, can you have it by Monday? * * * If you don't I am going to spread your name and his all over the front page of the paper." On her promise to try he bade her goodbye with the words, "I will see you Monday."

The foregoing constitutes the total evidence adopted by the jury as proof of the second count with the exception of the subsequent events in so far as they relate to those of his obtaining the $42. However on the same day by telephone he requested her permission to call at 1:30 p. m. That request she refused.

She reported the foregoing incidents to the police who arranged for two officers to be present to greet appellant on his promised visit at 9 a. m. on Monday, February 3. At an early hour of that day appellant telephoned to ask whether she had the $300. To her affirmative answer he said: "Why I called you is my buddy is going to call you. He will use the same name that I am using which is Jim. When Jim calls you, instead of telling him three you tell him $150." She replied: "Oh, you want the other $150 for yourself, is that it?" His answer was: "That is right; will you do that for me? I will call you in a few minutes." At 8:45 he telephoned that he would be right over. The two officers having arrived, put $100 in marked currency in the prosecutrix' hands and concealed themselves. On entering her abode appellant searched the apartment cautiously with an air of suspicion and finally discovered officer Shields in the clothes closet. After the two men had exchanged salutations the officer displayed his badge and appellant said he was looking for "her husband"; that he was her friend. On producing his identification the lady learned his true name for the first time and asked why he did not show them the badge he had exhibited to her. In reply to further questions appellant attempted to convey the idea that he had come for the sex relation. He was then placed under arrest.

Evidence Sufficient

[1-3] Appellant denied all of the material testimony of the prosecutrix but he did not contradict that of the two officers as to the events of February 3. However, the jury having determined the facts against him, his testimony cannot be considered on review merely because it conflicts with that of the prosecutrix. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780. The Newland decision leaves no room for argument that even where the evidence is circumstantial the appellate court cannot reverse a judgment approved by the trial court unless "upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." Where the circumstances of the apprehension of the accused and the testimony of the prosecutrix concerning antecedent events are consistent with the guilt of the accused the jury's implied finding of his guilt will not be disturbed by the reviewing court. (Ibid.)

[4, 5] The sole testimony of the victim as to appellant's obtaining the $42 is substantial proof of that event. The only rational attack upon the verdict as to the second count is that the sole inference from her testimony is that the money was taken from her without her consent, which would make appellant's act grand theft. Notwithstanding she testified that "he reached over and took the $42 out of my hand," it was not an unfair deduction that appellant took the money with her consent with the understanding that by his taking it she was to save herself from disgrace or from an injury to her reputation. People v. Peck, 43 Cal.App. 638, 645,

185 P. 881. When the jury determined that she thus consented to the taking, eo instante they acquitted him of grand theft and found him guilty of extortion. The events of that morning leave no cause for doubting the correctness of the jury's inference that the woman was intimidated by the threat of arrest or unfavorable publicity and by reason thereof yielded to appellant's demands. The question of consent is itself a fact for jury, to be determined from the circumstances as well as from the testimony of the prosecutrix. The victim of an extortioner might openly consent to the taking of his money "and yet protest in his own heart" against its being taken. People v. Peck, supra. The requirements of the statute (Penal Code, sec. 518) are that property may be obtained from another with his consent "by a wrongful use of force or fear," by a threat to accuse him or any relative of a crime, or to expose or impute to him any disgrace or crime, or to expose any secret affecting him or them. (Ibid., sec. 519.) From the utterances of appellant immediately prior to his taking the $42 it was a reasonable inference that the prosecutrix counted out the money to him to save herself from some accusation in a newspaper of a crime or of disgraceful conduct or from an exposure of a secret affecting her. People v. Peck, supra. Want of proof that the prosecutrix had committed a crime does not in the slightest minimize appellant's guilt. A person's fear of a threat to prosecute him for crime or to publish defamatory matter concerning him can be effective in causing him to pay money to an extortioner. People v. Francisco, 112 Cal.App. 442, 444, 297 P. 34. The proof supports the conviction of count 2.

Attempted Extortion.

[6] As to the attempted extortion the evidence is equally convincing. Appellant's enthusiasm for the enterprise never abated. At the first meeting on January 31 he emphatically demanded that the prosecutrix procure an additional $300 for him by Monday, the third of February, and declared the dire consequences to follow in event of her failure to have that sum for him. Not content with his demand while there he telephoned her during the noon hour requesting that he might call at once. By his early telephonic call on Monday his request indicated that a fellow "officer" was a party to his scheme but that he himself should have the lion's share. He followed this up by his personal call which the jury were justified in inferring was in furtherance of his demand for $300. If the narrative of the prosecutrix's experience with appellant was true as the jury believed, could there be any doubt in their minds that he failed to collect the $300 solely because of the officers' interference? The facts proved and the reasonable inferences therefrom fairly justify the deduction of his intent to extort $300. People v. Robinson, 130 Cal.App. 664, 668, 20 P.2d 369; People v. Francisco, supra. The evidence justifies the implied finding that by his threats to publish some real or fancied story of her relations with a man he intimidated her, and that his failure to victimize her was due to the presence of the police or to her poverty: certainly not to a change of heart by him.

Appellant cites People v. Miller, 2 Cal.2d 527, 530, 42 P.2d 308, 309, 98 A.L.R. 913, to show, and he argues, that mere intention to commit a crime is not the equivalent of an attempt; that preparation alone is not sufficient; that the act "must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation"; that neither intent alone nor an act alone will constitute an attempt; that there must be some overt act in part execution of the criminal intent. Nothing is to be found in the Miller case that is calculated to efface appellant's crime or to reduce its degree of depravity. The court adopted also Wharton's language: "There must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." A fragment of appellant's offense was established by the proof of his visit, his declaration and exhibition of a badge of authority, and his threat to publish an act of his victim unless she paid him money. His engagement to return to her apartment at a specified time and his telephonic calls with reference to the money and the hour of his coming are evidences of the progress of the crime. That its failure to be consummated was due to circumstances independent of appellant's will was a reasonable deduction by the jury. The finding that his coming to her home at the hour appointed was his overt act in furtherance of his declared purpose did not over-exercise the credulity of the jury.

[7] It is contended that there was no proof of any crime the prosecutrix had committed of which he might accuse her. Proof of a crime by her was not essential to his guilt. His offense inhered in his threat to accuse her of a crime unless she paid him the money demanded. A false accusation of crime is often as harmful as one that is true. To threaten the publication of either for nonpayment of money is extortion. (Penal Code, secs. 518, 519.)

Conduct of the Prosecutor.

Appellant's assignments of misconduct of the prosecutor in the cross-examination and argument as prejudicial are without substantial basis. He says there is no evidence that appellant intended to accuse the prosecutrix of violating the Penal Code. To designate specific acts is not the sole method practiced by the extortioner as his means of terrifying his prey. He reckons on the possibility that there might be some secret in the life of his intended victim of a nature more serious than that which he might propose. Thus he may accomplish his aims without incurring the risk attendant upon accusing his intended victim of a specific crime.

[8, 9] He contends that his cross-examination by the prosecutor developed his testimony in such a manner as unfairly to create an impression of his relations with the prosecutrix and thereby to cause him serious prejudice. The cross-examination of appellant was no more than to review the matters developed from appellant on his direct testimony. This procedure was in accordance with the Penal Code, section 1323. The cross-examination may extend to the whole transaction of which the witness has on direct examination given a part, and which occurred in immediate connection with the part he has related, "shortly before or after, and in which he must have been concerned, or of which he may be reasonably supposed to have had knowledge." People v. Teshara, 141 Cal. 633, 638, 75 P. 338, 340. Such rule does not violate the right of due process of a person accused of crime. Otherwise he might conceal the blood of his victim with his left hand while denying the truth with his right pointing upward. After appellant had denied the conversations detailed by the prosecutrix and related such as he chose to tell, the range of proper cross-examination encompassed his total knowledge of the events recited by himself or which he had categorically denied. People v. Mayen, 188 Cal. 237, 253, 205 P. 435, 24 A.L.R. 1383; Fricke's California Criminal Evidence, p. 97; People v. Marsh, 120 Cal.App. 630, 633, 8 P.2d 550.

[10, 11] Neither were the remarks of the prosecutor so intemperate in their application to the accused as to be classified as prejudicial. An examination of the argument of the deputy district attorney discloses no comment not warranted by the evidence. The two sentences of the state's counsel that evidently irked appellant are these: (1) "His conscience was guilty"; (2) "This is the man that tells us he is a cheater." Even though such statements had been error the assignment would not avail appellant. At no time in the course of the argument criticised did he object, assign the remarks as prejudicial or request an instruction that they be disregarded. Having neglected thus to direct the attention of the trial judge by specifying his particular objection or by entering his protest at a statement of the district attorney curable by an instruction, his silence then will now be deemed a perpetual waiver of the alleged misconduct. People v. Shack, 55 Cal. App.2d 16, 20, 130 P.2d 197; People v. Gray, 52 Cal.App.2d 620, 659, 127 P.2d 72; People v. Montgomery, 47 Cal.App.2d 1, 20, 117 P.2d 437; People v. Marvich, 44 Cal. App.2d 858, 863, 113 P.2d 223.

No Misconduct of Trial Judge.

[12] Certain statements of the court are assigned as prejudicial. After Officer Shields had on cross-examination displayed his badge and testified that not all shields used by the Los Angeles police department are of the same type as that used by him, appellant's counsel exhibited the shield to the jury. The witness then testified that he had shown his shield to appellant after the two had conversed in the closet where the officer had waited. On redirect examination the witness testified that he had another police badge which he then produced and testified that it also was a badge of the Los Angeles police department, which policemen wear. The court then interposed: "I suggest, in view of the fact the jury has viewed one of them, the other should be handed to the jury in all fairness to them." The court's remark is assigned as error as well as the subsequent overruling of appellant's objection to the introduction of the shield. In support of such assignments appellant cites People v. Boggess, 194 Cal. 212, 239, 228 P. 448. This case is not pertinent. Boggess was on trial for violating the Corporate Securities Act. After his report as receiver of a mine had been received in evidence the court read from and commented upon its contents adversely to the defendant. While the court's remarks would not be in good taste at the present time, that trial was over ten years prior to the adoption of section 19 of Article VI of the Constitution which authorizes the trial judge to "comment on the evidence, and the testimony and credibility of any witness." The other authorities cited (People v. MacDonald, 167 Cal. 545, 551, 140 P. 256; People v. Soeder, 150 Cal. 12, 87 P. 1016; People v. George, 72 Cal.App. 124, 236 P. 934; People v. Frank, 71 Cal.App. 575, 236 P. 189) are also antedeluvial. The court's statement was not prejudicial in any respect.

Information is Sufficient.

[13] Appellant contends that the information was insufficient in that it "failed to set out the specific injury threatened," citing People v. Schmitz, 7 Cal.App. 330, 94 P. 407, 419, 15 L.R.A.,N.S., 717. Section 950 of the Penal Code prescribes the form of an information, and section 950, subdivision 2, specifies that its contents shall be "a statement of the acts * * * in ordinary and concise language * * * to enable a person of common understanding to know what is intended." The language of the pleading at bar in each count thereof leaves no doubt of the pleader's intention. It is so phrased and its diction so appropriate as to make its meaning readily understandable by a person of common understanding. This suffices. People v. Lavine, 115 Cal.App. 289, 296, 1 P.2d 496; People v. Mahony, 145 Cal. 104, 109, 78 P. 354.

Admission of Telephonic Conversation Not Error.

[14] Appellant complains that without preliminary foundation the prosecutrix was permitted to testify that she had spoken to appellant over the telephone on a half dozen occasions prior to their meeting. Appellant appears to base his objection to the admission of the telephonic conversations upon the fact that the subject of such conversations related to her health and to that of her mother and to an alleged mutual friend. The subjects discussed by a person over the telephone have little to do with establishing the identity of the other party by the witness. The prosecutrix testified substantially that the same person who had talked with her before called her a few minutes prior to appellant's appearance and made an engagement to visit her immediately. Appellant's prompt arrival; his immediate discussion of the topics which she had previously discussed with the unseen person; his use of phrases and words which the strange voice had used in speaking with her; his immediate commencement of inquiry as to how the prosecutrix felt: these facts showed a sufficient familiarity of the witness with the party to entitle her to identify appellant as the person with whom she had held the several telephonic conversations. See People v. Albritton, 110 Cal.App. 188, 195, 294 P. 76.

The Other Assignments.

[15-17] No act is specified as a violation of the right of due process except the

cross-examination of appellant and the remarks of the prosecutor. Nor has a perusal of the prosecutor's cross-examination of appellant and of his argument to the jury disclosed that the rights of appellant, guaranteed by the federal constitution (Amendments V and XIV) have been disregarded. It is true that the cited amendments guarantee the observance of procedural standards in all courts for the protection of the rights of persons accused of crime (Chambers v. Florida, 309 U.S. 227, 238, 241, 60 S.Ct. 472, 84 L.Ed. 716) and that such standards are sacrosanct under the pronouncements of the United States Supreme Court. Indeed, where a federal right has been specially asserted—when the issue of due process is advanced—it is the duty of an appellate court independently to search the record and inquire not merely whether such right was expressly denied by the trial court but also whether it was denied in substance and effect. Unless such inquiry be made an appeal might fail to protect sacred rights. Furthermore, even though the constitutional protection be denied because the cited amendments have not been specifically violated, it is still obligatory upon the court of appeal to inquire whether the judgment rests upon a fair and substantial basis and, if not, so to declare. Norris v. Alabama, 294 U.S. 587, 589, 55 S.Ct. 579, 79 L.Ed. 1074; Broad River Power Company v. South Carolina, 281 U.S. 537, 540, 50 S.Ct. 401, 74 L.Ed. 1023; Demorest v. City Bank Farmers Trust Company, 321 U.S. 36, 42, 64 S.Ct. 384, 88 L.Ed. 526; Lisenba v. California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166; Chambers v. Florida, supra. However, under neither principle was appellant herein denied a fair trial nor was any of his procedural rights violated. He is the object of a verdict by a jury of his peers, following a trial conducted with fair regard for the orthodox amenities. Therefore the denial of his motion for a new trial was not prejudicial error.

The judgment and order are affirmed.

McCOMB and WILSON, JJ., concur.

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84 Cal.App.2d 500

In re LAURENCE'S ESTATE.

BRANDENBURGER v. STATE et al.

Civ. 7397.

District Court of Appeal, Third District, California.

March 23, 1948.

Rehearing Denied April 23, 1948.

Hearing Denied May 20, 1948.

1. Descent and distribution 🔑74

One entitled to succession takes, not by virtue of the decree of distribution, but by the law of succession, and title vests in such heir on the death of ancestor, subject only to control of probate court and to possession of any administrator for purpose of administration. Probate Code, § 300.

2. Descent and distribution 🔑71(7)

A decree of distribution to an heir does no more than declare the heir's title which accrued at the moment of deceased's death, and that is all that is necessary to be determined. Probate Code, § 300.

3. Aliens 🔑12(4)

Though title of a nonresident alien heir vests on deceased's death, it does so on the condition subsequent that the heir appear and demand the property within the prescribed period of five years. Civ.Code, §§ 671, 672, 1404; Probate Code, §§ 300, 1026.

4. Aliens 🔑12(4)
Descent and distribution 🔑71(7)

Where nonresident alien heir never appeared and claimed her interest in her deceased son's estate, and no claim was made on her behalf until her administrator did so 14 years after her son's death, her rights in the son's estate were barred by 5-year limitations, and the interest passed by escheat to the state, notwithstanding that decree of distribution in son's estate provided for distribution of the estate to the heir without making any reference to the fact that the heir was a nonresident alien. Civ.Code, §§ 671, 672, 1404; Probate Code, §§ 300, 1026.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding in the matter of the estate of Jesse Laurence, deceased, wherein Sheldon Brandenburger, administrator of the estate of Julia Candida de Jesus, deceased, filed a petition to recover a certain sum from the state treasury on behalf of the estate of Julia Candida de Jesus, deceased, and wherein the State of California and others filed an opposition alleging that the claim was barred by limitations and that the sum in question was subject to escheat to the state. From a judgment for the administrator, the State and others appeal.

Judgment reversed.

Fred N. Howser, Atty. Gen., and E. G. Benard, Deputy Atty. Gen., for appellants.

Brandenburger & White, of Sacramento, for respondent.

ADAMS, Presiding Justice.

The facts in this case are not in dispute. Jesse Laurence died in California on February 12, 1930, leaving a small estate which, after administration by the public administrator, was distributed to decedent's mother, Julia Candida de Jesus, "residing at Terceira, Azores Islands," in June, 1931. The estate so distributed consisted of $431.17 in cash. It was never collected by the distributee, but was first deposited in the county treasury, and on January 27, 1941, transferred to the state treasury.

Julia Candida de Jesus died in Portugal on December 30, 1934. On January 29, 1945, plaintiff Brandenburger was appointed administrator of her estate in Sacramento County, and on the same day filed a petition in the Estate of Laurence to recover the said sum of $431.17 from the state treasury on behalf of the estate of Julia Candida de Jesus. In said petition, which was verified by petitioner, it was alleged that "petitioner did not, nor did Julia Candida de Jesus participate in said probate proceedings in the matter of the Estate of Jesse Laurence, deceased, nor offer any proof therein to establish the claim of said Julia Candida de Jesus." Thereafter said petition was amended, the foregoing allegation being omitted; but there was added the allegation that "Proof was made on behalf of Julia Candida de Jesus in said probate proceedings establishing her right to inherit as sole heir, and Decree of Distribution was thereupon made as above set forth." Nowhere in said petition was it revealed that said Julia Candida de Jesus was a non-resident alien nor was it alleged that she had ever appeared in such proceeding and/or claimed the property.

Opposition to the granting of such petition was filed by the state treasurer, the state controller and the attorney general, alleging that more than five years had elapsed since the death of Jesse Laurence, that Julia Candida de Jesus was, at the time of decedent's death, and at all times thereafter remained, a non-resident alien, being a citizen of Portugal, and that she had never, within that period, made any claim to his estate, and, therefore, under the provisions of section 1026 of the Probate Code of California and sections 672 and 1404 of the Civil Code as they formerly existed, any claim for or on behalf of her estate was barred, and the said $431.17 was subject to escheat to the state of California.

The court held that since, in the Estate of Laurence, a decree of distribution had been entered distributing the residue of the estate to Julia Candida de Jesus, it must be presumed that she had claimed the estate prior thereto, and therefore within the five year period fixed by section 1026, supra; and that, therefore, the decree must stand unless proof were produced showing that the distributee did not appear in the estate proceeding or within the five year period to make claim to said estate. In its findings it found that Julia Candida de Jesus was a nonresident alien and that she was never in the United States; but, based upon the decree of distribution in the probate proceedings, it found that the said Julia Candida de Jesus did, "within the time for making claims and before the Decree of Distribution was made, appear and make proof *of her right to inherit the estate of said decedent.*" (Italics ours.)

Thereafter a substitute finding was made to the effect that the record or testimony upon which the decree of distribution in the Laurence estate was based had not been preserved, but that petitioner had introduced in evidence an affidavit found in the files, made by Manuel M. Esteves, dated May 12, 1930, in which affiant had stated that he resided at Ripon, California; that deceased (Laurence) never married and had no children; that deceased's father had died in the Azores in 1926; that the mother of said deceased, residing in the Azores, was the only heir at law of deceased Laurence; that Laurence was the brother of affiant's wife, and that affiant and his wife had been in communication with her mother in the Azores. The court then again recited that from the foregoing it found that Julia Candida de Jesus did, before the decree of distribution, "appear and make proof of her right to inherit the estate of said deceased"; and thereupon a judgment was entered ordering payment of the $431.17 to petitioner. A motion for a new trial was denied, and this appeal followed.

A settled statement has been filed here, showing that in the trial court in this proceeding Marie Julia Esteves was produced as a witness, but no other oral evidence was presented; that said witness testified that Jesse Laurence was her brother; that Julia Candida de Jesus was their mother; that Julia Candida de Jesus was living in Portugal at the time of the death of Jesse Laurence; that she had communication with her by mail; that Julia Candida de Jesus was never in America; that Manuel M. Esteves was the husband of the witness and that neither she nor her husband had received a power of attorney from Julia Candida de Jesus to collect the money here involved; that said Julia Candida de Jesus died in Portugal on December 30, 1934; that besides the witness herself there were three other children of Julia Candida de Jesus, all of whom at all times had resided and still did reside in Portugal; that she, herself, for some time prior to the death of Jesse Laurence, and at all times since, had resided at Route 1, Box 227, Ripon, California.

It is apparent from the decision of the trial court and from opinions filed by it, that its decision was based upon the proposition that in the absence of proof to the contrary, a decree of distribution which distributes an estate to one who is in fact a non-resident alien (though such fact is not stated in the decree) is evidence that said non-resident alien appeared and made claim to the property of said estate prior to the making of said decree; and that where such decree is made before the lapse of five years from the death of the decedent whose estate is so distributed, the statutes of this state are satisfied. In other words, that because a probate court distributes to an heir who is a non-resident alien it is to be presumed that such alien appeared and demanded the estate in such court *prior* to such decree.

Appellants on the other hand contend that on the death of Laurence, his mother, as his only heir at law, succeeded to his estate by virtue of our succession statutes; that upon a showing that Julia Candida de Jesus was the only heir at law of her deceased son it was proper for the probate court to decree distribution to her whether or not she had appeared and claimed the estate; that the statute did not require that a non-resident alien make claim to the right of succession before a decree of distribution could be made, but only required that she should appear and claim the property within five years of the death of the decedent; and that, as in this case the money distributed had remained in the county treasury and the state treasury for fourteen years after the death of Laurence and no claim therefor had been made until petitioner made his claim in 1945, it was obvious that no such demand had been made within the prescribed five years.

Section 671 of the Civil Code at the time of Laurence's death provided and still provides: "Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state." And sections 672 and 1404 of the Civil Code provided:

"672. If a non-resident alien takes by succession, he must appear and *claim the property* within five years from the time of succession, or be barred. The property in such case is disposed of as provided in title eight, part three, Code of Civil Procedure." (Italics ours.)

"1404. Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

In 1933 said sections were incorporated into section 1026 of the Probate Code reading:

"A nonresident alien who becomes entitled to property by succession must appear and demand the property within five years from the time of succession; otherwise, his rights are barred and the property shall be disposed of as escheated property."

[1] One entitled to succession takes, not by virtue of the decree of distribution, but by the law of succession. And title vests in such heir upon the death of the ancestor, subject only to the control of the probate court and to the possession of any administrator for the purposes of administration. Prob.Code, sec. 300, formerly Civ.Code, sec. 1384; Trippet v. State, 149 Cal. 521, 529, 86 P. 1084, 8 L.R.A., N.S., 1210; Estate of Benvenuto, 183 Cal. 382, 386, 191 P. 678, United States Fidelity & Guaranty Co. v. Mathews, 207 Cal. 556, 559, 279 P. 655; Estate of Kalt, 16 Cal.2d 807, 811, 108 P.2d 401, 133 A.L.R. 1424; Estate of Michels, 18 Cal.App.2d 201, 204, 63 P.2d 333.

[2] A decree of distribution to such heir does no more than declare the title of the heir which accrued at the moment of decedent's death. That is all that is necessary to be determined. Schade v. Stewart, 205 Cal. 658, 660, 272 P. 567; Western Pacific Railway Co. v. Godfrey, 166 Cal. 346, 349, 136 P. 284, Ann.Cas.1915B, 825; Estate of Wellings, 192 Cal. 506, 510, 221 P. 628; Estate of Wellings, 197 Cal. 189, 194, 240 P. 21.

Here the decree does not recite that Julia Candida de Jesus was a non-resident alien, nor does it appear that the said probate court was aware that she was such.

[3] However, while title of a non-resident alien heir vests upon the death of decedent, it does so on the condition subsequent that he appear and demand the property within the prescribed period of five years. This has been held in numerous cases. In Lyons v. State, 67 Cal. 380, 7 P. 763, a decedent resident of California died leaving as his only heirs at law certain alien residents of Ireland, who appeared and claimed the estate. The state of California contended that under section 4, Art. IX, of our state constitution, decedent's estate had vested eo instante in the state; but the court said, at page 384 of 67 Cal., page 765 of 7 P.: "The fault in the argument is that Guilford did not die without heirs. The petitioners were his heirs, and the property of his estate vested in them, subject to be divested if they did not appear and claim it within the time and in the manner provided by statute." To a like effect is the holding in Carrasco v. State, 67 Cal. 385, 7 P. 766. There a California resident died, leaving surviving him a widow and minor child residing in Chili. The minor child died, and the widow assigned her interest in the estate to Carrasco, who, after the estate had been administered and the residue paid into the state treasury, appeared and claimed same—presumably within five years from the death of decedent. The court held that since, under section 671 and 672 of the Civil Code, an alien may take, hold or dispose of property, real or personal, within the state if claimed within the given time, such person took by succession and could dispose of her interest; and that the buyer or assignee could then claim same.

In State v. Smith, 70 Cal. 153, 12 P. 121, it was contended also that a non-resident alien could not take by succession. The court said, page 156 of 70 Cal., page 123 of 12 P.:

"All aliens take by *succession*. Civ.Code, § 671. The failure of a non-resident alien to 'appear and claim' within five years after descent cast operates a bar of his right to assert any title in the property as against the state. And this, not on the idea that the property has escheated to the state, as of the date of the death of the ancestor, but because by the law the 'non-resident' takes subject to the loss of his right by a failure to make claim within the five years. The clause of section 672 is a limitation, applicable, however, not alone to the commencement of an action in the courts, but to any appearance within the state, and the assertion of a claim, whether by such action or otherwise. The claim may be in pais, as by taking possession of the property, or conveying or contracting with respect to it. If he fails to appear and claim it, the property is escheat at the expiration of the five years."

Also see People v. Roach, 76 Cal. 294, 296, 18 P. 407; Estate of Pendergast, 143 Cal. 135, 140, 76 P. 962; Estate of Romaris, 191 Cal. 740, 744, 218 P. 421; State v. Miller, 149 Cal. 208, 210, 85 P. 609; 1 Cal.Jur. 925.

Respondents rely upon Estate of Aufret, 187 Cal. 34, 200 P. 946, arguing that it was there decided that where a decree of distribution has been made distributing to a non-resident alien, the decree is conclusive, and it must be presumed therefrom that the non-resident alien distributee had appeared and claimed, else the trial court would not have made such a decree. In the Aufret case a decree did make distribution to persons known to be non-resident aliens, and an appeal therefrom was taken by the attorney general of this state who had appeared in the probate proceeding and opposed the petition for distribution. The state's opposition set forth that petitioners were citizens and residents of France and that they had not appeared and claimed the estate within five years from the death of decedent Aufret. The court said, page 36 of 187 Cal., page 947 of 200 P.:

"The answer does not state facts sufficient to show that the respondents are not entitled to the estate under the provisions of our Civil Code on the subject. Section 672 declares that—'if a nonresident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred.' Section 1404 provides, further, that aliens may take by succession the same as citizens —'but no nonresident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.' The answer does not aver that the respondents, or either of them, were not residents and citizens of California, or of the United States, at the time of the death of Suzanne Aufret in 1908, and ever since, until the time of the filing of the answer in the year 1919. If they were such residents or citizens at the time of the death of the decedent, they would immediately succeed to the title, free from the condition expressed in section 1404, and no claim on their part would be necessary to enable them to take by the succession. On the face of the petition and answer thereto, since the relationship was not disputed, the court below was authorized to make the distribution to the respondents, as it did. In our consideration of the case, since the answer stated no defense, it may be entirely disregarded."

However, it went on to say, at page 37 of 187 Cal., 200 P. 946, that as error is never presumed and all intendments were in favor of the judgment, in the absence of evidence it would be presumed that there was proof to the effect that respondents had within five years after the death of the decedent appeared and *claimed succession* to the property.

In that case it is implied that unless the alien heir had appeared and claimed succession no decree of distribution would or could have been made distributing the estate to her. But we do not think that such conclusion necessarily follows. There is nothing in the decree of distribution in the case before us to indicate that the distributee was a non-resident alien. The decree recites: "That said deceased died on the 12th day of February, 1930, in the County of San Joaquin, State of California, and was a resident of said County and State at the time of his death, and that he left surviving him as his only heir at law his mother, Julia Candida de Jesus, over the age of majority, residing at Terceria, Azores Islands, and that said Julia Candida de Jesus is entitled to the distribution of the residue of said estate."

It being made to appear that Julia Candida de Jesus was the only heir at law of decendent it was proper for the court to order distribution to her, regardless of her status. There is nothing in our statutes that required that the claim to the property be made prior to distribution. Title had already vested in her by virtue of section 671, supra, subject to be divested if she failed to make claim within five years. Section 672 did not provide that she must make claim to the *succession,* but claim to the *property itself.* She had five years to do so, and presumably could have asserted her claim within that time even if the estate had in the meantime been distributed to another. For analogy see Estate of Williams, 37 Cal.App.2d 181, 187, 99 P.2d 349; Estate of Lindquist, 25 Cal.2d 697, 712, 154 P.2d 879. The decree of distribution had no greater effect than to declare the title already vested in her by reason of her right as an heir. And as that right was subject to the condition subsequent, that she claim the property within the prescribed five year period, no reason appears why the decree is not likewise subject to such condition though it did not so recite. Obviously the state could not have claimed it as escheated property until after five years, regardless of the decree; and even if the state had appeared in the probate proceeding, such appearance and a showing that the distributee was a non-resident alien would not have had the effect of destroying her right to succession which arose from her relationship to the decedent, and by virtue of section 671 of the Civil Code, supra.

Bell v. Wilson, 159 Cal. 57, 112 P. 1100, though it concerned an out-of-state heir rather than an alien non-resident, is applicable. The court said, page 61 of 159 Cal., page 1101 of 112 P.:

> "In making a decree of distribution, it is the duty of the court to 'name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for and recover their respective shares from the executor or administrator, or any person having the same in possession.' Code Civ.Proc., § 1666. It is not enjoined as a duty upon the court in making the decree of distribution to enter into any investigation as to whether a distributee is or is not a resident of the state, or if a nonresident, whether he has or has not an agent here. Whether he is a resident or not only becomes of real importance after the distribution is made and is then only important in as far as it may affect the closing of the administration of the estate. The fact that the distributee is a nonresident does not preclude him from receiving from the executor or administrator his distributive share. When a nonresident knows that he is entitled to a portion of the estate he may be relied on to take measures to obtain it either personally as soon as the administrator is prepared to deliver it, or to appoint his own agent for that purpose, and, in either event, furnish the administrator with proper vouchers so as not to embarrass the closing of the estate and the final discharge of the administrator."

[4] Under the authorities hereinabove cited, the heir in this case, being a nonresident, succeeded to the title to the property of the estate subject to divestiture if she did not claim *the property,* not before a decree of distribution had been made, but within five years from the death of the decedent. And in order to prevent such divestiture it was necessary to show that she had appeared and claimed the property within five years. No such showing was made. On the contrary, it is conceded that she was never in the United States; and her only relatives here—her daughter and son-in-law—though they testified that they had been in communication with the mother, stated that they had never received a power of attorney from her to collect the money. Also the fact that the property remained uncalled for in the possession of the county and state treasurers for fourteen years after the death of Laurence indicates that no claim to such possession was made. It being presumed that official duty has been performed, it may be presumed that if the heir had made such claim within the five years the property would have been turned over to her or her authorized representative.

We are of the opinion that the evidence in the case as matter of law does not support the conclusions of the trial court, and its judgment is therefore reversed.

PEEK and THOMPSON, JJ., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

84 Cal.App.2d 523

KROMM v. KROMM.

No. 13547.

District Court of Appeal, First District,
Division 2, California.
March 24, 1948.

1. Judgment 🔑138(1)

The policy of the law is to encourage the trial of litigated matters on the merits.

2. Appeal and error 🔑982(1)
Judgment 🔑363

Applications under Code section authorizing vacation of a judgment taken against a defendant through his mistake, inadvertence, surprise, and excusable neglect, are addressed to the sound legal discretion of the court, and its action can be disturbed only if there is a clear abuse of discretion. Code Civ.Proc. § 473.

3. Divorce 🔑161

Court did not abuse discretion in refusing to open up default in divorce action, where no notice was given to plaintiff or her attorney that defendant's former attorney, after his withdrawal from case, was reassociated with defendant for purpose of urging a plea in abatement, and where defendant's attorney had been absent at the trial merely because of reliance on assurance of clerk of court that because calendar was crowded action would not come up on scheduled date and would be continued for five days for convenience of court. Code Civ.Proc. § 473.

4. Continuance 🔑1

A court clerk has no right to continue a case and inform defendant's attorney that the continuance is for the convenience of the court.

5. Attorney and client 🔑91

A clerk of court has no right to continue a case for an attorney who is not of record merely because he is intending to appear.

6. Abatement and revival 🔑4

The fact that a prior action is pending is not an absolute bar to court proceeding with second action, and, not being an absolute bar, it is within court's discretion to open up the case to permit its being pressed.

7. Judgment 🔑363

Code section authorizing vacation of a judgment taken against a defendant through his mistake, inadvertence, surprise, and excusable neglect, should be liberally construed to the end that trials on the merits may be had. Code Civ.Proc. § 473.

8. Judgment 🔑363

Judgment will not be vacated under Code section authorizing such action when judgment is taken against defendant through his mistake, inadvertence, surprise, and excusable neglect, where to do so would be the equivalent of granting a new trial at the capricious demand of a defendant who was either grossly negligent or had changed his mind after the judgment. Code Civ. Proc. § 473.

9. Judgment 🔑143(3)

To be relieved of a default on ground that judgment was entered against defendant through his mistake, inadvertence, surprise, and excusable neglect, defendant must establish that he acted in good faith and must demonstrate that his excusable neglect was actual cause of his failure to attend the trial. Code Civ.Proc. § 473.

10. Judgment 🔑363

Under Code section authorizing vacation of a judgment obtained through defendant's mistake, inadvertence, surprise, and excusable neglect, "excusable neglect" is that neglect which might have been the act of a reasonably prudent person under the same circumstances. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Excusable Neglect".

11. Army and navy 🔑34

Defendant was not entitled to have default divorce decree set aside because of the fact that defendant was in military service at time decree was rendered, and court did not appoint an attorney for defendant under the Soldiers' and Sailors' Relief Act, where defendant had previously had an attorney of record who withdrew, with defendant's consent, and defendant had written plaintiff indicating that he was not going to contest divorce, and there was no showing that defendant, if he had desired to be present at the action, could not have been present. Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 901 et seq.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Suit for divorce by Ruth Kromm against Fred Kromm, wherein a divorce decree was entered in favor of the plaintiff. From an order denying defendant's motion to set aside the decree, the defendant appeals.

Order affirmed.

E. C. Mahoney, of Burlingame, for appellant.

Irene A. Gies and Eli D. Langert, both of San Francisco, for respondent.

BRAY, Justice.

This appeal involves the question of whether the trial court abused its discretion in refusing to open up a default, and the question of whether, where two actions involving the same parties and subject matter are filed in the same county, the court has power to proceed in the action secondly filed.

On April 15, 1946, Fred Kromm filed a divorce action against his wife, Ruth Kromm, in San Mateo County. This action, numbered 40681, will be hereafter referred to as the first action. Two days later, Ruth, plaintiff herein, who had not yet been served with summons in the first action, filed in the same county an action for divorce against Fred, defendant herein. This action, numbered 40686, will be referred to herein as the second action. Summons and an order to show cause for attorney's fees and support were served on defendant in the second action. This order to show cause was heard April 26, on which day the wife was served with summons in the first action. She did not appear therein, and her default was entered on May 9. On May 15 defendant answered in the second action, denying generally the material allegations of the complaint and setting up, by way of plea in abatement, the pendency of the first action. On August 1 a default interlocutory decree of divorce was entered in the first action in favor of the husband. This decree was set aside on September 26 on motion of the wife, upon condition that within five days she file in this first action an answer and cross-complaint. This she did. No further proceedings were had in the first action. On November 1 a withdrawal as attorney in both cases was filed by the husband's attorney, Mahoney. On November 15, a notice that the second action was set for trial on November 22 was served on the husband. On November 22, the trial of the second action was continued to January 3. On January 3, the action was tried (no appearance being made by defendant), and an interlocutory decree of divorce was granted and entered in favor of plaintiff. On April 3 defendant moved to set aside the default and decree. The motion was made on the grounds (1) that defendant was prevented from having a fair trial, as he was not represented by counsel and was in the military service of the United States, and confined by severe illness in a military hospital in the state of Washington; (2) that defendant was misinformed as to the date of trial; (3) that the court knew that defendant was in the military service and failed to appoint an attorney to represent him.

The only evidence for defendant produced at the hearing was the affidavit of Mahoney, the attorney who had theretofore withdrawn from the case and who appeared as attorney for defendant for the purpose of the motion. The affidavit stated that he had been employed by the husband in April to bring a suit for divorce against the wife. It then set forth the proceedings in the two actions up to the time of the obtaining of the interlocutory decree by the wife in the second action, and that about August 1, defendant, who is an officer in the U. S. Army, had been ordered to duty in the Pacific Theater, and reported to Fort Lawton, Seattle, Washington; that about the time of his arrival there he had been stricken with a heart attack and ever since has been confined to an army hospital there; that "because said Fred Kromm's absence from the State of California was apt to be prolonged" affiant in the month of October withdrew as his attorney of record; that "disregarding the fact that department 2 of this court had assumed full jurisdiction of this divorce action" plaintiff on November 15 mailed a notice to defendant that the action would be tried in department 1 of the court, and that on November 29 she notified him that the trial had been continued to January 3, 1947; that about December 15, defendant phoned affiant from Seattle stating that he had received the latter notice of trial and employed affiant to appear for him on January 3 and urge the plea in abatement; that on December 27 affiant talked to the clerk of the court, stating that he "was intending to appear" for defendant in the second action and that he had heard it rumored that the matter might not go ahead on the date set; that affiant wanted to be sure about it as he was planning a short vacation in southern California and did not want to rush back unless it was necessary; that the clerk advised him the calendar was crowded for that date and she would continue the matter to January 8 and notify plaintiff's attorney that the continuance was necessary for the convenience of the court; that on January 8 affiant appeared at the courthouse and learned that the matter had been heard on the third.

This affidavit constituted the only showing by defendant on the motion. Plaintiff filed an affidavit in which, among other things, she called attention to the fact that no notice of the reassociation as attorney for defendant of Mr. Mahoney had ever been given her or her attorney prior to the motion to set aside the default, and then alleged on information and belief that defendant had not been confined constantly in the hospital but that on December 27 he was able to, and did, travel to and spend some time in Spokane, Washington, and that he made another such visit in March, 1947; that on January 2 the clerk of the court advised plaintiff's attorney that the calendar for January 3 was crowded but advised the attorney to be present at the time set for hearing this matter. The court denied the motion to set aside the default and the decree.

[1-3] Defendant claims to be entitled to relief under section 473 of the Code of Civil Procedure and under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 901 et seq. Even though it is the policy of the law to encourage the trial of litigated matters upon the merits, applications under section 473 are addressed to the sound legal discretion of the court and its action can be disturbed by an appellate court only if there is a clear case of abuse of discretion. McMahon v. McMahon, 70 Cal.App.2d 126, 160 P.2d 892. There was no abuse of discretion here. On November 1 Mahoney withdrew as attorney of record for defendant. At the time of obtaining the interlocutory decree of divorce neither plaintiff nor her attorney had any knowledge that Mahoney was intending to come into the case. Moreover, defendant about Christmas time sent plaintiff a Christmas card on which he wrote, in part, the following: "Thanks for having the trial postponed until Jan. 3rd 1947. You could have insisted on going ahead with it on Nov. 22nd–46. Why did you do it. Of course I don't ever expect you to answer that question." Assuming that the court clerk informed Mahoney that she would continue the case from January 3 to January 8, we cannot say as a matter of law that under all the circumstances, including the fact that Mahoney failed to notify plaintiff's attorney that he was coming back into the case, defendant's actions justified a setting aside of the default.

[4, 5] As applications for continuance (if the attorney's actions in stating to the court clerk that he was going to be away and did not want to have to hurry back can be considered as such) must be addressed to the discretion of the court, the clerk has no right to continue the matter and inform the other attorney that the continuance is for the convenience of the court. It was held in Thompson v. Crescent Mill & Elevator Co., 47 Colo. 4, 105 P. 880, that an attorney is not performing his duty if he merely relies upon the state-

ment of the clerk that his case "may not be reached" without waiting in the courtroom to see whether it is reached. Again, a clerk has no right, in any event, to continue a case for an attorney who is not of record, merely because he says he is "intending to appear." In Lynch v. De Boom, 26 Cal.App. 311, 146 P. 908, relied upon by defendant, the plaintiff, who was himself an attorney, appeared at the court and called the clerk's attention to the fact that his case set for that day was not on the calendar. The clerk informed him that it would be placed on the calendar for another day. The plaintiff was in the courtroom until ten minutes after ten, and his case was not called. Moreover, his attorney filed an affidavit tending to show a tentative agreement with counsel that the cause would not be tried. In Bodin v. Webb, 17 Cal.App.2d 422, 62 P.2d 155, opposing counsel had discussed the impossibility of defendant's attorneys being present on the day set. Moreover, the secretary of the court, who had charge of arranging the status of cases for trial and notifying attorneys concerning the probable dates upon which cases would go to trial, had assured counsel for defendants that owing to the congested state of the calendar their case would not go to trial on the day set. In both these cases opposing counsel knew that the other counsel would not be present in court and expected their cases not to be tried that day, and, in both cases, applications for relief from default were made within a very few days of the default. Manifestly, these cases involve facts differing materially from those in the case at bar. As said in 164 A.L.R. 552, in cases of misinformation given by the court clerk "* * * each case depends upon its own particular or peculiar circumstances." Again, there is no explanation of the delay in applying for relief. Defendant's attorney learned on January 8 of the action taken. 85 days elapsed before the motion to set aside the default was taken. No explanation is made of this delay. In Benjamin v. Dalmo, Mfg. Co., 31 Cal.2d —, 190 P.2d 593, the Supreme Court held that an unexplained delay of 90 days was fatal to an application for relief from a default under section 473.

At argument, defendant contended that on the filing of the first action the court assumed jurisdiction to the complete exclusion of the second action, and also, that as the first action had been assigned to department 2, no other department could proceed with the second action. Both of these contentions were made and answered in Brown v. Campbell, 110 Cal. 644, 648, 43 P. 12: "The rule invoked by the appellants, that the judgment of that court which first acquires jurisdiction of the subject-matter of a cause of action and of the parties thereto will prevail over the judgment of another court whose jurisdiction was subsequently acquired, has no application to the present case. That rule rests upon comity and the necessity of avoiding a conflict in the execution of judgments rendered by independent courts, either of district or concurrent jurisdiction. But the rule itself, as well as the reason for its exercise, has no existence in a case where the actions are brought in the same court, and the judgments are rendered by the same tribunal. There is but one superior court in the city and county of San Francisco, and all of the actions brought in that court are within the same jurisdiction. * * * The jurisdiction over a cause, after it has been assigned by the presiding judge to one of the other judges for trial, remains in the same court, and neither the judge to whom it has been assigned, nor the department over which he presides, has any jurisdiction over the cause distinct from that of the court in which the action is pending. The entire procedure, from the commencement of the action to the execution of the judgment, is in one court; and there is no opportunity for conflict of jurisdiction, either in pronouncing a judgment or in its execution after it has been rendered. When, therefore, a suit is commenced in that court upon a cause of action which is then pending before it in another suit, or which has already been carried into judgment, the procedure to be observed is the same as if the two actions were in a court with but a single judge before whom all causes therein were to be tried. If the defense of a pending suit, or the estoppel of a former judgment, is not pleaded when such defense is available to the defendant, he cannot, after an adverse judgment, avail himself of this defense which he neglected to plead when he had an opportunity to do so, any more than he could avail himself of any other defense which he had omitted to plead." See also Garris v. Mitchell, 7 Cal.App.2d 430, 436, 46 P.2d 225; People v. Martino, 113 Cal.App. 661, 299 P. 86; Davis v. Conant, 10 Cal.App.2d 73, 75, 51 P.2d 151.

[6] The attorney was employed only to open up the case to present the plea in abatement, and not to contest the case on its merits. The courts do not look with favor on purely dilatory pleas, and the limitation of the attorney's authority in this respect undoubtedly was considered by the court in connection with all the other circumstances. The attorney merely appears "for the purposes of this motion." The fact of a prior action pending is not an absolute bar to the court proceeding with the second action. Not being an absolute bar, it was within the discretion of the court to refuse to open up the case to permit its being pressed.

[7-10] As said in Elms v. Elms, 72 Cal. App.2d 508, 513, 164 P.2d 936, 939: "While it is the judicial policy liberally to construe section 473 to the end that trials on the merits may be had, we find nothing in defendant's affidavit to warrant an order vacating the annulment decree. To do so would be to grant a new trial at the capricious demand of a defendant who was either grossly negligent or had changed his mind after the judgment. One may not be relieved from his default unless he makes a showing that he has acted in good faith and demonstrates that his excusable neglect was the actual cause of his failure to attend the trial. Neither one's change of mind nor his inexcusable negligence is ground for vacating a judgment. To warrant relief under section 473 a litigant's neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances."

Effect of Soldiers' and Sailors' Civil Relief Act of 1940.

[11] Defendant makes no attempt to show that his being in the service prevented him from being represented in the case or from being present at the trial. The attorney's affidavit states that defendant has been confined in an army hospital (a matter which is completely hearsay as to the attorney (see Scott v. Crosthwaite, 69 Cal.App.2d 663, 159 P.2d 660)); it does not claim that he could not have left there long enough to come to the trial. Plaintiff's affidavit stated that he spent some time after December 27 away from the hospital and at Spokane, Washington. This court held in Wilterdink v. Wilterdink, 81 Cal. App.2d 526, 184 P.2d 527, that a judgment rendered without the court appointing an attorney under the provisions of the above act is not void and may be set aside only upon a showing, as required by the act, that the defendant was prejudiced in making his defense by reason of his military service. See also Allen v. Allen, 30 Cal. 2d 433, 182 P.2d 551. The affidavit here falls far short of this requirement. It is significant that even though in the military service defendant had an attorney of record until November 1. Then his attorney withdrew, undoubtedly with defendant's consent. Late in December defendant thanked plaintiff for postponing the trial to January 3, and indicated his surprise that she had not gone on with the trial in November, implying that he was not going to contest the case, even though, according to his attorney, on December 15 he had employed the attorney to present the plea in abatement; and nowhere does it appear that if he had desired to be present, defendant could not have done so.

We are overlooking the fact that defendant did not comply with Rule 15 of the Rules on Appeal, requiring that "Each point in a brief shall appear separately under an appropriate heading * * *." See In re Estate of Hartson, 218 Cal. 536, 24 P.2d 171.

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

84 Cal.App.2d 610

SLAVIN v. ARGOOD et ux.

Civ. 16022.

District Court of Appeal, Second District, Division 1, California.

March 29, 1948.

1. Pledges ⟾30(4)

Where defendant pledged percentage of net proceeds of corporation accruing to defendant for payment of pre-existing debt and delivered stock in corporation as security to trustee who was to receive pledged proceeds for benefit of plaintiff, and corporation was adjudicated a bankrupt before any payments were made and trustee in bankruptcy disputed claim for amount due and plaintiff compromised with trustee in bankruptcy to defendant's knowledge, compromise did not relieve defendant as principal debtor from liability for balance of debt.

2. Husband and wife ⟾268(1)

Wife of defendant who signed pledge contract only to be bound so far as her community interest was concerned in the emoluments due defendant from the corporation whose stock was pledged was not liable for balance due on the debt.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by B. C. Slavin against Frank Argood and Mina Argood for the balance due under the terms of a written agreement. From an adverse judgment, defendants appeal.

Judgment against Frank Argood affirmed and judgment against Mina Argood reversed with directions.

Burke Mathes, of Los Angeles, for appellants.

Joseph Stell and Alex D. Fred, both of Los Angeles, for respondent.

WHITE, Justice.

Defendants, husband and wife, have appealed from a judgment against them, in an action tried before the court without a jury, for the balance due under the terms of a written agreement. In the agreement defendants are described as "First Party," plaintiff as "Third Party," Pacific Linen Supply Company, a corporation, as "Second Party," and Attorney George Appel, who acted as a trustee, as "Fourth Party." The agreement, so far as here pertinent, provided as follows:

"Whereas, Frank Argood, one of the First Parties, is indebted to said Third Party in the sum of Eight Thousand Seven Hundred Fifty-Seven and Ninety-eight/100 Dollars ($8,757.98), and agrees to repay the same, with interest thereon at the rate of five per cent (5) per annum, payable monthly, in the manner and at the times hereinafter mentioned, And

"Whereas, Mina Argood, his wife, is cognizant of the terms and conditions hereof, hereby voluntarily executes this agreement as one of the First Parties; And

"Whereas, the First Party did procure for said Second Party certain contracts for the laundering of linen and other articles of apparel for the Service Army Camps in the vicinity of Los Angeles, California, and said contracts have become, and are now, valuable property rights;

"Now, Therefore, in order to secure said Third Party the amount which is due him, the parties hereto agree as follows, to-wit:

"The said First Party does hereby set over, transfer and assign unto Fourth Party as Trustee for the Third Party, Three and one-half Per Cent (3½%) of the entire net proceeds of the Second Party, derived from all sources of income, and accruing to the First Party from certain contracts with the said Second Party. The First Party covenants and agrees that the said percentage of Three and one-half Per-cent (3½%) shall never be less than One Hundred Dollars ($100.00) per month, plus accrued interest to date of each payment, and that all such payment shall be distributed to the Third Party by the Fourth Party * * *

" * * * In no event, however, shall the monthly payment hereunder be less than the sum of One Hundred Dollars ($100.00), plus accrued interest to date of each payment, and, should said Three and One-half per cent (3½%) of said entire net proceeds be less than One Hundred Dollars ($100.00) in each month, plus accrued interest to date of each payment, said difference shall be made up by said Second Party. * * *

"It is further agreed that as security for the faithful performance of the terms and conditions of this agreement, said First Party will simultaneously, upon the execution of this agreement, deliver to said Fourth Party as said Trustee for said Third Party, a certificate of stock in said Second Party, evidencing Three and one-half (3½) shares; said certificate to be held by said Fourth Party during the life of this agreement and redelivered to said First Party only upon complete performance of the within agreement by the First and Second Parties hereto.

"* * * * * *

"It is further agreed that the said First Party is a married man and that his emoluments hereunder are community property, and for said reason, his said wife has executed this agreement as a party hereto.

"* * * * * *."

In December, 1941, a little over two months after the execution of the agreement, an involuntary petition in bankruptcy was filed against Pacific Linen Supply Company, the "Second Party," and thereafter plaintiff filed his claim in bankruptcy for the amount due under the contract, or $8757.98, no payments having been made under the contract either by defendants or the corporation. A dispute having arisen over the allowance of the claim, on May 15, 1944, plaintiff entered into a stipulation with the Trustee in Bankruptcy of the bankrupt corporation, whereby it was agreed that "An Order of this Court" (District Court of the United States for the Southern District of California) "may be made and entered into in the proceedings now pending before this Court * * * That the claim of said B. C. Slavin may be allowed as a general unsecured claim in the sum of $2144.00," and that said claimant "shall have no further rights or claims against said debtor or its estate * * *." Plaintiff thereafter assigned his claim to Merritt Building Safe Deposit Company. Thereafter a reorganization plan under section 10 of the Federal Bankruptcy Act was approved by the United States District Court. On July 13, 1944, plaintiff brought the present action to recover the difference between the contract obligation and the sum of $2,144 allowed as a general unsecured claim in bankruptcy and realized by the sale of the claim to the Merritt Building Safe Deposit Company.

It further appears from the testimony of Mr. Appel, who acted as trustee and Fourth Party, and as attorney for Mr. Slavin, that "there was considerable doubt * * * as to whether or not there was any consideration by the corporation for the execution of the guarantee. * * * The claim was opposed on the ground that there was no consideration. I attempted to sustain it on the ground the corporation had been Argood's alter ego, that he completely dominated it. The referee, the special master, held against the claim of Slavin and * * *, and the matter came up here before Judge Beaumont. * * * and when it appeared to me that Judge Beaumont was adverse to my contentions, I immediately sought to see whether I could compromise the claim in some way, so we * * * arrived at the figures whereby we got $2144 * * * and we entered into a stipulation which was approved and subsequently we assigned the claims to the Merritt Safe Deposit & Trust Company Building, only as against the guarantor, the Pacific Linen Supply Company, it was an allowed claim in that sum only as against the Pacific Linen Supply Company, and since there was no money to speak of in the bankruptcy estate, and we wanted the cash, Mr. Robeson, of the Merritt Company, agreed to pay us the cash, whereas the other creditors were receiving theirs in installments, * * *."

As grounds for reversal it is urged that the contract in question constituted a mortgage; that the mortgagee may not release the mortgage and retain the right to sue the mortgagee on the debt; and further, that the findings of fact do not support the judgment for the reason that no finding was made that the 3½% of the "net proceeds" of Pacific Linen Supply Co. was valueless, and the findings "fail to show that the securities had become valueless at the time the action was brought."

The contract discloses not a chattel mortgage, but rather a pledge of a chose in action, together with an undertaking by Pacific Linen Supply Company that the monthly payments from the "net proceeds" should amount to at least $100 plus accrued interest. But in any event, if the security was valueless plaintiff was entitled to proceed against the debtor directly.

As to the contention that no finding was made as to the worth of the 3½% of the "net proceeds" or that the securities had become worthless at the time the action was brought, it appears that the court made a finding of fact as follows: "It is also true that the stock certificates referred to in the agreement of September 17, 1941, became worthless as a result of the bankruptcy proceedings of Pacific Linen Supply Co., *and made it impossible for plaintiff herein to receive any compensation in the manner provided by said agreement of September 17, 1941.*" (Emphasis added.)

Futhermore, the parties entered into a stipulation of facts whereby they agreed that "the facts alleged in Paragraph 7 of the complaint are true." Paragraph 7 of the complaint alleged in part: "That all securities mentioned in the aforesaid agreement as well as all securities given in accordance with the terms of the said agreement have become and are now valueless by virtue of bankruptcy proceedings * * *."

The court further found against defendants as to the allegation in their second affirmative defense that the agreement of compromise whereby plaintiff's claim was allowed as a general claim for $2144 was entered into "without the knowledge or consent of the defendants."

[1] Appellants' position appears to be that the respondent by compromising his claim against the corporation released the principal debtor from further liability. This contention is without foundation under the facts presented in the case at bar. The contract here was one of pledge of a chose in action, coupled with a guaranty. The corporate guarantor was adjudicated a bankrupt and the trustee in bankruptcy disputed the claim, whereupon the pledgee entered into a compromise. The claim that this compromise was made without the appellant's knowledge is negatived by the findings. Moreover, appellants did not in their answer charge that the compromise was not entered into in good faith, or that the corporation was not actually bankrupt, or that a better settlement might have been procured. While the nature of the "net proceeds" is not clear, they are referred to in appellants' brief as "future commissions" due Frank Argood, and in this connection, it should be noted that the court found that the defendant Frank Argood resigned as an employee of the corporation within one month after the execution of the agreement whereby he assigned to plaintiff 3½% of the "net proceeds" due him.

Beyond stipulating as to certain facts, the defendants offered no evidence. They do not upon this appeal contend that the findings made are not supported by the evidence. It must be held, therefore, that whatever security plaintiff held for his debt became worthless prior to the commencement of his action, which was initiated some 2½ years after the adjudication in bankruptcy and shortly after the compromise was entered into.

[2] It was error to enter judgment against the wife, Mina Argood, personally, upon the agreement under consideration. Nowhere in the agreement do we find a promise on the part of the wife to pay money, nor an acknowledgment of a preexisting debt owing her. The document recites that the wife executes the agreement "as one of the First Parties," but contains no promise or acknowledgment by "First Party" to pay a debt. The pre-existing debt is referred to as a debt of Frank Argood, the husband, only. From such evidence as was received, it appears that the intention of the parties was to bind the wife so far as her community interest was concerned in the "emoluments" due her husband from the corporation and which he assigned as security for his personal debt. The language of the contract, "that the said First Party is a married man and that his emoluments

hereunder are community property, *and for said reason,* his said wife has executed this agreement as a party hereto," reinforces our conclusion in this regard. It follows that as to defendant Mina Argood the judgment should be reversed with directions to enter judgment that plaintiff take nothing as against her.

The judgment against Frank Argood is affirmed. As to defendant Mina Argood the judgment is reversed, with directions to enter judgment that plaintiff take nothing as against her.

YORK, P. J., and DORAN, J., concur.

84 Cal.App.2d 700

HOLBROOK v. FAZIO.

Civ. 13567.

District Court of Appeal, First District, Division 2, California.
April 1, 1948.

1. Contracts ⚷166

Where general contract was incorporated into subcontract by reference, terms of general contract relating to method and time of payment became a part of subcontract.

2. Contracts ⚷166

A written agreement may, by reference expressly made thereto, incorporate other written agreements, and, where such incorporation is made, original agreement and those referred to must be considered and construed as one.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action for unpaid balance on subcontract by F. L. Holbrook against J. A. Fazio. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Lyle E. Cook, of Berkeley, for appellant.

Arch MacDonald, of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for the unpaid balance on a sub-contract. The trial court found that the final payment on the contract was not then due and gave judgment for the defendant.

The general or major contract was between the United States Maritime Commission and Kaiser Company, Inc., and called for the construction of dormitories and a recreation building. The company sublet to another association which executed a contract with defendant who in turn entered into a "construction subcontract" with plaintiff calling for the installation of certain heating and ventilation work. The contract price was fixed at $20,224.00 payable to plaintiff "in installments as follows: 90% of work completed and accepted by the Kaiser Company Inc." The general contract between Kaiser and Fazio provided that the 10% retained should be paid on "the completion and acceptance by the contractor of all work called for by this subcontract." When the complaint was filed, $3299.91 remained unpaid on the contract. Thereafter the defendant paid $2375.94, leaving a balance of $923.97 which is now claimed to be due.

The master contract with Kaiser called for payments upon completion and acceptance of the work by the field superintendent of the original contractor. The trial court found on substantial evidence that the Kaiser Company had not fully accepted the work performed by plaintiff and that defendant had not received from Kaiser payment in full on his sub-contract.

The issue on this appeal is whether when a general contract is incorporated into a subcontract by reference the terms of the general contract relating to method and time of payment become a part of the subcontract.

[1, 2] The answer is in the affirmative. The rule is stated in Bell v. Rio Grande Oil Co., 23 Cal.App.2d 436, 440, 73 P.2d 662, 663: "A written agreement may, by reference expressly made thereto, incorporate

other written agreements; and in the event such incorporation is made, the original agreement and those referred to must be considered and construed as one. (Citing cases.)"

Similarly in Valley Const. Co. v. City of Calistoga, 72 Cal.App.2d 839, 841, 165 P. 2d 521, 522, this court said: "The authorities in California are clear that if the reference in the contract to the plans and specifications indicates an intention to incorporate them generally they become a part of the contract for all purposes. (Citing cases.)" There is no substantial difference between incorporated clauses relating to the method of performance and a clause relating to the time and conditions of payment.

See generally for authorities in support of the rule 6 Cal.Jur. p. 320 et seq.

Judgment affirmed.

GOODELL and DOOLING, JJ., concur.

84 Cal.App.2d 603

JOHN G. SPEIRS & CO. et al. v. UNDERWRITERS AT LLOYD'S LONDON.

Civ. 3592.

District Court of Appeal, Fourth District, California.

March 26, 1948.

1. Insurance 🔑512

Third party's truck which was in possession of insured on their premises for purpose of having a trailer hitch installed was under "control" of insured, and a claim for damages from fire destroying truck arose out of an occurrence by reason of such "control" precluding recovery under indemnity policy excepting liability of insurer unless for loss over specified amount, arising out of any occurrence by reason of insured's "control" of any motor vehicle

See Words and Phrases, Permanent Edition, for all other definitions of "Control".

2. Insurance 🔑146(2, 3)

Ambiguities in a policy are to be construed against insurer, but where a provision of policy is unambiguous, it must be construed according to its plain meaning.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by John G. Speirs & Company, a California Corporation, also known as George G. Speirs & Company, and another against Underwriters at Lloyd's London for declaratory relief to determine the respective rights, duties and liabilities of the parties under an indemnity policy issued by defendant. Judgment for defendant and plaintiffs appeal.

Judgment affirmed.

Waldo R. Bergman, of Bakersfield, for appellants.

Calvin H. Conron, Jr., of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment for defendant, in an action in declaratory relief to determine the respective rights, duties and liabilities of the parties under a policy of indemnity insurance written by defendant, the insurer, indemnifying plaintiffs, the insured, against loss or claim of damage under certain circumstances.

The general terms of the policy were broad enough to cover the claim of loss made in this case. Exclusion provisions were contained in and were attached to the policy, and the construction and effect to be given one of them is determinative of this appeal. This clause reads as follows:

"Notwithstanding anything contained herein to the contrary, it is hereby understood and agreed that Paragraph 'F' of the form attached to the policy is amended to read as follows:

"F. It is expressly agreed that the agreement of the Company to indemnify attached Only When The Liability Imposed By Law upon the Assured exceeds the amount stated in item (a) and (b) below and then only for such excess

(a) $5,000 as respects any one claim or series of claims arising out of any one occurrence by reason of the ownership, operation, maintenance or control of any automobile, trailer, semitrailer, tractor, or other motor vehicle; or

(b) $100.00 as respects any claim or series of claims arising out of any one occurrence other than described above. * * *"

About May 3, 1944, a Dodge truck belonging to Gussie Spears was in the possession of plaintiffs on their business property in Bakersfield for the purpose of having a trailer hitch installed. There was no such hitch then on the truck. The trailer hitch was fabricated by plaintiffs and on May 3rd was being welded on the frame of the truck when a fire occurred damaging the truck in the alleged amount of $2,400, to recover which sum an action was brought against plaintiffs. They notified defendant of the action and demanded that it conduct the defense of the suit. Defendant denied liability and refused the request. This action is to determine the rights and duties of the parties under these circumstances. To settle this question, as the claim for damages was less than $5,000, we must determine if the plaintiffs had "control" of the motor vehicle at the time it was damaged by the fire.

In Black's Law Dictionary, "control" is defined as follows: "Power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee." In Rose v. Union Gas & Oil Co., 6 Cir., 297 F. 16, 18, it is defined as follows: "The word 'control' does not import an absolute or even qualified ownership. On the contrary it is synonymous with superintendence, management, or authority to direct, restrict, or regulate." See also, Dinan v. Superior Court, 6 Cal. App. 217, 91 P. 806; McCarthy v. Board of Supervisors, 15 Cal.App. 576, 115 P. 458; Coffey v. Superior Court, 147 Cal. 525, 82 P. 75.

[1] There can be little doubt that the Dodge truck was under the control of plaintiffs at the time of the fire and that the claim for damages against them arose out of an occurrence by reason of that control. Plaintiffs had complete possession of and power and authority to manage the truck during the time they were doing the work on it. It follows that they had "control" of it. As the claim for damages was less than $5,000, defendant was relieved from liability under the clear and express terms of the contract.

[2] As said in Guidici v. Pacific Automobile Ins. Co., 79 Cal.App.2d 128, 179 P.2d 337, 338, quoting from Clark Motor Co. v. United Pacific Ins. Co., 172 Or. 145, 139 P.2d 570:

"True, the exclusion clause greatly limits the liability of the insurer but it is not so repugnant to the 'Insuring Agreements' as to defeat the purpose of the policy and thereby lead to an absurd result. As said in Couch's Cyclopedia of Insurance, Vol. 1, § 187: '* * * an insurer ordinarily may insert as many exemption clauses in its policy as it sees fit, and the courts cannot change terms by judicial construction, even in the case of exemptions from liability, if the same are free from ambiguity and uncertainty as to meaning.'"

In the Guidici case it was further said: "Appellant argues that all ambiguities in a policy of insurance are to be construed against the insurer. This is a truism well established. Sampson v. Century Indemnity Co., 8 Cal.2d 476, 478, 479, 66 P.2d 434, 109 A.L.R. 1162. But where a provision of a policy is clear and unambiguous it must be construed according to its plain meaning. Sampson v. Century Indemnity Co., supra, 8 Cal.2d at page 480, 66 P.2d 434; Long v. West Coast Life Insurance Co., 16 Cal.2d 19, 104 P.2d 646; Coit v. Jefferson Standard Life Ins. Co., 28 Cal.2d 1, 168 P.2d 163 [168 A.L.R. 673]."

The foregoing conclusion makes it unnecessary to consider the other exclusion clauses in the policy.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

84 Cal.App.2d 476

PEOPLE v. RAGONE et al.

Cr. 2499.

District Court of Appeal, First District,
Division 2, California.
March 23, 1948.

1. Automobiles 🔑355(10)

In prosecution for taking automobile without owner's consent with intent to deprive him thereof the asportation, as any other fact, may be proven by circumstantial as well as direct evidence. Vehicle Code, § 503.

2. Criminal law 🔑1159(2)

The right to draw proper inferences from evidence is a function of jury, and as long as its conclusions do not do violence to reason, appellate court cannot substitute its finding of ultimate fact for that reached.

3. Criminal law 🔑552(4)

Circumstantial evidence may be as convincing in its force and as conclusive as testimony of witnesses to overt act.

4. Automobiles 🔑355(10)

Evidence supported conviction of both defendants of taking and driving automobile without owner's consent and with intent to deprive owner of his title to or possession of the automobile. Vehicle Code, § 503.

5. Conspiracy 🔑47

A conspiracy to commit burglary may be established by circumstantial evidence.

6. Burglary 🔑41(3)
Conspiracy 🔑47

Both intent to commit burglary and conspiracy to do so may be gathered from circumstances by inferences.

7. Conspiracy 🔑27

An act, which may be otherwise lawful, completes crime of conspiracy when it is done for purpose of effecting object of the unlawful agreement.

8. Conspiracy 🔑47

Evidence supported conviction of both defendants of conspiracy to commit burglary.

9. Automobiles 🔑357

In prosecution for taking automobile without owner's consent with intent to deprive him thereof, refusal of defendant's requested instruction relating to the "joyride statute" making punishable as a misdemeanor the taking of automobile or other vehicle without permission of owner for purpose of temporarily using or operating it was not error under the facts. Pen.Code, § 499b; Vehicle Code, § 503.

10. Criminal law 🔑795(1)

Generally, omission or refusal to instruct jury of their right to convict of lesser offenses included in that charged is not error when evidence shows, or tends to show, that defendant, if guilty at all, is guilty of offense charged.

11. Criminal law 🔑404(4)

In prosecution on charge of taking and driving automobile without owner's consent with intent to deprive him thereof and of conspiracy to commit burglary, where evidence warranted finding that automobile and its contents were in possession of defendant, pistol found in glove compartment of automobile was admissible. Vehicle Code, § 503.

12. Criminal law 🔑1170½(3)

Failure to rule upon defendant's objection to question propounded to witness for prosecution was not prejudicial error, where record disclosed that portion of question which was subject to objection was not answered, and that answer given was both competent and relevant.

◆

Appeal from Superior Court, City and County of San Francisco; Wm. F. Traverso, Judge.

August Ragone and Manuel Sanchez were convicted of violating section 503 of the Vehicle Code and of conspiracy to commit burglary, and they appeal.

Affirmed.

Leslie C. Gillen, of San Francisco, for appellants.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

OGDEN, Justice pro tem.

Appellants were jointly charged and tried before a jury upon three counts, violation of section 503 of the Vehicle Code, grand theft of an automobile and conspiracy to commit burglary. They were acquitted of grand theft but were convicted upon each of the other two counts. They join in this appeal from the judgment of conviction.

In the early morning hours, about 3:30 a.m., three police officers were cruising in a police automobile along Van Ness Avenue in San Francisco. Their attention was attracted to an automobile parked at the curb in front of a restaurant just south of the intersection of Geary Street. Both appellants were observed to get out of the automobile and, leaving its door next to the curb open, walk diagonally across the sidewalk toward the door of the restaurant. At the approach of the officers, appellants dropped an object which they had been carrying between them and separated, starting to walk away in opposite directions, but were immediately taken into custody. At the point where the object appellants had been carrying fell to the sidewalk, making as it did so a metallic like sound, the officers found a pair of bolt cutters. Sanchez was wearing gloves and Ragone held one glove in his hand which he dropped to the sidewalk when apprehended. The mate to this glove was later found on the back seat of the parked automobile. The restaurant was closed for the night and the door which appellants had been approaching was padlocked. The interior was unlighted except for one light directly over a safe which was about five feet within and visible through the front window. An examination of the automobile revealed that its motor was running, there was no key in the ignition lock, the electrical connection being made by means of "jump wire" attached to the coil and the starter. The left front vent window was broken and showed evidence of having been pried open. The back rest of the right front seat had been removed. In the glove compartment was found a fully loaded 45 calibre automatic pistol and on the floor of the automobile were found a sledge hammer, two crowbars and a valve stem. The record discloses that this automobile had been taken without the permission of its owner some time after 6:30 p. m. of the preceding evening when it had been locked and parked in front of his home. When last seen by its owner it had not been in the condition described nor did it contain the pistol or tools referred to.

At the trial, Sanchez did not take the witness stand. Ragone testified that he and Sanchez were on their way home by street car from the beach where the automobile which they had been driving had broken down and that at the time of their arrest they were about to enter a hotel adjacent to the restaurant for the purpose of telephoning to his brother to pick them up. He denied any connection on the part of himself or Sanchez with the stolen automobile or that either had been in it. On cross-examination many discrepancies between his testimony and previous statement given to the police as to his activities on the night of his arrest were developed. His explanation for admittedly not telling the police the truth was "because I was all disgusted and I didn't care what I told him."

[1-3] Appellants' contention that the evidence is insufficient to support a conviction of violation of section 503 of the Vehicle Code is apparently based upon the absence of direct evidence of the taking or operation of the vehicle. The asportation, as any other fact, may be proven by circumstantial as well as direct evidence. People v. Parra, 94 Cal.App. 777, 271 P. 1103; People v. Zabriski, 135 Cal.App. 169, 26 P.2d 511; People v. Valdez 14 Cal.App.2d 580, 58 P.2d 656; People v. Dixon, 16 Cal.App.2d 56, 60 P.2d 140. "The right to draw proper inferences from the evidence is a function of the jury; and as long as its conclusions do not do violence to reason, an appellate court is not permitted to substitute its finding of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. Circumstantial evidence may be as convincing in its force and as conclusive as the testimony of witnesses to an overt act." People v. Latona, 2 Cal.2d 714, 43 P.2d 260, 265.

The case of People v. Flores, 58 Cal. App.2d 764, 137 P.2d 767, strongly relied upon by appellants, has no application to the factual situation here. In that case, the only evidence presented to connect the defendant with the taking of the automobile was that showing the presence of his fingerprints on the rear-view mirror. Such evidence was held to be insufficient since it tended to prove nothing more than that the defendant had been in the automobile, a fact which he readily admitted with a reasonable explanation of the innocent circumstances thereof.

[4] Here the fact of the possession of the automobile by appellants was amply supported by the evidence. Officer Corrasa testified that he saw the door of the automobile open and saw both appellants get out of it. One of the gloves of Ragone was found on the back seat. The officers testified that there were no other persons in the vicinity. The motor was left running. From the circumstances of that possession the inference is strong that it originated in the unlawful taking and driving away of the automobile by the same persons in whose possession it was found.

[5, 6] The contention that the evidence is insufficient to support a conviction of conspiracy to commit burglary is equally without merit. A conspiracy to commit burglary may likewise be established by circumstantial evidence. People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44; People v. Bucchierre, 57 Cal.App.2d 153, 134 P.2d 505; People v. Duran, 57 Cal.App.2d 363, 134 P.2d 305. Both the intent to commit burglary and the conspiracy to do so may be gathered from the circumstances by inference. People v. Head, 9 Cal.App.2d 647, 50 P.2d 832; People v. Eiseman, 78 Cal.App. 223, 248 P. 716.

[7, 8] Two overt acts were charged, the possession of a set of burglar tools and the act of walking from the automobile in the direction of the restaurant carrying a pair of bolt cutters. It is true as argued by appellants that one may innocently walk in the direction of a restaurant, may innocently carry bolt cutters and may innocently possess crow bars and a sledge hammer. But it is not essential that any of the acts relied upon in support of a charge of conspiracy be an act amounting to a criminal attempt or one unlawful in itself. An act, which may be otherwise lawful, completes the crime of conspiracy when it is done for the purpose of effecting the object of the unlawful agreement. People v. Beck, 60 Cal.App. 417, 213 P. 61; People v. Rodriguez, 61 Cal.App. 69, 214 P. 452; People v. George, 74 Cal. App. 440, 241 P. 97. That the acts charged were, under the circumstances of their commission, done for the purpose of accomplishing a preconceived plan to commit burglary is not only a reasonable inference but is the only logical one that could be drawn. That the pair of bolt cutters was the object which appellants had been carrying and which they dropped to the sidewalk, there can be no room for doubt in view of the testimony of the police officers. That the tools found in the automobile were in the possession of appellants is established from their possession of the automobile and a showing that they were not in the car when it was taken from the possession of its owner.

[9, 10] An instruction requested by appellants relating to section 499b of the Penal Code was properly refused as inapplicable. This section, sometimes referred to as the "joy-ride statute", makes punishable as a misdemeanor the taking of an automobile or other vehicle without the permission of the owner for the purpose of temporarily using or operating the same. Appellants premise their assertion of error in this regard upon the assumption that the offense denounced in the Penal Code section is necessarily included in that defined in section 503 of the Vehicle Code. It is not necessary to here decide whether such assumption is correct and we refrain from doing so since, under the facts of this case, the requested instruction was clearly inapplicable in either event. The general rule is that it is not error to omit or refuse to instruct the jury of their right to convict of lesser offenses included in that charged when the evidence shows, or tends to show, that the defendant, if guilty at all, is guilty of the offense charged. (See 8 Cal.Jur., 378 and authorities cited.) The circumstances of the taking of the

automobile permit of no other inference than that of an intent to deprive its owner of his possession, at least temporarily. If the jury found, as it did, that appellants took the automobile, their intent to deprive the owner of his possession is so clear as to leave no room, under the facts, for an instruction on Penal Code section 499b.

[11] The automatic pistol found in the glove compartment of the automobile was properly received in evidence. What has heretofore been said as to the sufficiency of the evidence to support the implied finding that the automobile and its contents were in the possession of appellants is a complete answer to their assertion of error in such ruling.

[12] Complaint is made of the failure of the trial court to rule upon an objection to a question propounded to a witness for the prosecution. The record discloses no prejudice resulting therefrom however, since that portion of the question which was subject to the objection was not answered and the answer given was both competent and relevant.

The judgment of conviction upon both counts is affirmed as to both appellants.

NOURSE, P. J., and DOOLING, J., concur.

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84 Cal.App.2d 616

TRANSPORT OIL CO. v. EXETER OIL CO., LTD.

Civ. 15501.

District Court of Appeal, Second District, Division 3, California.

March 29, 1948.

1. Appeal and error 🔑1008(3)

Where there was no extrinsic evidence in aid of construction of oil and gas lease, District Court of Appeal was not bound by trial court's interpretation and would independently ascertain meaning of lease from language thereof as matter of law.

2. Mines and minerals 🔑78(1)

"Paying quantities" phrase in habendum of oil and gas lease serves to perpetuate lease beyond fixed term for as long thereafter as it would be mutually profitable to parties, whereas "paying quantities" phrase in development provision of lease operates primarily for benefit of lessee, as a limitation upon his obligation to drill and pay royalties.

See Words and Phrases, Permanent Edition, for all other definitions of "Paying Quantities".

3. Mines and minerals 🔑73

Oil and gas leases are to be construed in accordance with their reasonable and common sense meaning. Civ.Code, § 1643.

4. Mines and minerals 🔑73

Express definition in oil and gas lease must yield to general intent of the lease. Civ.Code, § 1650.

5. Mines and minerals 🔑78(1)

Provision in oil and gas lease that "For all purposes herein contemplated", a well should be deemed to be producing oil in "paying quantities" when such well would produce oil or gas of a value of $15 per day in excess of operating costs applied solely to development and payment provisions of lease and did not apply to habendum clause but meaning of term "paying quantities" in habendum was to be determined by reference to established legal meaning of the term. Civ.Code, §§ 1643, 1650.

6. Mines and minerals 🔑75

"Paying quantities" in extension clause of oil lease habendum means production in quantities sufficient to yield a return in excess of operating costs, though drilling, and undertaking considered as a whole may ultimately result in loss.

7. Mines and minerals 🔑78(1)

Where neither operating agreement nor assignments of oil and gas lease purported to affect duration of lease or method of calculating its date of termination, overriding royalties were not includible as an operating expense in determining whether oil or gas was being produced in "paying quantities" within habendum clause of lease, and operation was to be considered profitable and lease still operative as long as oil and gas could be produced in paying quantities by lessee who was required to pay only basic royalty as expense of operation.

8. Mines and minerals ⚷73, 83

Where oil company under terms of operating agreement assumed obligations of original lessee and those of assignee under the lease and assignments thereof, company had obligation of complying with terms of operating agreement, and with respect to landowner occupied same position as original lessee, and obligation incurred by company with respect to overriding royalties under operating agreement could not properly be considered in determining company's duties under basic lease.

9. Mines and minerals ⚷78(1)

Reserves for depletion could not be considered a cost of operation for purpose of determining whether oil or gas were being produced in paying quantities within habendum clause of lease.

10. Mines and minerals ⚷78(1)

Operation of oil and gas leasehold at an annual profit of about $4,300, without deduction of reserves for depletion and depreciation, and after exclusion under terms of lease and operating agreement of overriding royalties as an operating expense, was in "paying quantities" within habendum clause of lease.

11. Mines and minerals ⚷78(1)

Where application of "paying quantities" provision in habendum clause of oil and gas lease is involved and in absence of compelling reasons to contrary, profitability of lease should, where possible, be determined over relatively long-term period.

12. Mines and minerals ⚷78(1)

Operation of oil and gas leasehold at a substantial net loss in December 1941 did not terminate lease and justify abandonment under "paying quantities" provision in habendum clause of lease in view of substantial profit realized for the entire year 1941.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Transport Oil Company against the Exeter Oil Company, Limited, for damages from alleged breach of agreement to operate certain oil leasehold. Judgment for defendant and plaintiff appeals.

Reversed for retrial of issue of damages.

Victor Ford Collins, of Los Angeles, for appellant.

Elmer P. Bromley and John D. Maharg, both of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by Transport Oil Company, herein called Transport, from a judgment denying it damages against Exeter Oil Company, Ltd., herein called Exeter. The action arose as a consequence of Exeter's abandonment, in January 1942, of a certain oil leasehold located in the Signal Hill oil field at Long Beach, California, and of Exeter's agreement to operate the property for Transport.

The basic lease to this property was executed in 1921 to one Stutts as lessee. It required the lessee to do certain drilling on the property, which has been done, and to pay a 16⅔ per cent royalty to the lessor, based on gross returns. The habendum clause provided: "The Lessee shall hold said land hereunder, for the period of twenty (20) years from, and after, the date hereof and as long thereafter as oil or gas is produced in paying quantities unless otherwise forfeited by Lessee in accordance with the terms of this lease." In reference to the lessee's obligation to operate the leasehold, the lease stated, "If they shall so elect, drilling or pumping operations hereunder shall be suspended while, but only so long as, the Lessees are prevented from work by reason of strikes, lockouts, acts of God, unavoidable accidents or other methods beyond the control of the Lessees, or when the price of oil falls to or below the sum of Fifty Cents (50¢) per barrel at the well."

By means of successive assignments, Transport became the lessee. These various assignments reserved certain overriding royalties which Transport assumed.

On July 29, 1936, Transport entered into an operating agreement with Bacon and Bailes, who subsequently assigned to Exeter in 1937. Exeter assumed the obligations of the agreement and operated the property until it was abandoned, Transport's action is predicated upon a claimed breach of this operating agreement by Exeter.

The material provisions of the agreement as as follows: the operator was required to drill one new well, and to redrill or otherwise recondition certain existing wells. This was done, and at the time of abandonment three wells, designated No. 1, No. 2, and No. 5, were in production. The agreement provided further that the operators "shall with reasonable diligence and in good faith pump and otherwise operate and care for all wells drilled by them upon the said lease at all times so long as they shall remain in possession of the same so that the full production thereof may be obtained," etc. Finally, the agreement provided: "The parties of the second part (operators) hereby assume and agree to perform, each, every and all the duties, liabilities, covenants, agreements and obligations of the lessee under the lease hereinabove described, and of the party of the first part under said lease and the assignments thereof," etc. For the limited purposes of our decision Exeter should be deemed the lessee under the basic lease.

The royalty obligations assumed by Exeter as assignee of this operating agreement were the following: the 16⅔ per cent royalty called for by the basic lease; the overriding royalties, by reason of the assignments of the basic lease, amounting to 14 per cent, respectively, on wells No. 1 and No. 5, and 15⅚ per cent on well No. 2; and the additional royalties reserved by Transport in the operating agreement, amounting to 20 per cent on wells No. 1 and No. 2, respectively, and 12½ per cent on well No. 5. Thus Exeter was required to pay total royalties of 50⅔ per cent on Well No. 1, 52½ per cent on well No. 2, and 43⅙ per cent on well No. 5.

For many years prior to 1942, production of oil from the premises had been suffering an increasing and expected decline due to natural causes. In the latter part of 1941, Exeter sought unsuccessfully to negotiate a reduction in the amount of its royalty obligations. These efforts failing, in January 1942 Exeter abandoned the property, moved off all the equipment, and plugged and cemented off the wells according to legal requirements. No notice was ever given to Transport of intention to abandon the leasehold.

Under these circumstances, the abandonment by Exeter of performance under the operating agreement was also an abandonment of the lease, causing its forfeiture to Transport's lessor. In addition to damages claimed for the loss of the lease, Transport seeks to recover the value of the equipment removed by Exeter and allegedly converted in violation of a liquidated damages provision of the operating agreement. Exeter's defense, successful in the court below, is that the operation had become unprofitable, in that, oil or gas could no longer be produced in paying quantities, and that therefore the lease had by its own terms expired prior to January 1942. Thus, it is urged, Exeter acted squarely within its rights under the operating agreement in abandoning the leasehold and in removing the equipment for its own use. The question before the court is whether the abandonment was justified in view of Exeter's obligations.

The operating agreement itself contains no provision for cessation of operations or abandonment in case the leasehold could no longer be operated profitably. However, the lease, as we have seen, obligated the lessee to hold and operate the property "for the period of twenty (20) years from and after the date hereof and as long thereafter as oil or gas is produced in paying quantities." Since the lease was dated October 25, 1921, the fixed term had expired prior to the time of abandonment. The answer to the essential question of whether or not the lease had expired is thus seen to turn on whether or not production was in paying quantities at the time Exeter terminated its operations.

The lease contains no definition of what would be considered a paying operation unless such definition can be found in the following provision: "For all purposes herein contemplated, a well shall be deemed to be producing oil in paying quantities when such well, operated in a diligent and skillful manner, will produce oil or gas or both of a value at the well of $15 per day or more in excess of the reasonable cost of the fuel, labor, supplies and material required in the operation of such well." Exeter contends that this definition applies to the entire operation, that in the year 1941 none of the wells were making a net revenue of $15 per day, and that the lease was therefore terminable by either party thereto on that ground. The trial court concluded that the express $15 per day definition governed, but that if this provision were to be disregarded, the operation was nevertheless unprofitable.

[1] There being no extrinsic evidence in aid of the construction of the instrument, this court is not bound by the trial court's interpretation and will independently ascertain the meaning of the instrument's provisions from the language thereof as a matter of law. Trubowitch v. Riverbank Canning Co., Cal.Sup., 182 P.2d 182; Moore v. Wood, 26 Cal.2d 621, 160 P.2d 772.

Exeter places reliance upon the introductory words of the quoted definition, "For all purposes herein contemplated." Upon analysis, however, we are persuaded that these words referred solely to the development obligations of the lessee, and were not intended to operate as a limitation upon the habendum. The lease contemplated the drilling of one well on the north half of the property, with a privilege granted to the lessee of drilling a second one on the south half. The duty to drill the first well was limited to a depth of 3500 feet, "unless oil, in paying quantities shall have been obtained at a lessor [sic] depth." Furthermore, a cash bonus was to become payable only "in the event oil is obtained in paying quantities in the well so drilled on the north half of said Lot Three." And finally, the lessee's obligation to pay royalties was not to commence until "after the discovery and production of oil in paying quantities from said well." It will be noted that all three of these provisions refer in terms to an individual well rather than to the leasehold as an entirety. Similarly, the express $15 per day definition sets forth the circumstances as to production and expense of operation under which a single well is to be considered as producing in paying quantities, whereas the habendum clause defines the temporal duration of the lease as a whole. A grammatical reading would thus lead to the conclusion that the express definition was in no way intended to modify the habendum, but was rather designed to specify the extent of the development and payment obligations of the lessee.

[2, 3] In the evolution of oil and gas leases, the paying quantities phrase has come to have two entirely different meanings. In the habendum it serves to perpetuate the lease beyond the fixed term for as long thereafter as it would be mutually profitable to the parties. See 2 Summers, Oil and Gas, Perm.Ed., §§ 287, 306; Benedum-Trees Oil Co. v. Davis, 5 Cir., 107 F.2d 981; Union Gas and Oil Co. v. Adkins, 6 Cir., 278 F. 854. A different function is performed where the term appears in the development provisions, for there it operates primarily for the benefit of the lessee, as a limitation upon his obligation to drill and pay royalties. In view of this dissimilarity of purpose, application of the express definition equally to both provisions would do violence to the rule that such leases are to be construed in accordance with their reasonable and common sense meaning. Civ.Code, sec. 1643; Irving v. MacGregor, 203 Cal. 583, 265 P. 218.

[4, 5] A simple illustration will demonstrate the unreasonableness of Exeter's interpretation. Each well on the lease might have been producing a net revenue of $5,000 per year, rendering the lease extremely valuable, with no single well producing a net of $15 per day. Certainly the parties never contemplated that under such circumstances either the lessor or the lessee should have the right to terminate the lease. Again, the inclusion in the lease of the provisions quoted above, obligating the lessee to continue operations, except in certain contingencies not here involved, provides

support for our veiw that all producing wells, regardless of their individual profitability, were to be kept in continuous production as long as the operation, considered as a whole, was in paying quantities. The lessor would thereby be assured of receiving maximum royalties, which were to be computed on the basis of gross returns. In any event, the express definition must yield to the general intent of the contract. Civ. Code, sec. 1650. Accordingly, we hold that the effect to be given to the term, "paying quantities," in the habendum is not governed by the $15 per day definition, but is to be determined by reference to the established legal meaning of the term.

[6] Our next inquiry is whether the trial court correctly concluded that the leasehold was not producing in paying quantities, even within the meaning of the established legal definition of that term. By the great weight of authority, the term, "paying quantities," when used in the extension clause of an oil lease habendum means production in quantities sufficient to yield a return in excess of operating costs, even though drilling and equipment costs may never be repaid and the undertaking considered as a whole may ultimately result in a loss. Walden v. Potts, 194 Okl. 453, 152 P.2d 923; Denker v. Mid-Continent Oil Co., 10 Cir., 56 F.2d 725; note 84 A.L.R. 756.

[7] Exeter's contention, with which the trial court agreed, is that for the year 1941, the operation was conducted at a net loss of more than $100, and in the month preceding abandonment, at a net loss of more than $700. In computing operating costs, Exeter includes as part of cost all royalties, including those payable to Transport ,and also all cost of maintenance of the three wells here involved. Transport, on the other hand, contends that the royalties payable to it should not be included as an operating expense, but apparently concedes that all other royalties should be taken into account.

A careful reading discloses that nowhere in the operating agreement is there to be found any provision that in determining whether the lease has expired, overriding royalties, or any royalties other than the 16⅔ per cent payable to the landowner, should be treated as an expense of operation, nor is there particular reference to the landowner's royalty. However, each assignee of the lease assumed the lessee's obligations to the landowner. Exeter assumed them, as we have seen. Neither the operating agreement nor the assignments purported to affect in any way the duration of the lease or the method of calculating its date of termination. It would seem clear, then, that the operation was to be considered profitable and the lease still operative as long as oil and gas could be produced in paying quantities by a lessee who was required to pay only the basic royalty of 16⅔ per cent as an expense of operation.

[8] Stated in a somewhat different fashion, we find Exeter carrying a dual set of obligations. See 8 Cal.Jur.(Supp.) "Oil and Gas," sec. 141. In respect to Transport, it was, of course, required to comply with the terms of the operating agreement; in respect to the landowner, having assumed the leasehold obligations, it occupied the same position as the original lessee. Bessho v. General Petroleum Corp., 186 Cal. 133, 138, 199 P. 22. Consequently, as between Exeter and the landowner, the lease would endure, and Exeter would be obligated to continue to operate the wells, as long as Exeter received a sufficient net return to justify operation of the lease, after paying operating costs and the landowner's 16⅔ per cent royalty. The Transport and other overriding royalties, being obligations incurred by Exeter under the operating agreement alone, cannot properly be considered in determining Exeter's duties under the basic lease.

[9, 10] Turning to Exeter's own figures, which are stipulated by the parties to be correct, we find that when the overriding royalties, including those payable to Transport, are excluded as an operating expense, the total operation resulted in a profit, for 1941, of about $4,300, before reserves for depletion and depreciation, which were not shown. Regardless of the status of depletion in the calculation of taxable income (Dakota-Montana Oil Co. v. U.S., 59

F.2d 853, 75 Ct.Cl. 666) such charges are clearly not to be considered a cost of operation for present purposes, nor has it been seriously contended that they should be. There is room for argument, however, that depreciation might reasonably be treated as an operating cost. See Meyers v. Texas Co., 6 Cal.2d 610, 59 P.2d 132; United Central Oil Corp. v. Helm, 5 Cir., 11 F.2d 760, certiorari denied 271 U.S. 686, 46 S.Ct. 638, 70 L.Ed. 1151. Even so, on the record before us, the result would not be changed, for a substantial profit would remain after deducting depreciation, according to the depreciation claimed by Exeter for the year 1940. Under the generally accepted definition of paying quantities, then, it is clear that this leasehold was a successful operation in 1941.

[11, 12] Furthermore, Exeter's alternative contention, that a substantial net loss incurred in December 1941, the month preceding abandonment, had caused the lease to terminate, may not be sustained. It may be conceded that even when the overriding royalties, including Transport's, are disregarded as a cost of operation, the net loss amounted to more than $470 in this one month. This figure, however, is an insufficient basis for a finding that the leasehold was not producing in paying quantities. It is to be expected that a highly profitable lease may be operating at a loss temporarily. The present case amply illustrates the point, for the net loss in December 1941 was chiefly due to unusually high maintenance costs in that month. A similar experience was had in several previous months. In the absence of compelling reasons to the contrary, the profitability of a lease should, where possible, be determined over a relatively long-term period, so that expenses subject to wide fluctuations may be exposed to the leveling influences of time. Cf. Denker v. Mid-Continent Petroleum Corp., supra, 10 Cir., 56 F.2d 725. Under the circumstances here presented, the monthly basis appears inadequate to provide a reasonably accurate financial picture as to the profitability of production. The annual figures do not share in this deficiency. The loss for the month of December 1941 is thus immaterial in view of the substantial profit realized for the entire year 1941.

We hold therefore that the basic lease had not yet terminated in January 1942, and that abandonment at that time by Exeter was in violation of the operating agreement and the lease.

The judgment is reversed for a re-trial of the sole issue of damages, if any, suffered by plaintiff.

WOOD, J., and VALLÉE, J. pro tem., concur.

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84 Cal.App.2d Supp. 849

WHEELER et al. v. BAINBRIDGE et al.

Civ. A. 6674.

Appellate Department, Superior Court,
Los Angeles County, California.
March 15, 1948.

1. Landlord and tenant 🔑291(8)

Complaint, in unlawful detainer action, alleging that defendants were tenants of plaintiffs' apartments under month-to-month tenancy, and that on October 13, 1947, plaintiffs caused a notice to be served on defendants advising them that their tenancy was terminated as of November 13, and that on that date defendants were to surrender possession, stated cause of action under the state law where, until the complaint was filed on November 18, defendants still remained in possession.

2. Landlord and tenant 🔑278½
War 🔑4

Complaint in unlawful detainer action must allege, in addition to cause of action under state law entitling landlord to a judgment evicting defendant, additional facts revealing that landlord was free from federal restraint, where premises are located in federal rent control area. Housing and Rent Act of 1947, 50 U.S.C.A. Appendix, § 1881 et seq.

3. Appeal and error 🔑917(2)

On appeal from judgment entered for defendants after sustaining defendant's demurrer to plaintiffs' complaint without leave to amend, allegations of complaint were regarded as true.

4. Landlord and tenant ⚷278½
War ⚷4

Complaint, in unlawful detainer action, showing that defendants' tenancy had terminated because of proper notice given tenants under the state law, was not defective on ground that it did not allege that landlord was free from federal restraint under Federal Housing and Rent Act, where complaint showed that, upon termination of tenancy, rent was due and unpaid, since the federal act applies only so long as tenant continues to pay the rent to which landlord is entitled. Housing and Rent Act of 1947, § 209(a), 50 U.S.C.A.Appendix, § 1899(a).

5. Landlord and tenant ⚷278½
War ⚷4

Federal Housing and Rent Act places merely a limitation upon landlord's right to maintain an action against tenant for eviction, but does not impose a limitation upon landlord's right to terminate a lease or tenancy, or upon taking of any step which may result in putting an end to a tenant's rights to continue in possession. Housing and Rent Act of 1947, § 209(a), 50 U.S.C.A.Appendix, § 1899(a).

6. Pleading ⚷225(1)

Even if one of special demurrers was good, it was error to sustain demurrer to the complaint without leave to amend.

Appeal from Municipal Court of Los Angeles; Lucius P. Green, Judge.

Unlawful detainer proceedings by Rey B. Wheeler and others against Katherine Bainbridge and others. From an adverse judgment, plaintiffs appeal.

Reversed.

G. Gailliard Baumen, of Los Angeles, for appellants.

Otto A. Gerth, of Los Angeles, for respondents.

BISHOP, Judge.

The question presented, on this appeal from a judgment of dismissal following an order sustaining a demurrer, to appellants' complaint, without leave to amend, is in essence this: Is a landlord prohibited by the Federal Housing and Rent Act of 1947, 50 U.S.C.A.Appendix, § 1881 et seq., from taking any step he finds desirous to give him a cause of action to evict his tenant, or is its effect to prohibit him from pursuing the remedy of an action to evict? We have concluded that it is the use of the remedy that is prohibited, and that the demurrer should have been overruled.

[1] Plaintiffs' complaint revealed that the defendants were tenants of one of plaintiffs' apartments under a month-to-month tenancy, the rent being $50.50, payable in advance on the 8th of each month. On October 13, 1947, the plaintiffs caused a notice to be served on the defendants advising them that their tenancy was terminated as of a month later, that is, on November 13, and that on that date the defendants were to surrender possession of the apartment. Up until the complaint was filed, November 18, the defendants still remained in possession of the property.

[2] These facts, without more, clearly stated a cause of action, under the state law, entitling the plaintiffs to a judgment evicting the defendants. Palmer v. Zeis, 1944, 65 Cal.App.2d Supp. 859, 151 P.2d 323. What additional facts must be stated to make the complaint sufficient, having the federal law in mind? As we have held, with respect to former federal restrictions upon eviction actions (Lester v. Beer, 1946, 74 Cal.App.2d Supp. 984, 988, 168 P.2d 998, 1001), facts revealing that the landlord was free from federal restraint must be alleged in the complaint, not because they are necessary to reveal that the landlord had a cause of action to evict a tenant, but because the complaint should show, in addition to a cause of action, freedom from federal restraint upon bringing an action to enforce it. If there is any federal restraint upon the present action, it is found in the opening words of section 209 of the Housing and Rent Act of 1947, which became effective July 1, 1947:

"(a) No action or proceeding to recover possession of any controlled housing accommodations with respect to which a maximum rent is in effect under this title shall be maintainable by any landlord against any tenant in any court, notwithstanding the fact that the tenant has no lease or that his lease has expired, so long as the tenant continues to pay the rent to which the landlord is entitled unless—"

[3, 4] Section 1946, Civil Code, expressly declares that after terminating a month-to-month tenancy "the rent shall be due and payable to and including the date of termination." Some sum became due from the defendants for rent, therefore, for the period between November 8, when the November-December rent would have become due and payable, and November 13, when defendants' tenancy ended. In their complaint, plaintiffs declared that the sum of $10.10 became due and payable for this period and then alleged: "No part of the rent for said period has been paid." As the truth of this allegation stands admitted at this time (Speegle v. Board of Fire Underwriters, 1946), 29 Cal.2d 34, 41, 172 P.2d 867, 871), it can be stated that the restraining hand of section 209 is not laid upon the maintenance of this action for that section applies only "so long as the tenant continues to pay the rent to which the landlord is entitled."

[5] It is argued, in defense of the order sustaining the demurrer, that as it does not appear in the complaint that the rent was unpaid, or that any of the circumstances existed that are given as exceptions to section 209(a) following its "unless—" *at the time the notice was given terminating the tenancy,* as a consequence it does not appear that the landlord had the right to give the notice. Section 209, however, places a limitation upon the right to maintain, by which doubtless is meant the right even to bring (38 C.J. 336), an action in any court; no limitation is imposed upon the right to terminate a lease or tenancy or upon the taking of any step which may result in putting an end to a tenant's rights to continue in possession. The argument contains much the same fallacy as we found in the contention made in Bauer v. Neuzil, 1944, 66 Cal.App.2d Supp. 1020, 1029, 152 P.2d 47, 52, where it had been urged that as the landlord was not permitted, for a three months' period, to pursue the remedies afforded him by the state law to recover possession of demised premises, he could not during the period give a notice terminating the tenancy. We held that a limitation upon his right to pursue his remedy did not affect the right given him by state law to terminate a month-to-month tenancy.

[6] The complaint contains still further allegations concerning the service of a notice, on November 10, requiring that rent in the sum of $10.10 be paid within three days or that defendants quit the premises. If this notice was good, it gave the plaintiffs another foundation upon which to bring their action; if it was not good, it did not destroy the foundation already in existence. We are, therefore, not passing upon any of the possible problems the second notice presents, nor the special demurrer respecting it. Even if one of the special demurrers was good, it was error to sustain the demurrer without leave to amend. Maguire v. Hibernia Savings & Loan Soc., 1944, 23 Cal.2d 719, 737, 146 P.2d 673, 151 A.L.R. 1062; Kraft v. Smith, 1944, 24 Cal.2d 124, 132, 148 P.2d 23, 27.

The judgment is reversed, appellants to recover their costs of appeal.

SHAW, P. J., and STEPHENS, J., concur.

31 Cal.2d 630

PEOPLE v. STEIN et al.

Cr. 4836.

Supreme Court of California, in Bank.

April 2, 1948.

1. Criminal law 🔑1202(6)

Defendants who were convicted of armed robbery, and who were adjudged to be habitual criminals with two prior convictions, were entitled, after time for appeal from judgments had passed, to move to set aside the finding and judgment that the defendants were habitual criminals. Rules on Appeal, rule 31; Pen.Code, § 644(c).

2. Criminal law 🔑1202(7)

Where defendants were convicted, on plea of guilty of armed robbery, and they were adjudged to be habitual criminals with two prior convictions, and after time for appeal from judgments had passed defendants moved to set aside finding and judgment that they were habitual criminals, order overruling motion was appealable. Rules on Appeal, rule 31; Pen.Code, §§ 644(c), 1237.

3. Criminal law 🔑1202(6)

If evidence, without contradiction, established that tentative finding of habitual criminal status was inadvertent in that, as a matter of law, a prior conviction relied on was incompetent as a basis for a finding, trial court's failure to provide that defendant was not a habitual criminal, would constitute an abuse of discretion within provision of Penal Code that in exceptional cases, at any time not later than 60 days after actual commencement of imprisonment, court, may, in its discretion, provide that defendant is not an habitual criminal. Pen.Code, § 644(c).

4. Criminal law 🔑1202(7)

Where evidence is sufficient to establish that a defendant has suffered requisite prior convictions, and there is a substantial conflict in claimed showing that case is "exceptional" within provision of code that in "exceptional" cases, at any time not later than 60 days after actual commencement of imprisonment, court may, in its discretion, provide that defendant is not an habitual criminal, if there exists substantial conflict in inference to be drawn and as to whether interests of state will be best served by providing that defendant is not an habitual criminal, or by letting contrary determinations stand, then court's decision, either way, is beyond appellate intervention. Pen. Code, § 644(c).

5. Criminal law 🔑1202(1)

The enumeration of "burglary" in the Habitual Criminal Act as one of the offenses on which the determination of habitual criminality can be based includes second degree burglary. Pen.Code, § 644(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Burglary".

6. Criminal law 🔑1202(1)

Conviction in New Jersey of breaking and entering with intent to steal, though denominated a "high misdemeanor" in New Jersey, was an offense within Habitual Criminal Act in California on which a determination of habitual criminality could be based, since New Jersey denomination of the offense was not controlling, and the offense corresponded to California felony of "burglary". Pen.Code, §§ 459–461; N.J.S.A. 2:115–1, 2.

7. Criminal law 🔑1202(1)

Sentence on conviction in New Jersey of breaking and entering with intent to steal to "reformatory" when defendant was only 16 years of age was equivalent to service of a term in a "state prison" within California Habitual Criminal Act, in view of character of reformatory as a penal institution, and in view that it is character of institution and its inmates together with nature of proceedings leading to confinement therein which determine its status for purpose of the Act. Pen.Code, §§ 459–461, 644; N.J.S.A. 2:103–5, 30:1–7, 30:4–146, 147.

See Words and Phrases, Permanent Edition, for all other definitions of "Reformatory" and "State Prison".

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Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Bernard Stein and Morris Leder were convicted, on a plea of guilty, of armed robbery and were adjudicated to be habitual criminals with two prior convictions. From an order denying defendants' motion to set aside the finding that defendants were habitual criminals, they appeal.

Order affirmed.

Prior opinion 184 P.2d 20.

Morris Lavine, of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., and William E. Simpson, Dist. Atty., and Jere Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

SCHAUER, Justice.

On November 12, 1946, defendants Bernard Stein and Morris Leder pleaded guilty to two charges of robbery, admitted that at the time of the commission of the offenses they were armed with loaded pistols, and were adjudged guilty of robbery of the first degree. In addition to the adjudications of guilt of the substantive offenses the court found that each defendant was "an HABITUAL Criminal with two prior convictions." Certain other charges against defendants (robbery and kidnapping for the purpose of robbery) were dismissed. No appeals from the judgments of conviction were taken. On December 11, 1946, after the time for appeal from the judgments had passed (Rules on Appeal, Rule 31), defendants filed "notice of motion * * * to set aside the finding and judgment that defendants are habitual criminals." On December 17 the motion was presented on behalf of both defendants and as to each it was contended, for reasons hereinafter summarized, that the case is "exceptional" within the purview of subdivision (c) of section 644, and consequently, that the earlier finding of habitual criminal status should be vacated. Defendants appeal from the order denying their motion.

The People urge that the denial of defendants' motion is not an appealable order and, therefore, that defendants' contentions cannot be considered by this court; they also dispute the merits of such contentions. We have concluded that defendants are entitled to appellate review of these proceedings after final judgment, but that on the merits the trial court's refusal to set aside the determinations of habitual criminality was correct.

Appealability of Order

It is defendants' position that their motion was authorized by subdivision (c) of section 644 of the Penal Code ("in exceptional cases, at any time not later than 60 days after the actual commencement of imprisonment, the court may, in its discretion, provide that the defendant is not an habitual criminal"), and that the order denying the motion is appealable because it is an "order made after judgment, affecting the substantial rights of the party" (Penal Code, § 1237).

The People rely upon People v. Simms (1940), 41 Cal.App.2d 466, 469, 107 P.2d 86, 88, which holds that such a refusal "to provide that the defendant is not an habitual criminal" is not an appealable order. Such holding, according to the District Court of Appeal, was impelled by People v. Carkeek (1939), 35 Cal.App. 2d 499, 506, 96 P.2d 132. The Carkeek case, and People v. Tindall (1939), 35 Cal. App. 2d 507, 96 P.2d 136, which follows it, did not involve motions made under subdivision (c) of section 644; such cases dismissed appeals from orders denying motions, made many months after the judgments became final, to modify such judgments by striking therefrom the determination of habitual criminality; their holdings are based upon the view that to allow an appeal from an order denying a motion to modify a final judgment, where the matter presented for review could have been considered on appeal from the judgment, would in effect nullify the limitation on the time for appeal. This reasoning does not apply to the present appeal, which is from a ruling that must be made within "60 days after the actual commencement of imprisonment" and in the making of which ruling the court must exercise judicial discretion.

[1, 2] According to the Simms case (page 469 of 41 Cal.App.2d, page 88 of 107 P.2d) a motion for relief under subdivision (c) of section 644 "merely asks the court to repeat or overrule the former

ruling on the same facts." This is not correct. Subdivision (c) provides for relief from the earlier and more or less tentative finding of habitual criminal status where the court at the later hearing in the exercise of its discretion determines that the case is "exceptional." The Legislature has not undertaken to enumerate the facts, or even to indicate the character of the showing, which may be considered as establishing that the case is "exceptional." Hence, the field of discretion is large. Nevertheless, it must be a sound judicial discretion, based upon reason, law, and the facts, not upon caprice, sympathy or whimsy (Gossman v. Gossman (1942), 52 Cal.App.2d 184, 194–195, 126 P.2d 178). Since the court is given the power to relieve the defendant of the earlier determination; since that power must be exercised within the bounds of judicial discretion; and since the order is made after final judgment and affects the substantial rights of the defendant, it appears that the defendant should have the right to invoke exercise of the court's power by motion, with the production of supporting evidence, to that end, and that, from an adverse ruling, a right of appeal is within the reach of subdivision (3) of section 1237 of the Penal Code. Expressions to the contrary in People v. Simms (1940), supra, 41 Cal.App.2d 466, 469, 107 P.2d 86, are disapproved.

Scope of Defendants' Showing

Generally speaking, as to each defendant the attempt to show that his case is "exceptional" was based primarily upon the proposition that because of some infirmity, or near infirmity, in one of his two prior convictions, and because of the character of the earlier offense, the age of the defendant, or the nature of an institution in which he had previously been confined, the particular defendant does not fall within the class of persons upon whom the habitual criminal act was designed, or should be allowed, to operate.

[3, 4] If the evidence, without contradiction, established as to either defendant that the first or tentative* finding of habitual criminal status was inadvertent or improvident in that as a matter of law a prior conviction which had been relied upon was wholly incompetent as a basis for the finding, then it would seem that the failure of the court to "provide that the defendant is not an habitual criminal" would constitute an abuse of—in other words, exceed—the court's discretion. But where the evidence is sufficient to establish that a defendant has suffered the requisite prior convictions and there is a substantial conflict in the claimed showing that the case is "exceptional," or, even if it be assumed to be "exceptional" if there exists substantial conflict in the inference to be drawn as to whether the interests of the state will be best served by providing that "the defendant is not an habitual criminal" or by letting the contrary determination stand, then the decision of the trial court, either way, would appear to be authorized and beyond appellate intervention.

On this appeal the evidence is such (and this is at least impliedly recognized by defendants) that the defendants cannot hope to prevail unless they can establish that as a matter of law one or more of the relied upon prior convictions is incompetent within the purview of section 644. We consider their several claims in this regard, separately.

Correctness of Determination That Leder is an Habitual Criminal

[5] The information alleges and Leder admitted that he was convicted of burglary,

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* That the first finding, in this case, of habitual criminal status, was regarded by all parties concerned, including the trial judge, as being merely tentative or provisional is established by the record. Among other things, the trial judge stated, at the original hearing, that "as counsel has indicated, there is time for reconsidering the matter if sufficient evidence is brought to us to justify a modification * * * there is time within sixty days of the actual incarceration of the defendants to bring up this matter again. In making that statement, I want all of you to understand that I am not intimating that we will do anything about it, but the law does provide that it may be reconsidered at any time within sixty days."

a felony, in California in 1936, and served a term of imprisonment therefor in the state prison. He contends that, since the degree of the burglary was not alleged, admitted or proved, it must be presumed that he was convicted of burglary of the second degree only. This contention is beside the point, for the applicable provision of the Habitual Criminal Act (Penal Code, § 644, subd. (a) [Stats.1945, ch. 934, § 1]) enumerates "burglary," without mention of the degree of the crime, as one of the offenses upon which a determination of habitual criminality can be based. Such provision (material also to consideration of defendant Stein's hereinafter stated contention) is as follows: "Every person convicted in this State of the crime of robbery * * * who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any State prison and/or Federal [penitentiary], either in this State or elsewhere, of the crime of * * * burglary [or other named offenses] * * * shall be adjudged an habitual criminal and shall be punished by imprisonment in the State prison for life."

Correctness of Determination That Stein is an Habitual Criminal

[6] The information alleges that Stein was convicted of "Breaking and Entering and Larceny, a felony," in New Jersey in 1928 and "served a term of imprisonment therefor in a penal institution." Before judgment was pronounced, and again upon argument of the motion under subdivision (c) of section 644, the trial court's attention was directed to the facts that at the time of the commission of the offense Stein was but 16 years of age and that he was confined in the New Jersey Reformatory, not the New Jersey State Prison. Stein admitted the facts of this conviction and confinement. He contends that as a matter of law it is not sufficient to support the determination that he is an habitual criminal.

Stein asserts that the New Jersey conviction "is not a felony within the California Penal Code Section [644]" because the statutes of New Jersey which proscribed breaking and entering with intent to steal stated that such offense was a "high misdemeanor." (N.J.S.A. 2:115-1, 2:115-2 [L.1898, c. 235, §§ 131, 132, p. 830].) The New Jersey denomination of the offense and its grade is not controlling. The question is whether, in New Jersey, it was adjudicated that Stein committed an offense the elements of which correspond to those of an offense enumerated in section 644 of our Penal Code. (In re Wolfson (1947), Cal.Sup., 180 P.2d 326, and cases there cited.) The trial court, with the New Jersey law and the record of the New Jersey conviction before it, correctly determined that the elements of the offense of which Stein was convicted in 1928 corresponded to the essential elements of the California felony of burglary as defined by the statutes in force in 1928. (Penal Code, §§ 459-461 [Stats. 1913, p. 228; Stats.1923, p. 747; Stats.1925, p. 235].)

[7] Stein argues, further, that confinement in the New Jersey "Reformatory" for an offense committed when he was only 16 years of age is not equivalent to service of a term in a "State prison" as required by section 644. The following statutes of New Jersey apply to imprisonment in the "Reformatory": A high misdemeanor is punishable by fine or "imprisonment, with or without hard labor, as the court may direct, for a term not exceeding seven years, or both." (N.J.S.A. 2:103-5 [L.1898, c. 235, § 217, p. 854].) "Any male person between the ages of sixteen and thirty years, who has been convicted of a crime punishable by imprisonment in the state prison, who has not been previously sentenced to a state prison or a penitentiary in this or any other state, may be committed to the reformatory." (N.J.S.A. 30:4-147 [L. 1918, c. 147, § 316, p. 367].) "The New Jersey Reformatory shall include the existing reformatory near Rahway and all farms, camps, quarries or grounds, where prisoners sentenced to the reformatory may, from time to time, be kept, housed or employed." (N.J.S.A. 30:4-146 [L.1918, c. 147, § 315, p. 367].) In 1928 the only correctional or penal institutions of New Jersey wherein Stein could have been imprisoned were the "State Prison" and the "Reformatory" near Rahway. (N.J.S.A. 30:1-7 [L.1918, c. 147, § 118, p. 349].)

We agree with the trial court that the "Reformatory" was a penal institution for young first offenders and (as said in In re Gilliam (1945), 26 Cal.2d 860, 864, 865, 161 P.2d 793, 795, with reference to a federal reformatory) "not at all akin to a training school for juvenile offenders who are committed to the custody of such school but who are not confined therein under sentence of imprisonment." The New Jersey proceeding against Stein was not a "juvenile proceeding"; it was a prosecution for the crime of burglary. "[I]t is the character of the institution and its inmates together with the nature of the proceedings leading to confinement therein which determine its status in relation to the language of the code section [644]." (In re Gilliam (1945), supra, page 863 of 26 Cal.2d page 795 of 161 P.2d; In re Wolfson (1947), supra, Cal.Sup., 180 P.2d 326.)

For the reasons above stated the order appealed from is affirmed as to each defendant.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

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31 Cal.2d 563

In re SMITH'S ESTATE.

GROSS et al. v. JONES et al.

L. A. 20031.

Supreme Court of California.

March 30, 1948.

1. Wills 🔑167

A will may be revoked by an express written declaration of that intent executed with the same formalities required for execution of a will. Probate Code § 74(1).

2. Wills 🔑185

That revocation clause written, dated, and executed by testatrix, was written across face of unexecuted typewritten copy of will, did not destroy its authenticity as valid holographic instrument, since typewritten matter constituted no part of such instrument. Probate Code, § 53.

3. Wills 🔑98

Either a holographic or attested testamentary instrument may refer to and incorporate another testamentary instrument executed with different statutory formalities or an informal or unattested document, so long as the reference is unmistakable or with the aid of extrinsic proof, can be made so.

4. Wills 🔑185

Statement which was written by testatrix across each page of unexecuted copy of will and dated and signed by her, and which declared "this" will revoked and void, by use of quoted word identified will and was a valid effective revocation of will. Probate Code, §§ 53, 74(1).

5. Wills 🔑306

Evidence of extraneous occurrences and declarations of testatrix allegedly bearing upon intent to revoke could not overcome valid express revocation of will written across unexecuted copy thereof

6. Wills 🔑297(4)

Declarations of testatrix are admissible on issue of revocation only where allegedly revocatory act of testator is ambiguous and explainable by such declarations. Probate Code § 74(1).

7. Wills 🔑448, 449

The rule that constructions which lead to total or partial intestacy are not favored applies only where ambiguity exists in language of testator.

SCHAUER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Katherine Allen Smith, also known as Katherine A. Smith, deceased, wherein Peter Gross and Mary Schmitt filed a contest of purported will against Ernest E. Jones and Pomona College, a corporation, and Virgil L. Catching and Ben H. Brown, Public Administrator, filed petitions for letters of administration. From a judgment admitting will to probate, denying probate to revocatory instrument, granting proponent's petition for letters testamentary, and denying petition of Peter Gross for letters of administration, contestants appeal.

Judgment reversed.

Prior opinion 183 P.2d 310.

Louis Thomsen, of Los Angeles, for appellants.

Schweitzer & Schweitzer, of Los Angeles, for respondents.

SHENK, Justice.

This is an appeal by contestants from a judgment admitting a will to probate.

The facts are not in dispute. The questions presented concern the legal effect of an alleged revocation of the will and the correctness of the court's ruling admitting evidence over objection of the testatrix' declarations bearing upon her revocatory intent.

On July 22, 1942, the decedent, then about 58 years of age and describing herself as a widow without descendants, executed a duly attested typewritten document consisting of two pages which she declared to be her last will and testament. By this instrument she purported to leave her entire estate to Pomona College to establish the Katherine Allen Smith Scholarship Fund, and to appoint Ernest E. Jones, treasurer of the college, as executor. She deposited the executed will with her attorney and retained in her own possession an unexecuted carbon copy. She died on January 5, 1946, without recalling the executed document from her attorney's possession and without making another will. After her death there was found among her effects the unexecuted carbon copy of her will but with writing across the face of each page. Obliquely across the first page, extending through all of the typewritten portion, was the following entirely in the decedent's handwriting: "I Katherine Allen Smith do hereby revoke this will it is now nul and void (nul & void) Katherine Allen Smith July 10th 1945." Across the dispositive provisions and testimonium clause of the second page was the following entirely in the decedent's handwriting: "I Katherine Allen Smith do hereby revoke this will it hereby becomes nul and void Katherine Allen Smith July 10th 1945." These two writings will be hereinafter referred to as one writing or instrument. The decedent's estate aggregates in value about $13,000 and appears to have been her separate property by inheritance from her mother. Peter Gross, an uncle, 77 years of age, of North Hollywood, California (formerly of St. Cloud, Minnesota), and Mary Gross Schmitt, an aunt, 75 years of age, of St. Cloud, Minnesota, are the surviving next of kin and heirs at law by intestate succession.

On January 14, 1946, Virgil L. Catching, son of a living sister of the decedent's former husband Smith, and a resident of Los Angeles County, filed a petition for letters of administration as a creditor of the estate. On January 30, 1946, the public administrator of the county filed a petition for letters. Each petition indicated that the heirs of the decedent were unknown. On January 31, 1946, Peter Gross filed a petition for letters of administration alleging the kinship of himself and his sister. In each of the foregoing petitions it was stated that due search and inquiry disclosed that the decedent had not left a will.

On March 7, 1946, Ernest E. Jones, named as executor in the will of July 22, 1942, petitioned for the probate of that instrument and for the issuance to him of letters testamentary. This petition also set forth the revocatory instrument written, dated and signed by the decedent on July 10, 1945, but sought its rejection on the ground that it was not executed in accordance with statutory requirements and that at the time of its execution the decedent did not have testamentary capacity. Peter Gross and Mary Schmitt filed their objections and contest based on the asserted validity of the revocation of July 10, 1945.

A hearing was had on the contest and the answer thereto. The court denied probate to the revocatory instrument, admitted to probate the will of July 22, 1942, granted the proponent's petition for letters testamentary, and denied the petition of Peter

Gross for letters of administration. The contestants appealed from those portions of the judgment which embodied the foregoing orders.

The record does not show that the issue of testamentary incapacity of the decedent in July, 1945, was pressed and the court made no finding thereon. The court found and concluded that the decedent did not intend by the writing of July 10, 1945, to revoke her will. That finding was based on evidence introduced over objection of certain circumstances and declarations of the decedent. The evidence which was thus deemed to bear upon the revocatory intent and in effect to cancel the writing of July 10, 1945, consisted of the following:

In the latter part of June, 1945, Virgil L. Catching, in a conversation with the decedent about his uncle (decedent's former husband), asked if she intended to make reimbursement for moneys expended by her "in-laws" for taxes and other items for the home. The decedent stated her intent substantially as declared in her executed will. The nephew expressed a doubt that she had sufficient to do "much good along that line"; that it might be "kind of foolish," and that since there were so many of her "in-laws" who had helped her out from time to time she should make some provision for them. Another conversation was had between them when the decedent was in the hospital and six days prior to her death, wherein she stated that her attorney had all the papers pertaining to her estate with instructions as to what to do, that she wished to be buried "in the same order or building" as her parents, and that she was leaving her home to Virgil and his mother. There was testimony that on several occasions the decedent said that she had no living relatives. It appeared that the last times she heard from Peter Gross and Mary Schmitt were forty and twenty-five years ago respectively. Subsequent to the revocatory writing the decedent stated to Virgil's mother that her will and other papers were in the custody of her attorney, and that she would like Virgil and her (Virgil's mother) to have her home. In December, 1945, the decedent told the mother that she had made a will giving all her property to Pomona College to endow a scholarship. About August, 1945, in a telephone conversation with her attorney the decedent was reminded that her papers were in his possession to which she replied, "Yes, I know that." It also appears that for about a year prior to her death the decedent had not gone to the office of her attorney but about six months prior to her death had reported to him in a telephone conversation that she was suffering from some physical ailment.

[1] A will may be revoked by an express written declaration of that intent executed with the same formalities required for the execution of a will. Probate Code, section 74 (1). The contestants urge that the formalities were here complied with, that is, that the revocation of July 10, 1945, was entirely written, dated and signed by the hand of the testatrix and that it was entitled to be admitted to probate as a valid holographic instrument. Section 53, Probate Code.

It is conceded, as the court found, that the writing of July 10, 1945, including the date and signature, was by the hand of the decedent. It is also conceded that if she had specifically referred in that instrument to the will of July 22, 1942, as the will intended to be revoked, no question could arise as to the effectiveness of the writing as a revocation. But the proponents of the will urge that without the specific reference the holographic writing is ineffective as a revocation.

[2] The mere writing of the revocation clause across the face of the typewritten copy of the will of July 22, 1942, did not destroy its authenticity as a valid holographic instrument. The typewritten portion of the paper had nothing to do with the holographic writing as such. The holographic instrument was self-contained and the typewriting on the sheets is therefore deemed not a part of it. Probate Code, section 53; Estate of Oldham, 203 Cal. 618, 265 P. 183; Estate of De Caccia, 205 Cal. 719, 273 P. 552, 61 A.L.R. 393; Estate of Atkinson, 110 Cal.App. 499, 502, 294 P. 425; cf. Estate of Thorn, 183 Cal. 512, 192 P. 19; Estate of Bernard, 197

Cal. 36, 239 P. 404; Estate of Bower, 11 Cal.2d 180, 78 P.2d 1012.

[3, 4] The holographic writing was made across the copy of the typewritten will for the sole purpose of identifying the will intended to be revoked. That purpose is made certain by the use of the words "this will" in expressing the revocatory intent. It has long been settled in this state that either a holographic or an attested testamentary instrument may refer to and incorporate another testamentary instrument executed with different statutory formalities or an informal or unattested document, so long as the reference is unmistakable or with the aid of extrinsic proof can be made so. Estate of Skerrett, 67 Cal. 585, 8 P. 181; In re Soher, 78 Cal. 477, 21 P. 8; Estate of Young, 123 Cal. 337, 55 P. 1011, where the rule was recognized but the reference held inexplicit; Estate of Plumel, 151 Cal. 77, 79, 80, 90 P. 192, 121 Am.St.Rep. 100, citing cases; Simon v. Grayson, 15 Cal.2d 531, 102 P.2d 1081; Estate of Wunderle, 30 Cal.2d 274, 181 P.2d 874; Estate of Sullivan, 94 Cal.App. 674, 678, 271 P. 753; Estate of Atkinson, supra, 110 Cal.App. 499, 502, 294 P. 425; Estate of Miller, 128 Cal.App. 176, 181, 17 P.2d 181, citing cases; Estate of Martin, 31 Cal.App.2d 501, 505, 507, 88 P.2d 234. The writing of the revocation across the typewritten face of the copy of the will of July 22, 1945, with the use of the words "this will," was but a substitute for a more specific reference; and since that language with the aid of the typewritten copy upon which it appears identified the will intended to be revoked, it served the purpose of a specific reference. All that is here required is that the revocatory writing should so refer to the will that its identity will be unmistakable. That the language of the writing of July 10, 1945, across the face of the copy, does unmistakably identify it can admit of no doubt. It is therefore a valid effective revocation of the will of July 22, 1942.

[5-7] Once it is determined that the decedent revoked her prior will by the writing of July 10, 1945, there is no room for speculation. Therefore the evidence received of extraneous occurrences and declarations claimed to bear upon the intent to revoke cannot overcome the valid express revocation. It is said in 4 Page on Wills, p. 665, with citation of cases, that declarations of the testator are not admissible to show that an express revocation clause was not intended to revoke a prior will. The statement relied on from Estate of Thompson, 44 Cal.App.2d 774, 776, 112 P.2d 937, that declarations of a testatrix are admissible on the issue of revocation, standing alone, is too broad. That rule is applied, as it was in that case, where it is sought to establish a lost or destroyed will; or in the case of a will executed in duplicate one executed copy of which was destroyed (Estate of Janes, 18 Cal.2d 512, 116 P.2d 438; Managle v. Parker, 75 N.H. 139, 71 A. 637, 24 L.R.A., N.S., 180, Ann.Cas.1912A, 269); or to explain cancellation marks on the original will not amounting to an express revocation. Estate of Olmsted, 122 Cal. 224, 54 P. 745. See also cases collected in Note, 24 L.R.A., N.S., p. 180. The basis of the rule in such cases is that the act of the testator is ambiguous and is explainable by his declarations. It is the rule which applies when the language of a purported testamentary writing is ambiguous and extraneous declarations are necessary to determine the testamentary intent. See Estate of Pagel, 52 Cal.App.2d 38, 125 P.2d 853. The rule here applicable is not the rule which governs in the establishment of testamentary intent by ambiguous writing or conduct. Nor is there room for the application of the rule that constructions which lead to total or partial intestacy are not favored. That rule also applies only where there exists an ambiguity or uncertainty in the language of the testator. Estate of Wierzbicky, 69 Cal.App.2d 690, 693, 159 P.2d 699. Here there can be no inference other than that which is in accord with the unambiguous express revocation.

On this record all that was properly before the court was a duly executed express revocation of a prior will, which presented a case of intestacy and called for the issuance of letters of administration to the party entitled thereto. Luckey v. Superior Court, 209 Cal. 360, 365, 287 P. 450.

Those portions of the judgment admitting to probate the instrument of July 22, 1942, granting letters testamentary thereon, denying admission to probate of the holographic revocation of July 10, 1945, and denying the petition of Peter Gross for letters of administration are reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

I dissent. The majority opinion is essentially based on the statement that "The facts are not in dispute." But according to the record as I view it the facts *are* in dispute.

The crucial question in the case is whether the decedent executed the alleged revocatory instrument with intent to effect revocation of the will of July 22, 1942. Without such intent the later writing would be wholly ineffective. Since the decedent alone could have given direct evidence of her intent, and since her lips are stilled, resolution of the question must depend upon indirect or circumstantial evidence or upon rules of law as to the burden of proof. Since the due execution of the will was established the burden was upon contestants to prove the *animus revocandi* of the testatrix. The evidence upon this subject is in substantial conflict, at least in relation to the inferences to be drawn from the circumstances shown. An inference, of course, is evidence. (Code of Civil Procedure, § 1957.)

The evidence on the issue in question is conflicting in the following respects: An intent to revoke the will of July 22, 1942, is inferable from the very writing by decedent of the language used in the claimed revocatory document; such evidence, however, obviously is not conclusive of the intent with which it was penned. The testatrix may well have believed that the words written on the carbon copy of her will would have no effect whatsoever unless she published such later writing as her formal act. If she had ever executed a deed or contract it is not unlikely that she had been told that mere signing of the document would have no legal effect, that it would have to be delivered as well as signed to be effective; she may have thought the same rule would apply to an instrument revocatory of a formally executed will. She may have *contemplated* revocation but decided against it; in such contemplation she may have written the endorsement on the carbon copy of her will believing that those words would have no effect unless she secured the formally executed will from her attorney and made the endorsement on that document. This last hypothesis is one which the trial judge, in the light of all the evidence, may well have deemed most likely to be correct. Supporting such view are the following facts: The will of July 22, 1942, was formally executed and left with decedent''s long-time attorney; the claimed revocatory instrument was never delivered or even exhibited to any person during decedent's lifetime; decedent's attorney had drawn the will for her; he was told nothing of an intent to revoke it; on the contrary after the date of the alleged revocatory writing he talked with decedent and according to the record stated "'You know I have your will and papers here' and she said 'Yes, I know that'"; decedent also, subsequent to the asserted revocation date, made statements to the witness Julia O. Spencer which are definitely and substantially inconsistent with the claimed *animus revocandi;* likewise, the testimony of Virgil L. Catching, as to conversations with decedent both shortly before and after the claimed revocation date, shows a state of mind of the decedent inconsistent with revocation; the original will was left outstanding in the hands of decedent's attorney; the circumstances of decedent's estate and her relationship to the persons who seek to succeed thereto by overthrowing her will are shown to be such that the dispositive provisions of the will appear to be natural and reasonable; lastly, no motive for revocation is shown and no substitute will or altered testamentary plan is suggested to have been determined upon by the testatrix.

It is not contended that the revocatory instrument, if it ever was executed with intent to revoke the will, could itself be revoked and the will reinstated by any oral declarations of the testatrix; the proponents make no such suggestion. But it is most earnestly contended, and I think with full justification, that the evidence supports the conclusion that the testatrix merely contemplated and decided against revocation; that the asserted revocatory instrument never was executed with intent to make it effective; and that the original will never has been revoked. The trial court, having heard the evidence, specifically found "That testatrix did not intend by writing said words of July 10, 1945 to revoke or alter said Will of July 22, 1942, in whole or in part," and "That the Will of July 22, 1942, is the Last Will and Testament of Katherine Allen Smith, deceased, was considered as such by decedent at all times from the date of its execution until the date of her death, and at no time was revoked by decedent, in whole or in part."

The evidence upon which the trial court made its findings of fact, including the evidence as to the declarations of the testatrix, was competent to that end. (Estate of Thompson (1941), 44 Cal.App.2d 774, 776, 112 P.2d 937.) Under such circumstances it is our duty to affirm the judgment. (Estate of Bristol (1943), 23 Cal.2d 221, 223, 143 P.2d 689; Cate v. Certainteed Prod. Co. (1943), 23 Cal.2d 444, 448, 144 P.2d 335; Estate of Teel (1944), 25 Cal.2d 520, 526, 154 P.2d 384; Fackrell v. City of San Diego (1945), 26 Cal.2d 196, 207, 157 P.2d 625, 158 A.L.R. 773; Viner v. Untrecht (1945), 26 Cal. 2d 261, 267, 158 P.2d 3; Pewitt v. Riley (1945), 27 Cal.2d 310, 313, 163 P.2d 873; De Young v. De Young (1946), 27 Cal. 2d 521, 526, 165 P.2d 457; Millsap v. National Funding Co. (1944), 66 Cal.App.2d 658, 665, 152 P.2d 634; So. Calif. Freight Lines v. State Bd. of Equalization (1945), 72 Cal.App.2d 26, 29, 163 P.2d 776; Berry v. Chaplin (1946), 74 Cal.App.2d 652, 663, 169 P.2d 453; Medina v. Van Camp Sea Food Co. (1946), 75 Cal.App.2d 551, 556, 171 P.2d 445; Seidenberg v. George (1946), 76 Cal.App.2d 306, 308, 172 P.2d 891; see also cases epitomized in dissenting opinion in Isenberg v. California Emp. Stab. Comm. (Cal.Sup.1947), 180 P. 2d 11.)

The majority opinion leaps completely over the proposition that the finding of the trial court on conflicting evidence is binding on us, by its assertion, previously mentioned, that "The facts are not in dispute," and its assumption from then on that the testatrix, by her equivocal act, *intended* to revoke her will. As also previously shown, the crucial fact question in the case is whether she intended by her act to revoke the will. Yet the majority, without discussing the sufficiency of the evidence, asserts that the facts are not in dispute, assumes the intent to revoke, and declares, "Once it is determined that the decedent revoked her prior will by the writing of July 10, 1945, there is no room for speculation. Therefore the evidence received of extraneous occurrences and declarations claimed to bear upon the intent to revoke cannot overcome the valid express revocation. * * * Here there can be no inference other than that which is in accord with the unambiguous express revocation."

It is apparent that this court, by the language above quoted, has made the claimed revocatory writing *conclusive and exclusive* evidence of the intent with which it was written, although there is no evidence whatsoever that the writer ever published the document as her act, and despite the fact that substantially all the evidence on the subject tends to show that she never intended to revoke her will. The rule made by the majority seemingly would apply equally even though it were indisputably proven that at the time decedent penned the asserted revocatory words on the copy she declared that she was merely contemplating possible future revocation of her original, executed will and that she was writing the words across the face of a carbon copy of her will merely to serve as a memorandum in the event that in the future she should decide to revoke her will, in which case she would procure the original executed will from her attorney and write the same language thereon. Under the rule laid down by the majority, the result, it seems, would also be the same, even though the decedent made the above suggested declarations of intent in writing, and notwithstanding it should also appear that her attorney advised her that the making of the memorandum on the carbon copy would be meaningless unless she later determined to, and did, endorse the revocatory language on the original will. In fact, if the majority opinion is to be followed, upon a new trial an offer to prove all of the above suggested facts would be rejected.

In my view, questions of fact on conflicting evidence should be left to resolution by trial courts. The judgment here should be affirmed.

83 Cal.App.2d 534

In the Matter of the ESTATE of William LLEWELLYN, Deceased.

David E. LLEWELLYN, proponent and appellant, v. Gwendolyn M. CHEESEWRIGHT and Reese L. Milner, contestants and respondents.

Civ. 15789.

Supreme Court of California.

April 6, 1948.

Dissenting Opinion April 7, 1948.

On petition for hearing.

Prior opinion, 189 P.2d 822.

Hearing denied.

CARTER, Justice (dissenting).

I dissent from the order denying respondents' petition for hearing in the Supreme Court in the above entitled cause primarily because, in my opinion, it was an abuse of discretion for the appellate court to direct the entry of a judgment in favor of appellant. While it is true that section 629 of the Code of Civil Procedure provides that if a motion for a directed verdict or for a judgment notwithstanding the verdict is denied, the appellate court on appeal from the judgment may order judgment to be entered in favor of the appellant when it appears from the whole record that a verdict should have been so directed at the trial, I do not believe that the court was warranted in making such direction in this case even if the views expressed by the court as to the insufficiency of the evidence is correct. It is my view that in cases such as this where it may be possible for respondent to offer additional evidence on the retrial of the case, he should have that opportunity, and that the power of the appellate court to direct a judgment notwithstanding the verdict should be exercised only in those cases where it clearly appears that it would be impossible for a party against whom the judgment is directed to produce sufficient evidence to support a judgment in his favor upon a retrial of the case. Those familiar with trial practice know that it quite often happens that a stronger case can be made on a retrial than during the original trial. Furthermore, until the appellate court held that the evidence was insufficient to support the judgment, the prevailing party in the trial court had reason to believe that he had presented all of the proof necessary to support the judgment inasmuch as the trial court had ruled in his favor in denying motions for a nonsuit, directed verdict and judgment notwithstanding the verdict. In my opinion it is out of harmony with the modern concept of justice and fairness that a prevailing party in the trial court should be precluded by an arbitrary ruling of an appellate court from the opportunity of presenting evidence which may be readily available on a retrial to support a judgment in his favor.

From the cursory examination which I have been able to make of the record in this case, it is my present view that under settled rules governing an appellate court in passing upon the weight and sufficiency of the evidence and the credibility of witnesses, there is ample evidence in the record in this case to support the judgment of the trial court on the grounds of both mental incompetency and undue influence and that the judgment should therefore be affirmed, but I have not had an opportunity during the limited time allowed for the review of a petition for hearing to make an exhaustive study of the record and I am therefore not in a position at this time to express a considered opinion as to what final determination should be made in this case.

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31 Cal.2d 608

In re PARKER'S ADOPTION.

S. F. 17453.

Supreme Court of California.

April 1, 1948.

Rehearing Denied April 29, 1948.

1. Adoption 🔑1

The procedure for adoption of children was unknown to common law.

2. Adoption 🔑7

Under the statute respecting parental consent to the adoption of a child as the statute read in 1943, a consent tendered to the department of social welfare is not operative without the approval of the Department, so that, if the department does not accept the parent's consent, it is ineffective and it then becomes necessary to secure a consent signed in open court. Civ.Code, § 226.

3. Statutes 🔑219

Administrative interpretations of statutes will be accorded great respect by the courts and will be followed if not clearly erroneous.

4. Adoption 🔑7

Under statute as it existed in 1943 before amendment in 1945 and making consent of a parent to adoption of child if not accepted by department of social welfare ineffective, the mere signing by mother of illegitimate child of a consent to adoption before agent of department of social welfare and delivery of paper to department did not constitute an "acceptance" where form prescribed by department and signed by mother referred to the statute and also stated consent was not to be final until acceptance after investigation. Civ.Code, § 226.

See Words and Phrases, Permanent Edition, for all other definitions of "Acceptance".

5. Adoption 🔑7

Under statute providing that parental consent where necessary for adoption may be secured only by consent signed in presence of an agent of department of social welfare on a form prescribed by department or by consent signed in open court with permission of court, and giving department discretion as to whether to accept consent, mother who signed consent to adoption of illegitimate child in presence of agent of department was not estopped from revoking consent before acceptance by department. Civ.Code, § 226.

6. Adoption 🔑15

Where there had been no declaration in trial court that illegitimate child was free from parental control and custody by reason of abandonment, order of adoption could not be supported in Supreme Court upon theory of abandonment notwithstanding evidence in record which could be urged in support of an order declaring child free of mother, thus eliminating the necessity for consent of mother to adoption. Civ.Code, § 224; Welfare and Institutions Code, § 701 et seq.

SCHAUER, J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the adoption of Robert James Parker, a minor, and proceeding in the matter of Robert James West for a writ of habeas corpus, which were consolidated, and wherein Virginia E. Paige and Edward Francis Paige were petitioners for the adoption of the minor and Bertha Anderson was objector. From decree of adoption, Bertha Anderson appeals.

Reversed.

Prior opinion, 183 P.2d 119.

Schofield & Hanson, Allison E. Schofield, and Raymond L. Hanson, all of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., amici curiæ.

Jesse H. Miller and Joseph F. Leonard, both of San Francisco, for respondents.

GIBSON, Chief Justice.

After respondents, Mr. and Mrs. E. F. Paige, had instituted this proceeding to adopt Robert James Parker, an illegitimate child, the natural mother, Bertha Anderson (formerly Bertha Parker West) sought to recover custody of the child by a writ of habeas corpus. The two proceedings were consolidated for hearing, the writ was denied, and the petition for adoption was granted. This appeal is taken by the natural mother from the decree of adoption.

When the child was born on September 4, 1940, appellant was separated from her then husband, Thomas J. West, whom she had not seen for more than two years. Appellant testified that her brother's stepson was the father of the child. The Wests had four legitimate children, and appellant was afraid that if her husband found out about Robert the other children might be taken from her. Robert was cared for by relatives until April 1943, when appellant gave him to respondents for adoption. The petition for adoption was filed about six months later, and the State Department of Social Welfare was notified of the proceedings on October 19, 1943.

Appellant signed the following "consent to adoption" in the presence of a representative of the department on April 5, 1944: "I, the undersigned, being the mother of the above named minor child, and entitled to the sole custody of the said child, according to section 226 of the Civil Code, do hereby give my full and free consent to the adoption of said child by respondents, it being fully understood by me that I am giving up all my right of custody, services and earnings of said child and that said child cannot be reclaimed by me. *In signing this consent, I understand that it does not become final until it has been accepted by the State Department of Social Welfare after ascertaining that the best interest of the child will be promoted by the proposed adoption.* * * *" (Italics added.)

Two days after this consent was taken, the department filed a report in the adoption proceeding stating it was "removing the case from its calendar until the legal status of the child and the right of the parents to give consent has been established. As soon as this has been done, the * * * Department * * * will complete the investigation and submit its report to the Court." The word "void" was written across the "consent to adoption" by Mrs. Phillips, the department representative who witnessed appellant's signature to the consent, but the record is not clear that this was done when the foregoing report was filed with the superior court. However, since Mrs. Phillips left the department in July 1944, it must have been done before that time.

The final report of the department, filed May 10, 1945, stated that because of its inability to obtain the consent of West it refused to consent to the adoption and recommended that the petition be denied without prejudice. When this report was filed appellant joined with respondents in requesting the court to proceed with the adoption without the consent of West. This request was refused by the court apparently because West was the presumptive father and had received no notice of the proceedings.

In October 1945, appellant married her present husband, Anderson, who was the first person to speak to respondents concerning the adoption of the child. After the marriage appellant changed her mind about the child, and in May 1946 she notified the department that she refused to give her consent to the adoption, and she sought to regain the custody of the child by a writ of habeas corpus. Thereafter West filed his consent to the adoption by such persons as the court might designate.

The order for adoption, in reciting facts found by the court, states that appellant voluntarily appeared at the department and signed a consent to adoption, that she relinquished and waived all of her rights to the custody of the child, and that her attempt to revoke the written consent was void and of no force or effect. The court also found that respondents had complied with the provisions of the Civil Code with reference to the adoption, that they were fit and proper persons, and that the interest and welfare of the child will be best served by the adoption. It was ordered that the consent signed by appellant be delivered by the department to the clerk of the court for filing.

The question is whether there was a sufficient consent to give the court power to render the adoption decree.

[1] The procedure for the adoption of children was unknown to common law (Matter of Cozza, 163 Cal. 514, 522, 126 P. 161, Ann.Cas.1914A, 214), and we must look to the statutes under which these proceedings were taken to determine whether the consent was sufficient. Section 224 of the Civil Code provides, with certain exceptions not pertinent here, that an illegitimate child cannot be adopted without the consent of its mother if she is living. Section 226 of the Civil Code, which prescribes the procedure to be followed in adoption proceedings like the present one, provided in 1943, St.1943, p. 2748, that: "In all cases in which consent is required * * * the consent * * * for the adoption must be signed in the presence of an agent of the * * * Department * * * on a form prescribed by such department and filed with the clerk of the superior court * * *. Such consent, when reciting that the person giving it is entitled to the sole custody of the minor child, shall, when duly acknowledged before such agent, be prima facie evidence of the right of the person making it to the sole custody of the child and such person's sole right to consent."

[2] The section also provided that "it shall be the duty of the Department * * * to ascertain whether the child is a proper subject for adoption and whether the proposed home is suitable for the child, prior to accepting the consent of a natural parent to the adoption of the child by the petitioner."* The department is required to submit to the court a full report of the facts disclosed by its inquiry, with a recommendation regarding the granting of the petition, within one hundred and eighty days after the filing of the petition. If for a period of 180 days from the date of filing the petition or upon the expiration of any extension of the period granted by the court, the department "fails or refuses to accept the consent of the natural parent or parents to the adoption, or if said department fails or refuses to file or to give its consent, to an adoption in those cases where its consent is required by this chapter, either the natural parent or parents or the petitioner may appeal from such failure or refusal to the superior court of the county in which the petition is filed, in which event the clerk shall immediately notify the Department * * * of such appeal and the department shall within 10 days file a report of its findings and reasons for its failure or refusal to consent to the adoption or to accept the consent of the natural parent. After the filing of said findings, the court may, if it deems that the welfare of the child will be promoted by said adoption, allow the signing of the consent by the natural parent or parents in open court, or if the appeal be from the refusal of said department * * * to consent thereto, grant the petition without such consent."

It thus appears, with certain exceptions not material here, that there are only two methods provided by the code for securing parental consent to an adoption: (1) By a consent signed in the presence of an agent of the department on a form prescribed by it, and (2) by a consent signed in open court with permission of the court. In the present case, appellant did not sign a consent in open court, and the question is, therefore, whether under the facts of this case the consent signed in the presence of the department's agent was sufficient to bring the proceeding within the first method provided by statute.

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* In 1945 section 226 of the Civil Code was amended, and the portion quoted above was changed to read: "it shall be the duty of the Department * * * to accept the consent of the natural parents to the adoption of the child by petitioners and to ascertain whether the child is a proper subject for adoption and whether the proposed home is suitable for the child, prior to filing the report with the court." This and other changes made in section 226 in 1945 and 1947 are not directly applicable here because the report was filed before the effective date of the amendments.

The form of consent prescribed by the department and signed by appellant expressly stated that it should not become final until it was accepted by the department. The language in section 226, as it read in 1943, when considered as a whole plainly indicates that a consent tendered to the department is not operative without the approval of the department. No other construction would give full effect to the provision that if the department *"fails or refuses to accept* the consent of the natural parent or parents to the adoption * * * either the natural parent or parents or the petitioner may *appeal* from such * * * refusal to the superior court * * *." (Italics added.) Use of the word "appeal" implies that the department has a discretionary right, at least in the first instance, to refuse to accept a tendered consent. The effect of the statute is that in the event of such a failure or refusal, the parent or petitioner has no right to compel the department to approve the consent, but upon the appeal "the court may, if it deems that the welfare of the child will be promoted by said adoption, allow the signing of the consent * * * in open court."

It follows that, if the department does not accept the parent's consent, it is ineffective, and it then becomes necessary to secure a consent signed in open court. The parent may not, as a matter of right, be able to revoke a consent after it has been witnessed and approved by the department, and we expressly withhold approval of the statement in Adoption of McDonnell, 77 Cal. App.2d 805, 812, 176 P.2d 778, 782, that "natural parents have the right to withdraw a consent to adoption at any time before the rendition of the decree of adoption." We need not determine this question here, since it is apparent that no problem of revocation arises where the department fails to accept a tendered consent because, in such event, there would be no "consent" within the meaning of section 226 unless there was a consent signed in open court.

The existence of discretionary power in the department to approve or reject a consent is also indicated by the earlier form of the appeal provision in section 226 which specified a right to appeal only where the department "refuses to accept the consent * * * *on the ground that the best interests of the child will not be promoted by the proposed adoption."* (Italics added.) § 226, as amended in 1931. From this language it is obvious that the Legislature contemplated that the department should exercise discretionary powers, and the fact that the right to appeal was subsequently broadened by removing the limitation on that right certainly did not terminate those powers.

This construction is further supported by the provision in section 226, effective from 1931 to the date of the amendment in 1945, making it the duty of the department to ascertain whether the child was a proper subject for adoption and whether the proposed home was suitable "prior to accepting the consent of a natural parent." There would be little purpose to such a provision if the department did not have the right to refuse to accept the consent on the basis of facts discovered upon its investigation.

[3] There are numerous reasons for legislation permitting the department, after an investigation, to withhold approval of a tendered consent. One reason is to safeguard against the possibility of duress. Another is to ascertain whether the legal husband of the mother of a child asserted to be illegitimate has notice of the proceedings in order to give him an opportunity to contest the claim of illegitimacy and show he is the real father. The department should have discretion to refuse to accept a consent which by statute is made "prima facie evidence of the right of the person making it to the sole custody of the child and such person's sole right to consent" and which may therefore have the effect of rebutting the presumption of legitimacy. This is particularly true where, as here, the department has knowledge that the consenting parent was married when the child was

conceived, and no notice has been given the presumptive father.

The department's manual of procedure shows that it has interpreted the statute as giving it discretion to refuse to take or accept a consent. The manual states that in order to avoid the upsetting effect and the physical and emotional stress resulting from childbirth, the consent of the mother shall not be taken during confinement; that consent is not to be taken unless it is full and free, and if the mother seems to be in doubt, she is to be given further time to decide; and that where there is a presumptive father, his consent or a court order refuting the presumption of legitimacy must be obtained. It is the settled rule, of course, that administrative interpretations such as these will be accorded great respect by the courts and will be followed if not clearly erroneous. County of Los Angeles v. Frisbie, 19 Cal.2d 634, 643, 122 P.2d 526; Bodinson Mfg. Co. v. California E. Comm., 17 Cal.2d 321, 325, 109 P.2d 935; Los Angeles v. Superior Ct., 17 Cal.2d 707, 712, 112 P.2d 10.

The mere signing of a consent before an agent of the department together with physical receipt of the paper by the department does not necessarily constitute an acceptance or approval. The code section as it read in 1943 did not so provide, and no good reason has been shown for writing it into the statute even where, as here, some investigation was made by the department before it witnessed the signature of the mother. To the contrary, both the purposes of the statute and orderly administrative procedure indicate that the department should be permitted to obtain the signature of the mother either before or during the course of its investigation and withhold acceptance until it has had ample time to give proper consideration to the matter. Moreover, the department might be unwilling to conduct a lengthy and expensive investigation upon the mere oral statement of the mother that she is willing to give up her child. To hold that the mere act of receiving a paper signed by the mother is per se an approval of the adoption or acceptance of the consent might result in depriving the presumptive father of notice and might in many instances prevent the department from fully carrying out its statutory duty of ascertaining the facts relating to the child, its parents, and the proposed home.

[4] In the present case it was made clear to appellant at the time the consent was signed that the department reserved the right to pass upon the matter at a later date. It is undisputed that the form she signed referred to section 226 of the Civil Code and further stated: "In signing this consent I understand that it does not become final until it has been accepted by the State Department of Social Welfare after ascertaining that the best interest of the child will be promoted by the proposed adoption." The use of such a condition is a proper method of informing the mother that the department did not purport to act immediately, particularly in view of the statement in section 226 that the consent is to be signed "on a form prescribed by such department." The evidence established without contradiction that appellant read the statement which she signed. Both she and the department had a right to rely on the fact that the consent was conditional and ineffective without approval by the department. Accordingly, it must be held that the mere signing of the document and delivery to the department under these circumstances is not alone sufficient to establish an acceptance of the consent within the meaning of section 226.

There is no evidence in the record which will support a conclusion that the department accepted the consent, and what evidence there is on the subject is to the effect that there was no approval. After the consent was received, the word "void" was written upon it by an agent of the department, and two days after it was signed the department filed a report in court stating that the case was removed from its calendar "until the legal status of the child and the right of the parents to give consent has been established." The final report recommended against adoption because of inability to obtain consent of the presumptive father or complete the investigation. On the face of this record it would be completely unrealistic to hold that the department approved the consent.

[5] In the present state of the record there is no basis for the application of the doctrine of estoppel in this case. The code, in order to protect the interests of the child and other persons concerned, permits an adoption only in the manner specified. Resort to estoppel where the statutory requirements are not met would not only defeat the safeguards prescribed by the Legislature but would amount to the creation of a method of adoption—by private agreement of the parties—not recognized at common law or by statute.

[6] It has been suggested that the judgment can be affirmed upon the ground that the child was abandoned by its parents. Section 224 of the Civil Code provides that consent of the parents is not necessary for adoption if they have been judicially deprived of the custody and control of the child by order of the juvenile court. Section 701 et seq. of the Welfare and Institutions Code prescribes the procedure to be followed in obtaining a declaration that a child is free from parental custody and control by reason of abandonment. There is evidence in the record which could be urged in support of an order declaring the child free of appellant's control, thus eliminating the necessity for her consent to adoption, but no such declaration was obtained here, and, therefore, the order of adoption cannot be supported upon the theory of abandonment. Nothing we have said, however, is intended to preclude appropriate proceedings under the foregoing sections.

The judgment is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

I dissent. I agree with the statement in the majority opinion that "There is evidence in the record which could be urged in support of an order declaring the child free of appellant's control, thus eliminating the necessity for her consent to adoption," but I disagree with the holding, which is contrary to the finding of the trial court, that the evidence fails to show appellant's consent to the adoption which was adjudicated.

In my view of the facts and the law, one need go no further than the face of the majority opinion to discover facts which fully support the learned and experienced trial judge in the strict legal probity as well as the wisdom and justice of his holding. It is to be noted that the majority opinion italicizes the language "In signing this consent I understand that it does not become final until it has been accepted by the State Department of Social Welfare after ascertaining that the best interest of the child will be promoted by the proposed adoption. * * *" Such opinion then proceeds to construe the consent signed by appellant as though the italicized language were necessarily the controlling sentence of the document. This is contrary to the construction given the document by the trial judge; it ignores the directly conflicting language in the preceding sentence, that "I * * * do hereby give my full and free consent to the adoption of said child * * *, it being fully understood by me that I am giving up all my right of custody, services and earnings of said child and that said child cannot be reclaimed by me." The majority opinion likewise ignores the circumstances shown by the evidence, to the effect that the Social Welfare Department, in accord with its established practice, had investigated the case before it took the signed consent of the appellant; it ignores the implied finding of the trial court, made on ample extrinsic evidence, that the Department accepted the mother's consent at the time it was signed in the presence of the Department's agent.

The action of the majority in construing the consent, upon extrinsic evidence, contrary to the interpretation found by the trial court, is contrary to the well established rule that an "appellate court will accept or adhere to the interpretation [of a contract] adopted by the trial court—and not substitute another of its own— * * * where parol evidence * * * is such that conflicting inferences may be drawn therefrom." (4 Cal.Jur. 10 Yr. Supp. (1943 rev.) 146, 147, § 192; Estate of Rule (1944), 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319; Transportation Guarantee Co. v. Jellins (1946), 29 Cal.2d 242, 255, 174 P.2d 625.)

I think also that in a case such as this, where upon the facts and the law, the choice of this court for an affirmance seems at least as logical as for a reversal, we should hold that the trial judge was eminently correct, and sustain him, in considering the welfare of the child as being paramount in relation both to the belated claim of the appellant and the purely technical contention on behalf of the state administrative agency.

For a more complete, and to me entirely satisfactory, treatment of all points involved, reference is made to the opinion prepared by Mr. Justice Bray for the District Court of Appeal, First Appellate District, Division 1, reported at 183 P.2d 119.

Rehearing denied; SCHAUER, J., dissenting.

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31 Cal.2d 619

HUNT et al. v. MAYOR AND COUNCIL OF CITY OF RIVERSIDE et al.

L. A. 20430.

Supreme Court of California.

April 2, 1948.

1. Municipal corporations 🔑108

As between provisions of Constitution and of city charter, those which reserve the greater or more extensive referendum power in the people will govern. Const. art. 4, §§ 1, 34.

2. Mandamus 🔑164(4)

In mandamus proceeding to compel mayor and city council to submit sales tax ordinance to referendum vote, uncontroverted allegation in answer that ordinance was adopted by council and approved by mayor to provide revenue necessary to pay usual expenses of city government would be accepted as true. Code Civ.Proc. § 1091.

3. Municipal corporations 🔑108

A city ordinance levying sales tax for usual and current city expenses was not required under Constitution to be submitted to referendum vote. Const. art. 4, § 1.

4. Municipal corporations 🔑108

City sales tax was a tax "mentioned" in revenue article of Riverside city charter declaring that all taxes and licenses shall constitute revenue of city, and hence ordinance levying sales tax was not subject to referendum under charter provision that ordinances levying taxes "mentioned" in revenue article shall not be subject to referendum. St.1929, pp. 2158, 2160, 2167, §§ 202, 211, 233; Const. art. 11, § 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Mentioned".

5. Licenses 🔑1

A "sales tax" is imposed as a license, or as a "privilege of transacting business," tax.

See Words and Phrases, Permanent Edition, for all other definitions of "Sales Tax".

6. Municipal corporations 🔑108

Generally, referendum provisions of Constitution and of charters and statutes should be liberally construed in favor of the reserved power. St.1929, p. 2167, § 233; Const. art. 4, § 1.

Mandamus proceedings by Roy C. Hunt and others against the Mayor and Council of the City of Riverside and others to compel the respondents to submit to a referendum vote of the electors of the city a sales tax ordinance adopted by the city council and approved by the mayor.

Writ denied.

Prior opinion 184 P.2d 717.

Best, Best, Gabbert & Krieger, of Riverside, for petitioners.

Miguel Estudillo, City Atty., and Albert H. Ford, Deputy City Atty., both of Riverside, for respondents.

SCHAUER, Justice.

Petitioners seek the issuance of a peremptory writ of mandate to compel repondents, who are the mayor and the council of the City of Riverside, to submit to a referendum vote of the electors of the city a sales tax ordinance adopted by the council on May 13, 1947, and approved by the mayor on May 23, 1947. We have concluded that the ordinance in question is not made subject to referendum under the provisions of either the constitution of this state (Art. IV, § 1) or the Riverside City Charter, and that the writ must be denied.

By the ordinance a license tax "For the privilege of selling tangible personal property at retail" is imposed "upon all retailers at the rate of one per cent (1%) of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in the City of Riverside * * * on or after July 1, 1947." In its other provisions the ordinance is largely patterned after the California "Sales and Use Tax Law," found in Part 1 of Division 2 of the Revenue and Taxation Code. On May 26, 1947, petitioners filed a referendum petition with the city clerk, requesting that the ordinance be submitted to the vote of the electors. On June 6, 1947, the city clerk found the number of signatures on the petition to be insufficient. (See Section 233, Article XXI, Charter.) On June 18, 1947, an amended petition was filed which the city clerk on June 23, 1947, certified to contain the requisite number of signatures of qualified and registered electors of the city. The city attorney by written opinion advised respondents, the mayor and city council, that the ordinance was not subject to referendum, and respondents refused to submit it to a vote of the electors. Thereafter, on July 9, 1947, petitioners instituted this mandate proceeding.

Whether respondents are correct in refusing to submit the ordinance to a vote of the electors depends primarily upon whether the referendum power reserved to the people in either the California Constitution or the Charter of the City of Riverside, extends to such an ordinance. As a restriction upon the legislative powers exercised by the state legislature and by the legislative bodies of counties and cities, the people of this state, by provision in section 1 of article IV of the state constitution, have reserved to themselves the power known as the referendum. (See Dwyer v. City Council (1927), 200 Cal. 505, 513, 253 P. 932; Ley v. Dominguez (1931), 212 Cal. 587, 593, 299 P. 713.) That section, so far as here material, reads as follows: "The second power reserved to the people shall be known as the *referendum.* No act passed by the Legislature shall go into effect until ninety days after the final adjournment of the session of the Legislature which passed such act, except acts * * * providing for tax levies or appropriations for the usual current expenses of the State, and urgency measures * * * Upon the presentation to the Secretary of State within ninety days after the final adjournment of the Legislature of a petition * * * signed by qualified electors equal in number to five per cent of all the votes cast for * * * Governor at the last preceding general election at which a Governor was elected, asking that any act or section or part of any act of the Legislature be submitted to the electors for their approval or rejection, the Secretary of State shall submit to the electors for their approval or rejection, such act, or section or part of such act * * * and no such act or section or part of such act shall go into effect until and unless approved by a majority of the qualified electors * * * The * * * referendum powers of the people are hereby further reserved to the electors of each county * * * city and town of the State to be exercised under such procedure as may be provided by law * * * Nothing contained in this section shall be construed as affecting or limiting the present or future powers of cities or cities and counties having charters adopted under the provisions of section eight of article eleven of this Constitution * * * This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved." (See also section 34 of article IV.)

Riverside is a city having a charter adopted under the provisions of section 8 of article XI of the constitution. (See Stats. 1907, p. 1277; 1929, p. 2102; 1935, p. 2307.) Section 233, article XXI, of the Riverside charter states that "No action providing for the sale or lease of any city property exceeding one thousand dollars in value and no ordinance passed by the council (except when otherwise required by the general laws of the state or by the provisions of this charter, respecting street improvements and except an ordinance for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency * * *), and no action made subject to the referendum by this charter shall go into effect before thirty days from the time of its approval by the mayor or the time of its passage over his veto * * * and if during said thirty days, a [sufficient referendum] petition * * * be presented to the council, the same shall thereupon be suspended from going into operation and it shall be the duty of the council to reconsider such ordinance and if the same is not entirely repealed, the council shall submit the ordinance proposed, to the vote of electors of the city * * *."

[1] It is established that where the right of referendum is reserved by city charter provision, "The declaration of the Constitution that its provisions do not affect or limit the referendum power reserved to the people of any city by its charter does not limit the constitutional reservation, nor enlarge those reserved by such charter. The two reservations are thereby made independent of each other. The constitutional reservation goes to the full extent expressed by its language. If the charter differs from the Constitution in any respect, it does not thereby diminish the power reserved by the Constitution. On the other hand, if the powers reserved by the charter exceed those reserved in the Constitution, the effect of the charter would be to give to the people the additional powers there described." (Hopping v. Council of the City of Richmond (1915), 170 Cal. 605, 610–611, 150 P. 977, 979, see also Brown v. Boyd (1939), 33 Cal.App.2d 416, 420–421, 91 P.2d 926, and cases there cited; Spencer v. City of Alhambra (1941), 44 Cal.App.2d 75, 77, 111 P.2d 910.) In other words, as between the provisions of the constitution and the provisions of a city charter, those which reserve the greater or more extensive referendum power in the people will govern. It is, therefore, necessary to here determine whether the people have reserved to themselves under either the constitution or the charter the power of referendum over the sales tax ordinance which gave rise to this proceeding.

1. *The Ordinance is Excepted from the Referendum Provisions of the Constitution.*

[2] Respondents allege in their answer to the petition for mandate that the sales tax ordinance "was adopted by the Council, and approved by the Mayor of the City of Riverside, to provide income and revenue which is necessary to pay the usual and current expenses of conducting the municipal government of the City." Petitioners have not controverted the allegation and it will therefore be accepted as true. (See Code of Civil Procedure, § 1091; Ertman v. Municipal Court (1945), 68 Cal.App.2d 143, 150, 155 P.2d 908, 156 P.2d 940.) Moreover, the ordinance itself contains no provision appropriating the proceeds of the tax levy to any selected municipal purpose.

[3] As we have already seen, "acts * * * providing for tax levies or appropriations for the usual current expenses of the State" are expressly excepted from the operation of the referendum provisions of the constitution. The California Retail Sales Tax Act (Stats.1933, p. 2599, Deering's 1933 General Laws Supp., p. 2360, Act 8493), now known as the Sales and Use Tax Law (Rev. & Tax.Code, Div. 2, Part 1), was adopted by the Legislature as "a tax levy for the usual current expenses of the State" to "take effect immediately." It was held in Roth Drug, Inc. v. Johnson (1936), 13 Cal.App.2d 720, 729, 57 P.2d 1022, that the act was excluded from those provisions of the constitution which require a ninety-day waiting period during which referendum petitions may be filed, and that the legislature was within its powers in declaring the act immediately effective. We are of the view that referendum power over the city ordinance levying a sales tax for the purpose of meeting the usual and current expenses of the city is similarly not reserved to the people by the referendum provisions of the constitution.

2. *The Ordinance is Excepted from the Referendum Provisions of the City Charter.*

Article III of the Charter of the City of Riverside is entitled "Legislative Department." In section 7 of that article it is provided that "The legislative power of the city is hereby vested in a mayor and council consisting of seven members. * * *" Section 16 provides that "The mayor and council of said city shall have power: * * * 17. To levy and collect *taxes on all property,* real or personal within the city; 18. *To license for the purposes of revenue* and regulation, *all and every kind of business* authorized by law and transacted and carried on in said city * * *; to fix the rates of *license tax* upon the same and to provide for the collection of the same by suit or otherwise; * * * 21. To manage and control the city's finances * * *." (Italics added.)

Article V of the charter, entitled "Executive Department," provides that (Section 105): "The city treasurer shall be ex officio tax collector and as such * * * shall receive and collect *all city taxes, general* and *special* and other branches of the city's revenue not otherwise provided for by law, by this charter, or by ordinance * * *." [Section 106] "As long as and during such period as the *regular city taxes* may be assessed and collected by the county officers of Riverside County as herein provided for in article fifteen [entitled "Revenue and Taxation"], section 209, the duties of the treasurer as such ex officio tax collector shall be deemed inoperative. Unless otherwise provided by ordinance or by law the treasurer shall collect all special assessments, liens or other *special taxes.*" (Italics added.) Section 108 gives the mayor and council power to "provide for the duties of tax collector" in case the office is abolished or becomes inoperative.

Section 168 of Article XI, entitled, "Judicial Department," states that the city police court shall have jurisdiction over actions and proceedings "for the collection of any *license tax* required by any ordinance" except where because of the amount involved the state constitution gives jurisdiction to other courts. (Italics added.)

Charter Article XV, entitled "Revenue and Taxation," provides as follows (all italics have been added):

"Section 202. All taxes, licenses, fines, penalties and all moneys received from any source shall constitute the revenue of the city and shall be collected and paid into the city treasury."

Section 203 requires the "several heads of each department, office, board and commission" to submit to the council annually an estimate of expenditure for the ensuing fiscal year, with duplicates to the auditor.

Section 204 requires the auditor to submit annually to the mayor and council "an estimate of the probable financial necessities of the municipal government for the fiscal year * * * The estimate shall also show what amount of income and revenue is likely to be collected from fines, licenses and all *other sources of revenue,* exclusive of *taxes upon property,* and what amount will probably be required to be levied and raised by *taxation* in order to meet the necessities * * * for such fiscal year."

"Section 205. The council shall * * * fix by ordinance the amount of money necessary to be raised by *taxation upon the taxable property* of the city, as * * * revenue * * * of such city for the current fiscal year * * * The council shall * * * fix said amount on the first Tuesday in August in any year when provision has been made * * * for the assessment and collection of the *city taxes* by" county officers.

"Section 206. During such time as the assessment and collection of city taxes shall be made by the * * * officers of said city, the council shall [annually] * * * sit as the board of equalization * * *."

"Section 207. The mayor and council shall * * * unless the *city taxes* are assessed and collected [by county officers] * * * provide by ordinance a system for the assessment, levy and collection of *all city taxes* and for the sale of property for *delinquent taxes,* which system shall conform, as nearly as the circumstances * * * permit, to [that] * * * of this state with reference to * * * *state* and *county taxes* and sale of property for delinquent taxes * * * *All taxes assessed* * * * shall constitute liens on the property assessed * * *."

"Section 208. If there shall be no ordinance in force availing the city of the privilege of having *its taxes* assessed and collected by the officers of the county, the city clerk shall be ex officio tax collector * * *."

Section 209. If state law provides "for the assessment and collection of *city taxes* by county officers" at the option of the city, then the mayor and council shall annually pass an ordinance taking advantage of and in conformity with the state law "in order to avail the city of the privilege of having *its taxes* assessed and collected by such county officers."

Section 210. In any year when "provision has been made by ordinance for the assessment and collection of the *city taxes* by" county officers, "the council shall fix the *rate of taxes* for such year" and transmit it to the county auditor.

"Section 211. * * * Ordinances providing for the levying of *the taxes mentioned in this article* shall not be subject to the provisions of the referendum referred to in section 233, of Article 21.

"The council shall not * * * levy a *general tax* greater than one dollar and thirty-five cents on each one hundred dollars of the assessed valuation of all property within said city. This limit is exclusive of all taxes for the payment of the principal and interest of the bonded indebtedness of the city, all district taxes, *special taxes,* special assessments and all taxes for library or school purposes. * * *"

[4] Petitioners urge that the only "taxes mentioned" in article XV, ordinances levying which are thereby, pursuant to the provisions of section 211, excepted from the referendum, are property taxes; i. e., they ask us to construe section 211 as though it read "Ordinances providing for the levying of *property taxes* shall not be subject to * * * referendum." Respondents emphasize the fact that section 211 actually reads "*Ordinances* providing for the levying of *the taxes mentioned in this article* shall not be subject," etc.; it is pointed out that both the word "ordinances," and the phrase "the taxes mentioned in this article," are plural and inclusive in the scope of their reference; further, respondents point to the declaration of section 202 that "*All taxes, licenses* * * * and all moneys received from any source shall constitute the revenue of the city and shall be collected and paid into the city treasury," as indubitably supporting their position that a city sales tax is a tax "mentioned" in article XV and that the ordinance levying it is therefore not subject to referendum. (Italics added.) After studying the charter as a whole, and in particular those provisions quoted or summarized hereinabove, we are impelled to the conclusion that the learned city attorney was correct in his advice to the respondents and that their position here is sound.

As a verb, "mention" is defined in Webster's New International Dictionary, 2d Ed. (1943), as "To make mention of; to refer to * * * casually; to specify, esp. by name; to name," and as a noun the word is employed to indicate "a speaking or notice, esp. in a brief or cursory manner; a specification, usually by name; casual introduction into speech or writing; naming, esp. incidentally."

[5] It is a judicially accepted theory of the law that a sales tax is imposed as a license or "privilege or transacting the business" tax (see People v. Herbert's of Los Angeles, Inc. (1935), 3 Cal.App.2d 482, 484, 39 P.2d 829; Roth Drug, Inc. v. Johnson (1936), supra, 13 Cal.App.2d 720, 730, 736, 57 P.2d 1022). Such a tax is expressly authorized by the terms of section 16 (18) of the city charter and, as already noted, was here enacted to provide revenue to pay usual and current city expenses. Also, in section 168, jurisdiction of court actions for collection of license taxes is treated. It is thus indisputable that the charter contemplates the levy of just such a tax as is here in controversy; and it seems apparent that it is included among the "taxes mentioned" in article XV, by the comphehensive ref-

erence in section 202 of that article to "all taxes, licenses," etc. To phrase the same proposition differently, manifestly the ordinance provides for a license which is a tax; it seems equally manifest that the words "All taxes, licenses * * * and all moneys received," etc., constitute a "mention" of that tax. Moreover, although the only taxes for which detailed provision is made in article XV are ad valorem taxes on property, a study of the article in its entirety discloses that it is contemplated and provided therein that the rate of property taxes shall be fixed for each fiscal year only after the probable revenue from sources other than property taxes, but including all other taxes, has been ascertained. Thus, by section 204, the city auditor is given the duty of annually preparing an estimate of funds needed for the next fiscal year and an estimate of total expected revenue, including income from license taxes but excluding that from property taxes, and an estimate of the amount required to be raised by "taxation in order to meet the necessities" of the city. Whether the word "taxation" as used in the phrase last quoted be taken to refer to property taxes alone, or whether it is considered as either including on the one hand, or requiring a separate estimate of on the other, the sum required to be raised by other methods of taxation in case the council is averse to imposing the full maximum property levy (see section 211, ante) or in case such maximum will fall short of providing adequate funds, the "mention" of license taxes in section 204 cannot realistically and conscionably be ruled out. The fact that the phrases "city taxes," "delinquent taxes," "its taxes," and "general taxes," as used in sections 205 through 211, have to do with the assessment and collection of property taxes, is but consistent with the employment of the same or similar expressions in sections 105, 106, and 209, in which are discussed "city taxes, general and special," "regular city taxes," and "special taxes," and in no sense obliterates the distinct mention of other taxes, including license or privilege taxes, in other sections of article XV. The very fact that specifically descriptive language is used in some of the charter provisions suggests that similarly precise language would have been used to limit the types of tax ordinances not subject to referendum if the freeholders had so intended.

It is also argued by respondents that the "special taxes" to which reference is made in the last section (number 211) of article XV may be taken to include the sales tax levy. Whatever may be the true encompassment of that phrase we need not here determine because we think the mention of the sales tax in prior sections of the article effectively excludes from the charter referendum provisions the ordinance by which it was imposed.

[6] In reaching the conclusion set forth above we have had in mind the principle, relied upon by petitioners, that referendum provisions of the constitution and of charters and statutes should, as a general rule, be liberally construed in favor of the reserved power. (See Ley v. Dominguez (1931), supra, 212 Cal. 587, 593, 595, 299 P. 713; McClure v. Nye (1913), 22 Cal.App. 248, 251, 133 P. 1145; Laam v. McLaren (1915), 28 Cal.App. 632, 638, 153 P. 985; Whittemore v. Seydel* (1946), 74 Cal.App.2d 109, 115, 168 P.2d 212; Dye v. Council of the City of Compton* (1947), 80 Cal.App.2d 486, 490, 182 P.2d 623.) As opposed to that principle, however, "in examining and ascertaining the intention of the people with respect to the scope and nature of those [reserved, referendum] powers, it is proper and important to consider what the consequences of applying it to a particular act of legislation would be, and if upon such consideration it be found that by so applying it the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential, and perhaps, as in the case of the

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* Petitioners concede that in neither the Whittemore nor the Dye case was the issue raised that the respective license tax ordinances involved were not subject to referendum because levied for usual and ordinary city expenses, and, further, that the points here involved were not decided in either of those cases.

power to compel the improvement of streets, indispensable, to the convenience, comfort, and well-being of the inhabitants of certain legally established districts or subdivisions of the state or of the whole state, then in such case the courts may and should assume that the people intended no such result to flow from the application of those powers, and that they do not so apply." (Chase v. Kalber (1915), 28 Cal.App. 561, 569–570, 153 P. 397, 400.) Thus in the cited case it was held that the referendum powers of the people were not reserved as to a resolution of a town board of trustees establishing the grades of certain streets and avenues. Again, in State of Missouri, etc. v. Regan (1927), 317 Mo. 1216, 298 S.W. 747, 749, 55 A.L.R. 773, 778, the Missouri Supreme Court in determining whether an ordinance imposing a sales tax on cigarettes was subject to the referendum under the Kansas City Charter, said: "While we have no right to construe a law by our view of its expediency, we can take that feature into consideration in attempting to ascertain what was in the legislative mind. Kansas City would be in severe financial straits if every occupation tax could be held up by referendum * * * This ordinance may be a bad measure, but it stands on the same footing as a good one. A reasonable construction is that the framers of the charter meant to have such tax measures subject to the emergency provision [not subject to referendum]."

Here, before the city council can determine the amount of annual revenue which must or should be raised by property taxes to help meet the needs of the city and before the property tax rate can be fixed, the estimated revenue from all other sources, including license taxes, must be known. As indicated above, we are of the view that the charter in its present form cannot reasonably be construed as contemplating that the council, in making up the annual city budget and in levying permissible taxes to assist in providing necessary city revenue, should be hampered by the uncertainty and delay of referendum proceedings. It may be observed, in this connection, however, that if the people actually wish to make current revenue taxes of any type or types subject to referendum the charter may be amended to that end, and further, it would seem that the sales tax levy may still be voted upon by the people under present initiative provisions of the charter.

Because of our conclusion that the ordinance levying the sales tax is not subject to the referendum provisions of the charter, it is unnecessary to consider contentions of respondents that the attempted referendum petition is insufficient in various respects.

The alternative writ heretofore issued is discharged, and the peremptory writ is denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

31 Cal.2d 586

VAUGHN v. JONAS.

S. F. 17618.

Supreme Court of California, in Bank.

March 31, 1948.

Rehearing Denied April 29, 1948.

1. Appeal and error 🔑1001(1)

Supreme Court must accept jury's determination of issue of fact where evidence was not insufficient as a matter of law to support a conclusion either way.

2. Evidence 🔑207(4)

In action for injuries from bullet wound, evidence that defendant had pleaded guilty to misdemeanor charge of assault arising out of the shooting was admissible as admission against interest, though defendant, upon fulfilling conditions of probation, had obtained a dismissal of charge pursuant to statute providing for release from all penalties and disabilities resulting from conviction. Pen.Code, § 1203.4

3. Evidence 🔑207(4), 265(11)

Record of guilty plea, though not factually conclusive, is admissible as an admission against interest in civil action against defendant growing out of the same offense.

4. Trial ⚷269

Each instruction should be identified by a number and should indicate by whom it was requested or that it was given by court of its own motion and on each requested instruction trial judge should endorse the fact as to whether it was given or refused or given as modified, with modification clearly indicated. Code Civ.Proc. §§ 608, 609.

5. Assault and battery ⚷13

One may use in self-defense such force as reasonably appears necessary in view of all the circumstances to prevent impending injury without regard to what is actually reasonably adequate and necessary to the occasion.

6. Appeal and error ⚷1064(1)

Giving of inconsistent instructions may constitute reversible error, where it is impossible to determine which of the conflicting rules was followed by jury.

7. Appeal and error ⚷1170(9)

Where jury awarded punitive damages for injuries from bullet wound under instruction making a finding that shooting was actuated by malice, a prerequisite to such award, refusal to instruct that defendant was entitled to use amount of repelling force as "appeared" to him necessary rather than the amount that was "reasonably necessary" was not prejudicial, since if shooting was actuated by malice it was unjustified on any theory. Const. art. 6, § 4½.

8. Appeal and error ⚷901, 1032(1)

Appellant has the burden of affirmatively showing error and that such error is prejudicial, and statutory presumptions must be indulged in favor of sustaining a judgment. Code Civ.Proc. §§ 475, 1962, 1963; Const. art. 6, § 4½.

9. Appeal and error ⚷1170(1, 3)

Attacks on a judgment based on technical defects in pleadings or procedure are not favored by reviewing courts. Code Civ. Proc. §§ 475, 1962, 1963; Const. art. 6, § 4½.

10. Assault and battery ⚷24(1)

In action for injuries from bullet wound, complaint alleging that defendant "assaulted" plaintiff by firing at him a revolver, the bullets from which passed through plaintiff's body causing serious injury, notwithstanding use of quoted word, charged a "battery" and not "assault" as defined in Penal Code. Pen.Code, §§ 240, 242.

See Words and Phrases, Permanent Edition, for all other definitions of "Assault" and "Battery".

11. Assault and battery ⚷24(1)

Complaint alleging that defendant wrongfully, unlawfully and violently committed on plaintiff a battery by gunshot inferentially pleaded malice as ground for recovery of punitive damages. Pen.Code, §§ 7(4), 242; Code Civ.Proc. § 1962(1).

12. Assault and battery ⚷24(3)

In action for injuries from bullet wound, plea of self-defense asserted an affirmative defense which was deemed controverted and, regardless of adequacy of complaint as charging malice, authorized proof by plaintiff that shooting was actuated by malice and not solely in self-defense. Code Civ.Proc. § 462.

13. Pleading ⚷403(2)

A defect in complaint may be cured by answer which tenders otherwise unpleaded issue.

14. Appeal and error ⚷928(1)

Trial court should not be presumed to have gone beyond the issues made by the parties in giving instructions proposed by plaintiff on subject of exemplary damages based on malice. Code Civ.Proc. § 1963 (15, 17, 18).

15. Appeal and error ⚷928(4)

Where record did not show at what stage of proceedings plaintiff's requested instructions were served and presented, reviewing court should presume in favor of judgment that proposed instructions on exemplary damages were served and presented before first witness was sworn so that defendant from that time knew that plaintiff sought exemplary damages. Code Civ.Proc. §§ 475, 607a; Const. art. 6, § 4½.

16. Appeal and error ⚷882(3)

Where action for injuries from bullet wound was tried on theory that malice as basis for recovery of punitive damages was at issue, defendant could not claim for the first time on appeal that such issue was not pleaded.

17. Assault and battery ⚷39
Damages ⚷157(5)

That prayer of complaint does not expressly mention exemplary damages does not preclude allowance of such damages upon a contested trial.

18. Trial ⚷255(13)

In action for injuries from bullet wound, failure to define the word "malice" in instruction on punitive damages was not error, where defendant requested no such definitive instruction.

SPENCE, SHENK and EDMONDS, JJ., dissenting.

◆

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Civil action by John J. Vaughn against William Jonas for injuries from a bullet wound. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior opinion 183 P.2d 335.

W. H. Morrissey, of Redwood City, and John J. Taheny, of San Francisco, for appellant.

F. E. Hoffmann, of San Mateo, for respondent.

SCHAUER, Justice.

Defendant, avowedly in self-defense, shot and severely wounded plaintiff. Thereafter, having partially recovered from his wounds, plaintiff filed this action for damages; in it he contends that defendant acted not in self-defense but maliciously and without just cause. At the trial plaintiff prevailed; a jury awarded him $5500 as compensatory and $4500 as exemplary damages; defendant appeals from the judgment entered on the verdict. As grounds requiring reversal of the judgment defendant urges that the trial court erred to defendant's prejudice in the admission of certain evidence; in giving certain instructions concerning self-defense; in failing to give or in modifying certain other instructions relative to self-defense, requested by defendant; and in instructing the jury as to exemplary damages. It is also contended that the pleadings do not support the award of exemplary damages. We have observed that the evidence relevant to the issues of provocation, justification and malice or lack thereof, is sharply conflicting but after scrutiny of the entire record and consideration of all of the points urged, we have concluded that no prejudicial error is shown and that the judgment must be affirmed. The reasons for our conclusions become manifest in the discussion which follows.

On the day of the shooting, March 16, 1942, defendant owned and with his wife operated a bar and restaurant known as "Dick's Tower" and located in Brisbane, San Mateo County, California. The premises were also used as living quarters by defendant and his wife.

Plaintiff and two men companions entered the bar at about 1:15 in the morning. Each of the three ordered and was served beer. Plaintiff testified that they had visited other taverns during the night of March 15 and early morning of the 16th and that he had drunk five to eight glasses of beer "all together." The three carried the beer to a pinball machine "right next to the bar" and began playing the machine. On it were one or two small signs, apparently about three inches by four inches, which read "For amusement only, no pay-off." The machine was so constructed and adjusted that if the player made a certain score he won the right to one or more free games. After plaintiff and his companions had played for 15 or 20 minutes the machine registered 74 or 75 free games. They asked defendant, who was behind the bar, to pay them off in cash; defendant pointed to the signs and stated "That machine doesn't pay off, it is for amusement only," and suggested that they "play off" the free games.

Plaintiff's testimony as to the subsequent events leading up to the shooting is as follows: He put another nickel in the machine "but it wouldn't work, nothing would work anymore, the machine wouldn't pay-off the free games." Plaintiff then told defendant the machine would not work and that "we wanted the money" and defendant "came out from behind the bar and put a nickel in it, and it wouldn't work for him either. He went back behind the bar again, and we started giving him a panning * * * [W]e started telling him it was a cheap place * * we used a few swear words * * * I did use a certain amount of profane language." Neither he nor his companions made "threats to break the machine, or wreck the place." Defendant "didn't say anything at all" in response to plaintiff's profane language; he "was very quiet, and kept working and walking up and down behind the bar." Plaintiff then noticed that "it was getting close to two o'clock" and suggested to his two companions "Let's go." Plaintiff's companions "walked out the doorway" and plaintiff "went in the men's room, lavatory" where he remained "only a minute" and then went outdoors to join the other two men in their car. Plaintiff "was just about to step in the car when" defendant called to him "from the doorway." Plaintiff turned around and saw defendant "on the top step." Defendant "asked me if I wanted to get paid," and then said "Here's your pay you son-of-a-bitch" and shot plaintiff in the stomach. (The gun was shown to be a .38 calibre police special revolver.) Plaintiff stated that before the shooting he had engaged in various sports as an amateur and as a professional and, in particular, that at the time of the altercation in question he was a professional boxer.

One of plaintiff's companions, John Mahoney, who was driving the automobile in which the three men had arrived at defendant's premises, corroborated plaintiff's story that after the three had gone outside following the argument, defendant shot plaintiff from the doorway of the bar just as plaintiff was "getting in the car" to leave. Over objection, plaintiff was also permitted to prove that in another court "the defendant had pleaded guilty to a misdemeanor, to wit, simple assault, because of the shooting."

Defendant related the following account of the shooting: After plaintiff had stated that the machine was out of order and would not play off the free games, defendant told him "I am sorry I am not allowed to pay off cause it would be gambling * * * [T]hen * * * they became very violent, very abusive and used language that I wouldn't repeat here. They * * * threatened to break up the place, and called it a cheap joint and told me they would wreck this joint and told me they would get me too." Defendant did not refuse to pay because of the amount of money involved, "it was my license, I never did pay off." Defendant did not "go out from behind the bar at any time"; his wife "went over and showed them the sign." Plaintiff and his companions were "About that time * * * loud and very threatening * * * Mr. Vaughn * * * had his hands on the bar and said, 'You are going to pay me,'—as though he was coming over the bar, so I got away from them and went down to where the gun was, reached in * * * the drawer back of the bar, and stuck it in my belt so they could have seen it, I don't believe they did. I came back up and I stayed away from where they could reach me. My wife said, 'I will call the sheriff's office.' She went to the 'phone * * * and said, 'I have the sheriff's office.' Just at that time I heard one of them say, 'come on, let's get out of here.' Then I said to my wife, 'Hang up, they're leaving.' * * * Mr. Vaughn turned around—the three of them were together half way to the door and Vaughn turned around and threatened me. He said, * * * 'I'll get you you son-of-a-bitch, you will wish you had paid off,' * * * Well, they were very, very violent and did pull the machine out from the wall, picked it up and dropped it on the floor, and made a terrible racket. I didn't move as I thought they really meant what they said—they were going to wreck the place there." Defendant "put the gun in his belt at that time * * * in case they did come over the bar and I needed it for protection * * * [of] My property and my life." The three men then left together by way of the front door and defendant "heard them start the car up * * * shift gears—and when I was reasonably sure * * * they had driven away * * * I came from behind the bar and started to close the place." As defendant was about to close the front door he "glanced out of the door and there was the car parked and a few feet this side of the car, between me and the car, was Vaughn and he had this rock in both hands and he was coming towards me and I hollered to him, I said, 'Stop, put down that rock I have a gun,' but he kept right on coming. About that time—this all happened mighty quick—immediately after that Mrs. Jonas was at my side. She was screaming and hollering. * * * About the time I got through telling him I had a gun I reached and pulled the gun out * * * and thought I would stop him by firing at his feet. He did stop when I fired the gun; dropped the rock and turned around and ran [20 or 25 feet] back to the automobile in a sort of crouching position * * *" Plaintiff was within 3 or 4 feet of "the bottom step" when defendant fired. Defendant "shot to stop him; if he hadn't stopped I would have shot again * * * As soon as he got to the car some one opened the door to the car and he got in the car and they drove off." Defendant then picked up the rock which "was lying right at the foot of the steps" and "laid it on the steps * * * then I closed the door." He did not know until some two or three hours later when he was visited by a deputy sheriff that his shot had struck plaintiff.

Defendant's wife corroborated his testimony as to the events preceding the shooting. She testified further that after defendant shot, plaintiff "ducked and ran in a crouching position to the car * * * and * * * got in the car, the door was shut and drove off. Mr. Vaughn didn't make a noise * * * and didn't fall. * * * Mr. Jonas and I didn't have any idea he had been hit."

Ross Martin, a customer in defendant's bar when plaintiff entered it, testified that he heard the "argument" develop over the machine's "not paying off." Plaintiff and his two companions "were cussing and said they were going to wreck the machine and joint * * * they pulled the machine from the wall." The witness heard no threats against defendant personally. Mrs. Jonas went to the telephone back of the bar and the men left. Defendant then walked "leisurely" to the door to close it. The witness heard a "noise," went to the door and saw a rock on the porch. Defendant brought the rock inside and said "they were going to throw the rock at him or did throw it I don't know which." The witnesses Peter D. Cutney and Richard Trantham also gave testimony which tends to corroborate at least certain elements of defendant's version of the affray.

A pinball machine expert testified that on the afternoon of March 16 (the day of the shooting) he examined the designated pinball machine which was installed in Dick's Tower; that he found it out of order; that a small hole had been drilled in the machine "on the right hand side close to the players end"; that a wire could have been put in the hole which would "cause the machine to start running up a lot of games as high as 70, or 74" and would also be "liable to shortcircuit" it and blow out a fuse.

[1] From the evidence as above related it is obvious that the area of its conflict is relatively small but that within its scope the clash is sharp. Thus, it may be said that substantially the sole, ultimate issue of fact was the question as to whether defendant in shooting plaintiff was actuated by reasonable apprehension or by malice. The evidence cannot be held to be as a matter of law insufficient to support a conclusion either way; we are bound, therefore, to accept the jury's determination of the issue. (In re Estate of Bristol (1943), 23 Cal.2d 221, 223, 143 P.2d 689; Cate v. Certainteed Products Corporation (1943), 23 Cal.2d 444, 448, 144 P.2d 335; In re Estate of Teel (1944), 25 Cal.2d 520, 526, 154 P.2d 384; Fackrell v. City of San Diego (1945), 26 Cal.2d 196, 207, 157 P.2d 625, 158 A.L.R. 773; Viner v. Untrecht (1945), 26 Cal.2d 261, 267, 158 P.2d 3; Pewitt v. Riley (1945), 27 Cal.2d 310, 313, 163 P.2d 873; De Young v. De Young

(1946), 27 Cal.2d 521, 526, 165 P.2d 457; Millsap v. National Funding Corporation (1944), 66 Cal.App.2d 658, 665, 152 P.2d 634; Southern California Freight Lines v. State Board of Equalization (1945), 72 Cal.App.2d 26, 29, 163 P.2d 776; Berry v. Chaplin (1946), 74 Cal.App.2d 652, 663, 169 P.2d 442; Medina v. Van Camp Sea Food Co. (1946), 75 Cal.App.2d 551, 556, 171 P.2d 445; Seidenberg v. George (1946), 76 Cal.App.2d 306, 308, 172 P.2d 891; see also cases reviewed in dissenting opinion in Isenberg v. California Employ. Stab. Comm. (1947), 30 Cal.2d 34, 46–48, 180 P. 2d 11.) But in the light of the clash of the testimonies as noted we carefully consider the assignments of error.

Defendant urges three grounds for reversal, which he states as follows: 1. "The plaintiff's counsel was guilty of prejudicial misconduct and it was prejudicial error for the trial court to permit him to show that the defendant had pleaded guilty to a misdemeanor, to-wit, simple assault, because of the shooting"; 2. "The trial court deprived the defendant of a substantial defense by refusing to instruct the jury that, in the face of actual or apparent danger at the hands of the plaintiff, he could use not only such force as was actually and reasonably necessary, but also such force as appeared to be reasonably necessary, and by telling the jury, instead, that the burden was on the defendant to show that he had used no greater force than was necessary"; 3. "It was prejudicial error for the trial court to instruct the jury that punitive damages could be awarded, and that part of the judgment which is based upon the verdict of $4500 punitive damages is outside the pleadings and issues and therefore contrary to law." Each of the three above stated contentions is hereinafter discussed.

[2] 1. *It Was Not Error to Permit Plaintiff to Show That Defendant Had Pleaded Guilty to Simple Assault.* Over objection plaintiff elicited from defendant testimony that he had pleaded guilty to a misdemeanor assault based on the shooting. In explanation of the plea defendant also testified that following the shooting he first pleaded not guilty to a charge of assault with intent to commit murder; that on advice of counsel and with the assurance that he would be saved the expense of a jury trial and could later secure a dismissal of the charge under section 1203.4 of the Penal Code he subsequently pleaded guilty to a misdemeanor assault; that sentence on that plea was suspended, defendant was granted probation and thereafter the court granted his motion to withdraw the guilty plea and "to dismiss the entire action and set aside judgment."

Section 1203.4 of the Penal Code reads as follows: "Every defendant who has fulfilled the conditions of his probation * * * shall at any time thereafter be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; * * * and * * * the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted * * *; provided, that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." Defendant argues that inasmuch as the criminal charges against him were dismissed under the procedure set forth in the quoted section, the provision of that section that he should "thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted" operated to protect him against the admission into evidence in this civil action of the fact that he had pleaded guilty to the misdemeanor offense. To support his argument defendant cites People v. Mackey (1922), 58 Cal.App. 123, 128–131, 208 P. 135. At the time that case arose the statutory provisions relied upon by defendant were found in section 1203 of the Penal Code. In that case the defense attempted to introduce into evidence for the purpose of impeaching a prosecution witness the record of a case in which the witness had pleaded guilty to a felony, had been admitted to probation and had fulfilled the terms thereof, and pursuant to section

1203 of the Penal Code had secured a dismissal of the charges. The trial court sustained an objection to such evidence and on appeal the ruling was upheld on the ground (pages 130, 131 of 58 Cal.App., page 138 of 208 P.) "that the Legislature intended in a legal sense, by directing a dismissal * * * to wipe out absolutely the entire proceeding in question in a given case, and to place the defendant in the position which he would have occupied in all respects as a citizen if no accusation or information had ever been presented against him. Such is the legal effect of the dismissal of a criminal charge before conviction, and we are convinced that the law-making body intended, by section 1203, that the same effect should attend a dismissal after conviction. * * * [T]he Legislature intended by the enactment of section 1203 that no convicted person discharged after probation thenceforth should be regarded as one possessed of the degree of turpitude likely to affect his credibility as a witness."

[3] In the present case evidence of defendant's plea of guilty was not offered for impeachment purposes, however, but as an admission of a party against interest. Hence the problem of its admissibility differs from that in the Mackey case. That the record of such a plea, although not held by the court to be factually conclusive, "is an admission on the part of the defendant, and as such is admissible" against him in a civil action growing out of the same offense is established in this state. (Olson v. Meacham (1933), 129 Cal.App. 670, 675, 19 P.2d 527; see also Fawkes v. Reynolds (1922), 190 Cal. 204, 213, 211 P. 449; Burbank v. McIntyre (1933), 135 Cal.App. 482, 485, 486, 27 P.2d 400; Langensand v. Obert (1933), 129 Cal.App. 214, 218, 18 P.2d 725.) As stated in the last cited case, at page 218 of 129 Cal.App., at page 727 of 18 P.2d, the record is admitted "not as a judgment establishing the fact, but as the deliberate declaration or admission against interest that the fact is so; in other words, a solemn confession of the very matter charged in the civil action." (See also In re Phillips (1941), 17 Cal.2d 55, 61, 109 P.2d 344, 132 A.L.R. 644.) We are of the view that the fact of defendant's plea of guilty was admissible in the present action; it tended to some extent to support plaintiff's charges; its weight and significance under the circumstances were for the jury to determine.

[4] 2. *The Instructions Pertaining to the Right of Self-Defense Uduly Limited That Right but the Error is not Shown to be Prejudicial.* The burden of the court in reviewing this phase of the appeal is unnecessarily aggravated by the improper manner in which the record is made up. Each instruction should be identified by a number and should indicate by whom it was requested or that it was given by the court of its own motion; on each requested instruction the trial judge should endorse the fact as to whether it was given or refused or given as modified, with the modification, if any, clearly indicated. In the record before us the reporter's transcript sets forth in the form of a single instruction, covering approximately seven pages, a congeries of propositions of law which apparently was designed to encompass the entire charge given to the jury; there is in it no indication as to who requested statement of the many and varying principles of law therein declared; thereafter, under the heading "Instructions Requested by Plaintiff," there is copied a group of instructions which in large part constitute but a repetition of the charge previously set forth; following this group is still another under the heading "Instructions Requested by Defendant." Under this latter heading the matter copied is likewise in large part included in the unitary charge first mentioned. Whether the reporter simply copied the duplicated instructions twice or whether the trial judge read them twice is not stated. None of the requested instructions given, refused or modified bears an identifying number and none of those marked modified indicates how or in what respect it was modified.

Since 1872 it has been the law and the accepted practice of judges and lawyers that "Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part." (Code of Civil Procedure, § 609; see also Code of Civil Procedure, § 608.) The record produced here has the undesirable attributes of being both repetitious and inadequate; it subjects a party to unnecessary and unwarranted expense and it burdens the court with a tedium of labor in searching and comparing to ascertain that which in a properly prepared record should be manifest at a glance.

Concerning the right of one to defend his person, family, and property against unlawful attack the court instructed as follows:

"The burden of proof to establish self-defense is always with the defendant, and he must show that he used no greater force than was necessary to repel the alleged attack of the plaintiff, if you so find that plaintiff did attack the defendant.

"You are instructed that acts done in self-defense alone are not assaults. A person cannot assault another in self-defense; and any acts done in self-defense cannot be an assault.

"Provocative acts, conduct, former insults, threats, or words, if unaccompanied by any overt act of hostility, do not justify an assault or battery no matter how offensive or exasperating, nor how much they may be calculated to excite or irritate one.

"Section 50 of the Civil Code of the State of California provides as follows:

"'Any necessary force may be used to protect from wrongful injury the person or property of one's self, or of a wife, husband, child, parent or other relative, or member of one's family, or of a ward, servant, master or guest.'

"However, I instruct you that the right to use force to protect one's person, or the person of another is always limited by the condition that the force used must be no more than is reasonably adequate and necessary to the occasion.

"You are instructed that the right of the defendant to use force upon the plaintiff at the time and place in question did not depend upon the question whether the plaintiff actually intended or attempted to inflict serious injury upon the defendant or his wife. If the circumstances as they appeared to the defendant were such that a reasonable person in the position of the defendant would be justified in believing that the plaintiff had the present ability to inflict serious injury upon him or his wife and that the plaintiff intended to do so, then you are instructed that the defendant was justified in using such force as was reasonably necessary to defend the person of the defendant, his wife, or his property.

"You are instructed that if you find from the evidence that the plaintiff was advancing toward the defendant with a large stone or piece of concrete in his hand and if you further find from the evidence that the defendant was in or upon his own premises and that the circumstances were such as to justify a reasonable man in the position of the defendant in believing that the plaintiff had the present ability and intention to inflict serious injury upon the defendant or his wife, then, the defendant was entitled to remain standing where he was and was entitled to use such force as was reasonably necessary to protect himself and his wife from injury, and under such circumstances, there was no duty on the part of the defendant to retreat."

By a process of comparing, sentence by sentence, the unitary charge with the instructions grouped under the headings "Instructions Requested by Plaintiff" and "Instructions Requested by Defendant" we have ascertained that certain portions of the above quoted instruction are identical in substance with instructions which were requested by plaintiff and other portions of the charge are the same as certain instructions which were requested by the defendant. We have shown above in italics the portions which duplicate the requests by plaintiff and in plain type those which may be attributed to defendant. It also appears that the two sentences "You are instructed that acts done in self-defense alone are not assaults. A person cannot assault another in self-defense; and any acts done in self-defense cannot be an assault" are identical with two sentences in an instruction proposed by the defendant and reading in its entirety as follows:

"The plaintiff seeks to recover from the defendant for an alleged assault by the use of a gun. * [You are instructed that acts done in self-defense alone are not assaults. A person cannot assault another in self-defense; and any acts done in self-defense cannot be an assault.] Therefore, if you find from the evidence that the plaintiff was advancing toward the defendant with a piece of concrete in his hands at the time of the shooting under such circumstances that a reasonable person in the situation of the defendant would have reasonable grounds for believing that the plaintiff intended to attack and injure the defendant with said piece of concrete, and if you further find from the evidence that the defendant at said time was acting in defense of his person at the time he fired the gun and that there were reasonable grounds for believing that the firing of said gun was reasonably necessary for his defense, then, if you so find, your verdict shall be in favor of the defendant and against the plaintiff."

It further appears that the court refused the following instruction requested by defendant:

"You are instructed that the question whether the defendant was justified in shooting the plaintiff does not depend on whether he intended to shoot at the plaintiff or at the ground, but on whether the circumstances, as they appeared to the defendant, were such that a reasonable person in the position of the defendant would have apprehended that he was in imminent danger of sustaining serious injury at the hands of the plaintiff. If you find from the evidence that the circumstances, as they appeared to the defendant, were such that a reasonable person in his position would have been justified in concluding that he was in such danger, then you are instructed that in using all the force reasonably necessary to prevent such injury, the defendant incurred no civil liability to the plaintiff; and if you further find from the evidence that a reasonable person in the position of the plaintiff would have been justified in concluding that it was reasonably necessary for his protection either to fire said gun at the ground or at the plaintiff, then you are instructed that under such circumstances the defendant is not liable in damages to the plaintiff for either aiming and firing said gun at the ground or at the plaintiff."

[5] Defendant urges that he was entitled to the requested and refused instructions on the ground that the jury were not otherwise specifically or adequately informed that the amount of force which he was permitted to use to repel the claimed attack upon himself and his wife was that which under the circumstances would *appear* reasonably necessary even though such force might have been greater than actually was reasonably required. Particular complaint is made of the fact that in the charge which it did give the court specifically told the jury that defendant "must show that he used no greater force than was necessary to repel the alleged attack" and that "the right to use force to protect one's person, or the person of another is always limited by the condition that the force used must be no more than is reasonably adequate and necessary to the occasion." The two last quoted statements are clearly erroneous and should never be given. The right of self-defense is not limited by actualities. The correct rule (quoted in Fraguglia v. Sala (1936), 17 Cal. App.2d 738, 744, 62 P.2d 783, 786) is stated in 4 American Jurisprudence 152: "Generally stated, the force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury." See also 40 C.J.S., Homicide, § 115. In emphasizing that the law of self-defense is a law of necessity courts should never lose sight of the fact that the necessity may be either real or apparent.

[6, 7] The error pointed out would not necessarily have been entirely cured by giving in full the instructions which the defendant requested and which were refused in whole or in part; such refused instructions go little or no farther toward elucidating the point in question than the statement which the court did give that "the right of the defendant to use force upon the

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* The bracketed portion is the part which was included in the charge given by the court.

plaintiff at the time and place in question did not depend upon the question whether the plaintiff actually intended or attempted to inflict serious injury upon the defendant or his wife. If the circumstances *as they appeared to the defendant* were such that a reasonable person in the position of the defendant would be justified in believing that the plaintiff had the present ability to inflict serious injury upon him or his wife and that the plaintiff intended to do so, then * * * the defendant was justified in using such force as was reasonably necessary." (Italics added.) The last quoted statements, which are correct as far as they go, are to that extent inconsistent with the earlier (erroneous) ones on the same subject. "Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury. [Citations.]" (People v. Dail (1943), 22 Cal.2d 642, 653, 140 P.2d 828, 834; People v. Peterson (1946) 29 Cal.2d 69, 79, 173 P.2d 11; People v. Sanchez (1947), 30 Cal.2d 560, 570, 184 P.2d 673. Here, however, it does not seem reasonably possible that the jury were misled by the error in question to defendant's prejudice. From the verdict awarding punitive damages it appears that the jury necessarily found that the defendant acted maliciously. Exemplary damages, under the instructions given on that subject, could not have been awarded unless the jury found that the shooting was actuated by malice; if it was actuated by malice it was unjustified on any theory. (See 40 Corpus Juris Secundum, Homicide, § 126.) We do not find any persuasive basis for believing that the finding as to malice was influenced to any extent whatsoever by the erroneous statements of law. In view of the verdict, therefore, and our duty under section 4½ of Article VI of the State Constitution, we cannot hold that the error in question requires reversal of the judgment. (We do not imply, by anything hereinabove said, that the instructions which were requested by the defendant and refused in whole or in part, should have been given in the form in which they appear above. Each is a formula instruction; each is incomplete in some particular; and each invades to some extent the province of the jury.)

[8, 9] 3. *The Issue as to Malice, With Punitive Damages Based Thereon, Was Properly Submitted to the Jury.* The burden is on the appellant in every case affirmatively to show error and to show further that the error is prejudicial; likewise, the presumptions declared in sections 1962 and 1963 of the Code of Civil Procedure must be indulged in favor of sustaining a judgment. To presume in favor of error or prejudice would be directly contrary to the policy of this state as declared in section 4½ of Article VI of the Constitution and to the admonitions of section 475 of the Code of Civil Procedure. It follows, therefore, that, regardless of the state of the record, attacks on a judgment based on technical defects in pleadings or procedure are not favored by reviewing courts, and it is in the light of our constitutionally declared policy and the statutory admonitions that we must examine the record to ascertain whether defendant has sustained the appellant's burden of establishing error and prejudice.

Defendant's claim of error in relation to the award of exemplary damages is based on the proposition that the plaintiff's complaint does not expressly plead malice or pray for such damages. The only allegation of such complaint which is claimed by plaintiff to charge malice is the averment that on the 16th day of March, 1942, "defendant wrongfully, unlawfully and violently assaulted the plaintiff by firing at plaintiff a loaded revolver, the bullets from which passed through plaintiff's abdomen * * * causing serious and severe wounds * * *" However, in the answer filed by defendant it is specifically pleaded that immediately preceding the shooting, the plaintiff "ran towards defendant and his wife with a rock weighing about sixteen pounds in his hands, and at the same time threatened to strike and kill the defendant and his wife with said rock * * * That * * * in self-defense, defendant discharged said pistol in the direction of the plaintiff * * * That defendant in necessary defense of his body and person and the body and person of his wife, to prevent the plaintiff from assaulting them with said rock, used a pistol to defend himself and wife, and in so doing, defendant did necessarily and unavoidably discharge said pistol in the direction of the plaintiff, but only did so in self-defense of himself and his wife * * * [D]efendant used only the necessary force in preventing plaintiff from striking him and his wife with said rock."

The record further discloses that plaintiff requested that the jury be instructed that "If, under the courts instructions, you find said plaintiff entitled to a verdict, in addition to the special and exemplary damages you may award him," etc.; that he requested an instruction reading, "I instruct you that if you find that the defendant made any statements at the time he committed the act of shooting the plaintiff, if you find he did shoot him, then you may consider any language used by him at the time of the shooting as bearing upon the question of his malice in shooting plaintiff"; likewise, it also appears that the plaintiff requested the following instruction: "I instruct you that Section 3294 of the Civil Code of the State of California provides as follows:

"'In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, expressed or implied, the plaintiff in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.'

"Under the provisions of this code section it is the rule that a jury may allow punitive damages if they believe from the evidence that a malicious intent exists. Evidence of the language used, if any, at the time of the assault, may be considered by the jury in determining the issue as to whether or not the defendant acted maliciously.

"In the event that you find that the defendant shot the plaintiff maliciously then the amount of exemplary damages you may award plaintiff is in your discretion. I further instruct you that the condition of the plaintiff subsequent to his injury may be taken into consideration by you in determining the amount of exemplary damages, providing the case is a proper one for the granting of such damages." The substance of the above quoted requested instructions (with some changes which are immaterial to this discussion) appears to have been included in the charge which was given.

Concerning the instructions pertaining to exemplary damages defendant says: "These instructions were prejudicially erroneous for several reasons. First of all, malice was not pleaded. Punitive damages were not alleged nor prayed for. The case was not tried on the theory that malice existed. Secondly, the court at no point defined malice * * * The defendant requested no instructions concerning malice for the simple reason that malice was outside the issues." We are satisfied for reasons hereinafter elucidated, that defendant is mistaken in the substance of his contentions above quoted.

[10, 11] It is obvious that the plaintiff in pleading that "the defendant wrongfully, unlawfully and violently *assaulted* the plaintiff by firing at plaintiff a loaded revolver, the bullets from which passed through plaintiff's abdomen and other parts of his body, causing serious and severe wounds to plaintiff" (italics added), has actually pleaded a battery[1] (Penal Code, § 242) rather than a mere assault[2] (Penal Code, § 240). While the verb "assaulted" is inaccurately used in its technical legal sense, the meaning of the pleader is made clear by the context. "The words 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." (Penal Code, § 7(4).) "A malicious and guilty intent" is to be conclusively presumed from the deliberate commission of an unlawful act, for the purpose of injuring another." (Code of Civil Procedure, § 1962 (1).) It seems to us that the charge that defendant committed on plaintiff a battery by gunshot "wrongfully, unlawfully and violently," necessarily imputes to defendant "a wish to * * * injure another person" and "an intent to do a wrongful act." Malice, therefore, is inferentially pleaded.

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[1] Penal Code, § 242: "A battery is any willful and unlawful use of force or violence upon the person of another."

[2] Penal Code, § 240: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

[12, 13] In this connection it is also to be noted that the sole defense pleaded by defendant (the substance of which is hereinabove quoted) is self-defense. This is an affirmative defense which is deemed controverted (Code of Civil Procedure, § 462) and which, regardless of the adequacy of the complaint as charging malice, authorizes proof by the plaintiff that the act of defendant was actuated by malice rather than solely in defense of the person or property of his wife or himself. A defect in a complaint may be cured, as against attack on appeal, by an answer which tenders the otherwise unpleaded issue. (8 Cal. Jur. 893; Noakes v. City of Los Angeles (1918), 179 Cal. 38, 40, 175 P. 409; Alden v. Mayfield (1917), 33 Cal.App. 724, 729-730, 166 P. 382; see also Macdougall v. Maguire (1868), 35 Cal. 274, 279, 95 Am. Dec. 98.) We are satisfied, for the reasons which we have noted, that malice was at all times an issue encompassed by the pleadings.

Defendant argues, however, that since the complaint neither expressly alleges malice nor specifically mentions exemplary damages, he was taken by surprise when the issue as to such damages was submitted to the jury. In the state of the record shown we find some justification for counsel's argument but not grounds for sustaining it on appeal. The record independently of the pleadings, as well as in conjunction with them, tends to show that the case was tried on the theory that malice was an issue as a basis for exemplary damages. The testimony as to the dispute between plaintiff and defendant over the former's demand for cash payment of his winnings at the marble game furnishes a background from which ill feeling can be inferred; the testimony of plaintiff that defendant as he fired the wounding shot said "Here's your pay you son-of-a-bitch," tends to negate the theory of self-defense and to establish that the act was malicious. The very fact that plaintiff was shot, at close range, in the abdomen rather than in the foot or a limb may well have been deemed significant on the issue of malice. As hereinabove shown, the allegations of the answer, regardless of the sufficiency of the complaint, disclose that the controlling factual issue to be litigated was the question as to whether defendant in shooting plaintiff acted justifiably or maliciously. The pleadings therefore, whether viewed alone, together, or in the light of the evidence adduced, justified the proposal of instructions covering the effect of malice. The requested instructions which touch upon the subject of malice all relate likewise to the subject of exemplary damages. Section 607a of the Code of Civil Procedure provides that "In every case which is being tried before the court with a jury, it shall be the duty of counsel for the respective parties, *before the first witness is sworn,* to deliver to the judge * * * and serve upon opposing counsel, all proposed instructions to the jury covering the law as disclosed by the pleadings. Thereafter, and before the court has commenced instructing the jury, and before the commencement of the argument, counsel may deliver to such judge * * *, and serve upon opposing counsel, additional proposed instructions to the jury upon questions of law developed by the evidence and not disclosed by the pleadings." (Italics added.)

[14-16] The court, in giving the instructions proposed by plaintiff on the subject of exemplary damages based on malice as an element of the case, is not to be presumed to have gone beyond the issues made by the parties. (Code of Civil Procedure, section 1963 (15, 17, 18).) The record does not show at what stage of the proceedings the plaintiff's requested instruction were served and presented; under such circumstances, in accord with the principles hereinabove mentioned (Calif.Const. Art. VI, § 4½; Code of Civil Procedure, § 475), it is to be presumed in favor of the judgment

that the proposed instructions were served and presented "before the first witness [was] sworn," and, hence, that the defendant knew, at least from that time onward, that the plaintiff was claiming exemplary damages. The evidence hereinabove reviewed is consistent with the view that the case was tried on the theory that malice was at issue and that punitive damages were claimed. A party cannot permit an issue to be litigated and on appeal escape the consequences by claiming that such issue was not pleaded. (Slaughter v. Goldberg, Bowen & Co. (1915), 26 Cal. App. 318, 325, 147 P. 90: Boyle v. Coast Improvement Co. (1915), 27 Cal.App. 714, 720, 721, 151 P. 25; Hirsch v. James S. Remick Co. (1918), 38 Cal.App. 764, 767, 177 P. 876; Pioneer Truck Co. v. Hawley (1920), 47 Cal.App. 594, 595, 190 P. 1037; McCord v. Martin (1920), 47 Cal.App. 717, 723, 191 P. 89: Avakian v. Noble (1898), 121 Cal. 216, 219, 53 P. 559; 8 Cal.Jur. 893.)

[17] Defendant urges that the evidence which shows malice was admissible as relevant to some other issue in the case, and, hence, that his failure to object to such evidence cannot be held to indicate acquiescence in the trial of the issue of malice as a basis for the award of exemplary damages. He cites Lorenz v. Hunt (1928), 89 Cal.App. 6, 15, 264 P. 336, 340, wherein the court says, "The complaint contains no allegation of oppression, fraud or malice on the part of defendant nor any demand for exemplary damages. There is no basis, therefore, for the award of punitive damages. 8 Cal.Jur. 894. It is true that there is sufficient evidence to show malice, and the court found that the defendant's assault upon the plaintiff and her arrest by him were malicious and oppressive, but it cannot be held that the case was tried upon the theory that the question of punitive damages was in issue, because the evidence tending to show malice and oppression was admissible in support of the allegation of actual damages." We are satisfied that the very substance of the matter quoted distinguishes that case in principle from the one before us; as already shown, in the case at bar the record falls short of establishing that malice, with punitive damages based thereon, was not in issue at the trial. The fact that exemplary damages find no express mention in the prayer of the complaint does not preclude the allowance of such damages upon a contested trial. (Waite v. San Fernando Pub. Co. (1918), 178 Cal. 303, 307, 173 P. 591.) Insofar as the language or holding of the Lorenz case may be deemed to contain implications inconsistent with the views herein expressed it is disapproved.

[18] As to defendant's complaint regarding the failure of the trial court to instruct the jury on the legal significance of the word "malice," little comment need be made beyond the observation that defendant failed to request any such instruction. Malice is a word in common usage and since, as shown above, malice was an issue in the case, it was defendant's duty, if he wished to have the term defined to the jury, to prepare and present a proper definitive instruction. (24 Cal.Jur. 824, § 90.)

For the reasons above stated we conclude that no prejudicial error has been established; accordingly, the judgment is affirmed.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concur.

SPENCE, Justice.

I dissent.

If the judgment herein had not included an award for $4500 as exemplary damages but had consisted only of an award of $5500 as compensatory damages, I could agree that such judgment for compensatory damages only should be affirmed. The pleadings here, however, contained neither an express allegation of "oppression, fraud, or malice" (Civ.Code, sec. 3294) nor any prayer for exemplary damages, and I cannot agree that malice, as the basis for an award of exemplary damages, was ever made an issue by the pleadings or otherwise. On the contrary, the complaint was in the usual form of a complaint for compensatory damages only, and there was nothing in the pleadings or evidence to apprise defendant that any claim for exemplary damages was to be made. Under such circumstances, the award of exemplary damages should not be permitted to stand.

The great weight of authority adheres to the rule stated in 15 Am.Jur., at pages 766 and 767, as follows: "To entitle a person to exemplary damages he must set up distinctly in his complaint the elements that make up the basis of his claim for such damages and must make such averments as will advise the defendant that he will have to meet a demand of that kind at the trial." This is a salutary rule, for where a recovery is sought for an amount over and above the sum which will fully compensate plaintiff for the wrong inflicted, such additional recovery is in the nature of a penalty, which should not be allowed unless defendant has been clearly apprised of the nature and basis of plaintiff's demand.

In Lorenz v. Hunt, 89 Cal.App. 6, at page 15, 264 P. 336, at page 340, the court said: "The complaint contains no allegation of oppression, fraud, or malice on the part of defendant nor any demand for exemplary damages. There is no basis, therefore, for the award of punitive damages. 8 Cal.Jur. 894. It is true that there is sufficient evidence to show malice, and the court found that the defendant's assault upon the plaintiff and her arrest by him were malicious and oppressive, but it cannot be held that the case was tried upon the theory that the question of punitive damages was in issue, because the evidence tending to show malice and oppression was admissible in support of the allegations of actual damages."

The situation presented in the cited case cannot be distinguished from that existing here. The mere fact that plaintiff may have proposed instructions on exemplary damages at some time during the trial cannot, in and of itself, be made the basis for the claim that the case was tried upon the theory that the question of exemplary damages was in issue. In my opinion, the case of Lorenz v. Hunt, supra, correctly sets forth the rules governing the circumstances under which exemplary damages may be awarded, and it should be followed rather than disapproved.

SHENK and EDMONDS, JJ., concur.

Rehearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.

LOVING & EVANS v. BLICK. *

L. A. 19884.

Supreme Court of California.

March 25, 1948.

Rehearing Granted April 19, 1948.

Arbitration and award 🔑77

Where motion to vacate arbitration award was supported by uncontradicted affidavits showing that building contract executed by contractors in partnership and upon which award was based was void because only one member of partnership held a contractor's license when contract was entered into and performed, trial court erred in affirming award in favor of contractors. Code Civ.Proc. §§ 1280–1293; Business and Professions Code, § 7025 et seq.

SHENK, CARTER, and SCHAUER, JJ., dissenting and EDMONDS J., dissenting in part.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Proceeding in the matter of the arbitration between Loving & Evans, a copartnership, contractors, and Frank R. Blick, owner, concerning work performed and services rendered under a building contract. From orders that motion for order confirming arbitrator's award be granted, and that motion to set aside the award be denied and that a judgment for $5,739.87 be entered on the award in the favor of the contractors, Frank R. Blick appeals.

Judgment reversed.

Prior opinion, 177 P.2d 981.

Siemon, Maas & Siemon, Alfred Siemon, Walter L. Maas, Jr. and Bennett Siemon, all of Bakersfield, for appellant.

Burum, Woodruff & Young and Roland S. Woodruff, all of Bakersfield, for respondents.

Loeb & Loeb and Herman F. Selvin, all of Los Angeles, amici curiæ.

SPENCE, Justice.

This case presents for consideration the propriety of a judgment entered upon an arbitration award in compensation of certain contractors for work performed and services rendered under a building contract. The legality of the award is challenged upon the ground that the contractors at all times in question had failed to comply with the state licensing requirements and were therefore not entitled to enforce their claim. An examination of the record shows this point to be well taken, for the award cannot be reconciled with the settled public policy of this state as expressed in our statutory law.

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* Subsequent opinion 202 P.2d 73.

On February 8, 1945, Loving and Evans, a copartnership, respondents herein, entered into a written contract with Frank R. Blick, appellant herein, for the repair and remodeling of the latter's premises. The contract was on "a cost plus ten per cent (10%) basis," and it provided that any controversy arising between the parties should be submitted to arbitration. After the work was completed, appellant paid to respondents the sum of $13,555.00, but respondents claimed that a further amount was still due. To settle this point of dispute and in line with their previous understanding, the parties on August 24, 1945, entered into a separate "Agreement of Submission to Arbitration" of all their rights and obligations, under the provisions of sections 1280 to 1293, inclusive, of the Code of Civil Procedure. The agreement empowered the chosen arbitrator to hear the evidence, judge and determine the controversy, and "according to the legal right of the parties" render a "final award," which should "constitute a complete and final adjudication of all matters * * * submitted to arbitration" and "be in the same form" as a judgment in any civil action.

In accordance with the agreement, the following pleadings were submitted to the arbitrator: (1) respondents' petition setting forth their claim; and (2) appellant's answer wherein he (a) denied the correctness of respondents' various charges and demands, (b) urged as a "separate and special defense" that respondents as contractors could not recover on the building contract in the absence of proof that they were duly licensed as required by article 2, chapter 9, division 3 of the Business and Professions Code, and (c) counterclaimed for the sum already paid to respondents and for damages by reason of respondents' alleged failure to complete the construction work within the time provision of the contract. On March 22, 1946, the arbitrator made his award declaring that "a dispute had arisen * * * in regard to the amount due" under the parties' building contract, and that they thereupon signed an agreement which "provided that the issues of said controversy should be joined by the submission of a petition * * * and an answer thereto" and that the arbitrator should determine "the matters submitted to arbitration" and that the "award should constitute a complete and final adjudication" of all matters submitted; that a hearing was had on "all of the issues involved"; and that "after consideration of the evidence introduced" he found in favor of the contractors in the sum of $5,739.87.

Thereafter, respondents served upon appellant and filed in the superior court an application for an order confirming the award of the arbitrator. Appellant appeared and objected to the award upon the ground that the arbitrator failed to "make a full and final determination of the matters submitted" in that he gave no consideration to the special defense presented by appellant in his pleading of respondents' noncompliance with the state licensing provisions as a bar to their recovery on the contract. Accordingly, appellant served and filed his notice of motion to set aside the award, stating that it would be based upon the award, the agreement of submission, the petition for the award, and the answer to the petition—copies of all of which were attached thereto—and upon the objections to the award, the affidavit of the arbitrator, and the affidavit of appellant's counsel—copy of each of which was served therewith. The affidavit of the arbitrator recited the filing of the petition and answer, setting out the special affirmative defense; that in the course of the hearing of the matters before him, "it was stipulated by the parties * * * that it was true that at all times from the initial negotiations for the work to be performed by the Contractors for the Owner, one of the partners of the firm of Loving and Evans, to wit: J.P. Loving, held a contractor's license and held such license throughout the progress of the work and until the completion thereof," and that during all of said time "the other partner, H. D. Evans, did not have such a contractor's license" nor did "the firm of Loving and Evans, a partnership, hold or have issued to [it] a contractor's license under the provisions of the Business and Professions Code of the State of California"; that "the initial negotiations for the work eventually performed were conducted between J. P. Loving and Frank R. Blick, the Owner"; that "prior to February 9, 1945, H. D. Evans became a partner with J. P. Loving in the contracting business and thereafter the work * * * was carried on by * * * [the] partnership." The affidavit of appellant's counsel corroborated the affidavit of the arbitrator with reference to the stipulation therein mentioned.

On May 13, 1946, the matter came on for hearing and was submitted for decision. In addition to the above documents and papers stating the positions of the parties, there was also before the court the affidavit of respondents' counsel. That affidavit admitted the making of the stipulation before the arbitrator with respect to the licensing status of respondents—that "at all times * * * J. P. Loving held a general contractor's license * * *; that the firm of Loving and Evans did not hold such a license until after the termination of [the] job; that H. D. Evans, individually, did not hold such license"—but declared that "the admission of such facts did not admit that said Contractors had not complied with the provisions of the Business and Professions Code * * *, nor admit that said provisions were applicable under the circumstances * * *"; nor "admit that the question of license was a proper matter of defense in said hearing"; that "at said [arbitration] hearing evidence was introduced that the original contract for the performance of the * * * work was executed by J. P. Loving and Frank R. Blick" individually, and that "at said time J. P. Loving was doing business as an individual and was properly licensed as a general contractor."

On May 17, 1946, it was ordered that respondents' motion for an order confirming the award be granted and that appellant's motion to set aside the award be denied; and accordingly judgment for $5,739.87 was thereupon entered on the award. This appeal is taken from the two orders and the judgment. The county clerk certified the documents and papers aforementioned in accordance with Rule 5 of the Rules on Appeal. 22 Cal.2d 1, 4—6. Attached thereto is the certificate of the trial judge certifying that the three affidavits above reviewed were "used and considered" by him at the hearing, and that they constituted "all of the evidentiary matter so used or considered." Cf. Engasser v. Engasser, 75 Cal.App.2d 80, 82, 170 P.2d 116, 118.

There are two legal issues involved: (1) whether respondents, under the undisputed evidence, operated in violation of the law; and (2) if so, whether the award of the arbitrator and its approval by court order can be sustained.

The following provisions of the Business and Professions Code must be considered in determining the first question. Section 7028 states that "it is unlawful for any person to engage in the business or act in the capacity of a contractor within this State without having a license therefor, * * *." Section 7025 declares "person" to include "an individual, a firm, copartnership, * * *." Section 7026 defines "a contractor" as "any person * * * who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair * * * or demolish any building * * * or other structure, project, development or improvement, or to do any part thereof, * * *." Section 7029 specifies that "it is unlawful for any two or more licensees, each of whom has been issued a license to engage separately in the business or to act separately in the capacity of a contractor within this State, to jointly submit a bid or otherwise act in the capacity of a contractor within this State without first having secured an additional license for acting in the capacity of such a joint venture or combination in accordance with the provisions of this chapter as provided for an individual, copartnership or corporation." And section 7031 provides that "no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

There can be no question but that this case presents a clear violation of the statutes regulating the contracting business. Thus, while respondent Loving at all times possessed an individual contractor's license, his respondent partner Evans did not, and the partnership, as such, failed to procure such a license. As appellant maintains, it has been repeatedly declared in this state that "a contract made contrary to the terms of a law designed for the protection of the public and prescribing a penalty for the violation thereof is illegal and void, and no action may be brought to enforce such a contract" (Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 689, 166 P.2d 265, 266; see, also, Haas v. Greenwald, 196 Cal. 236, 247, 237 P. 38, 59 A.L.R. 1493; Wise v. Radis, 74 Cal.App. 765, 774-776, 242 P. 90; Holm v. Bramwell, 20 Cal.App. 2d 332, 335-337, 67 P.2d 114; Phillips v. McIntosh, 51 Cal.App.2d 340, 343, 124 P.2d 835); and that "whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case." Firpo v. Murphy, 72 Cal.App. 249, 253, 236 P. 968, 969; see, also, Chateau v. Singla, 114 Cal. 91, 94, 45 P. 1015, 33 L.R.A. 750, 55 Am.St.Rep. 63; Moore v. Moore, 130 Cal. 110, 113, 62 P. 294, 80 Am.St.Rep. 78; Levinson v. Boas, 150 Cal. 185, 193, 88 P. 825, 12 L.R.A., N.S., 575, 11 Ann.Cas. 661.

To overcome the force of these settled principles, respondents unavailingly seek to align their status under the licensing regulations with that prevailing as a distinguishable consideration in Gatti v. Highland Park Builders, Inc., supra, 27 Cal.2d 687, 166 P.2d 265. There a judgment in favor of plaintiff contractors was affirmed although no license in the name of the partnership under which they had been operating had been issued to the two plaintiff contractors as such. But in the Gatti case these factors were material to its disposition: (1) At the time the contract was performed, both plaintiffs possessed contractor's licenses in their own names as individuals; and (2) during the performance of the contract, a joint contractor's license was issued to plaintiffs and a third party not concerned in the action so that "thereby any matters which might form the basis of legitimate inquiry by the licensing board as a condition precedent to the issuance of an *additional* partnership or joint venture license to plaintiffs, though involving a third party, were necessarily considered, and favorable action was taken thereon." Page 689 of 27 Cal.2d, page 266 of 166 P.2d. Accordingly, it was concluded at page 690 of 27 Cal. 2d, at page 266 of 166 P.2d, that plaintiff contractors had "substantially complied with the statutory requirements," for otherwise their legitimate claim would be defeated on a "technical ground, resting on an unnecessarily strict construction of the statutory provision for the *additional* joint contractor's license and denying any effect to the combination license in fact issued to plaintiffs and a third person as above recited, [and] the legislative scheme in relation to the licensing of contractors, intended 'for the safety and protection of the public,' would become an unwarranted shield for the avoidance of a just obligation." As was further said in the Gatti case at page 690 of 27 Cal.2d, at page 266 of 166 P.2d, "similar considerations" with respect to a contractor's claim prevailed in Citizens State Bank v. Gentry, 20 Cal.App. 2d 415, 67 P.2d 364, and "justified the denial of defendant's [a] motion for a nonsuit, predicated on a rigid application of the licensing requirement," where the "contractor's license expired while the work was in progress but was renewed in the name of a corporation, organized by and bearing the contractor's name, and in which he was the dominant and controlling factor; and where the work was completed under the auspices of the corporation." But no comparable situation is presented here, for under the undisputed facts the contracting partnership of Loving and Evans did not hold a license "until after the termination of [the] job" in question and though from "all times from the initial negotiations * * * throughout the progress of the work and until the completion thereof," respondent Loving "held a contractor's license," his partner, respondent Evans, during all of said times "did not have such a contractor's license." Thus, it is apparent that the licensing regulations enacted "for the safety and protection of the public," by prohibiting inexperienced persons from engaging in contracting work, were at no time here material permitted to function in determining the qualifications of respondent Evans therefor. Such disregard of the public policy underlying the state's licensing requirements cannot be correlated with the rationale governing the Gatti and Gentry cases, and it renders the entire transaction between respondents and appellant "illegal and void," for completion of the contract "necessarily would involve the performance of illegal acts." Wise v. Radis, supra, 74 Cal.App. 765, 776, 242 P. 90, 94.

There now remains the question of the premise of appellant's objection to the enforcement of the award in favor of respondents. It must be conceded at the outset that ordinarily with respect to arbitration proceedings "the merits of the controversy between the parties are not subject to judicial review" (Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal.2d 228, 233, 174 P.2d 441, 445) and that "arbitrators are not bound by strict adherence to legal procedure and to the rules on the admission of evidence expected in judicial trials." Ibid, page 241 of 29 Cal.2d, page 449 of 174 P.2d. But, as will hereinafter appear, the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award. When so raised, the issue is one for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator, whether in the nature of a determination of a pure question of law or a mixed question of fact and law, should not be held to be binding upon the trial court.

It is generally held that "a claim arising out of an illegal transaction is not a proper subject matter for submission to arbitration, and that an award springing out of an illegal contract, which no court can enforce, cannot stand on any higher ground than the contract itself." 6 C.J.S., Arbitration and Award, § 12. Aptly illustrative of this well-settled principle is the fairly recent case of Smith v. Gladney, 128 Tex. 354, 98 S.W.2d 351, where a dispute arose between the parties as a result of trading in "futures" upon the Chicago Board of Trade. The matter was submitted to arbitration. When suit was brought upon the award and it was affirmed "on the theory that [it] was final," the appellate court, in reversing the judgment, said at pages 351, 352 of 98 S.W.2d: "It appears to be almost universally recognized that a claim arising out of an illegal transaction, such as a speculation in futures, is not a legitimate subject of arbitration, and an award based thereon is void and unenforceable in courts of the country. Tandy v. Elmore-Cooper Live Stock Commission Company, 113 Mo.App. 409, 87 S.W. 614, 618; Benton v. Singleton, 114 Ga. 548, 40 S.E. 811 [58 L.R.A. 181]; Lum v. Fauntleroy, 80 Miss. 757, 32 So. 290, 92 Am.St.Rep. 620; Hall v. Kimmer, 61 Mich. 269, 28 N.W. 96, 1 Am.St.Rep. 575; Polk v. Cleveland Railway Company, 20 Ohio App. 317, 151 N.E. 808. * * * A claim that cannot be made the basis of a suit cannot be made the basis of an arbitration. The mere submission of an illegal matter to arbitrators and reducing it to an award does not purge it of its illegality." See, also, In re Gale, 176 Misc. 277, 27 N.Y.S.2d 18, 21–23.

In ruling here upon the propriety of the arbitrator's decision, the trial court had before it and considered the affidavits of the arbitrator, of counsel for appellant, and of counsel for respondents showing the invalidity of the contract stemming from respondent partners' failure to comply with the state licensing requirements and the partnership's consequent lack of authority to bring or maintain an action or proceeding for the enforcement of the award. Pleaters & Stitchers Ass'n v. Davis, 140 Cal.App. 403, 406, 35 P.2d 401. Such affidavits were neither denied nor controverted, and, being entirely in accord on the facts showing the invalidity of the contract, the court was required to accept as true the facts therein stated. Giannopulos v. Pappas, 80 Utah 442, 15 P.2d 353, 355. Since an unlawful transaction cannot be given legal vitality by the arbitration process, there is obviously no force to respondents' argument that they are in a distinguishable position because they are not bringing "any action in any court" on their claim, within the meaning of section 7031 of the Business and Professions Code, but are only seeking judicial confirmation of an arbitration award, and therefore their noncompliance with the statutory licensing regulations would not preclude their right to enforce a recovery. In this connection it was said in Tandy v. Elmore-Cooper Live Stock Commission Co., 113 Mo.App. 409, 87 S.W. 614, at page 618: "The laws in support of a general public policy and in enforcement of public morality cannot be set aside by arbitration, and neither will persons with a claim forbidden by the laws be permitted to enforce it through the transforming process of arbitration." See, also, Smith v. Gladney, supra, 128 Tex. 354, 98 S.W.2d 351, 352. To hold otherwise would be tantamount to giving judicial approval to acts which are declared unlawful by statute. Wise v. Radis, supra, 74 Cal.App. 765, 775, 776, 242 P. 90; Massie v. Dudley, 173 Va. 42, 3 S.E.2d 176, 180, 181; In re Gale, supra, 176 Misc. 277, 27 N.Y.S.2d 18, 21-23.

In conclusion, however, it appears appropriate to make reference to certain claims made by respondents, and also to make further comment upon the state of the record on this appeal. Respondents set forth in their briefs and petition for hearing certain alleged facts as the basis for the claim that they had substantially complied with the licensing requirements. Their statement of these matters is prefaced by the remark "Although the record does not reflect the following facts and they are recited here merely for example, the facts concerning the license of respondents are as follows: * * *" Appellant not only disputes the correctness of the facts stated by respondents but likewise contends that it is improper for respondents to attempt to bring before this court alleged facts which do not appear in the record on appeal. We are of the opinion that this contention of appellant must be sustained. Under the authorities above cited it seems clear that when a party seeks to use the processes of the courts to obtain confirmation of an arbitrator's award, and an issue is raised concerning the alleged illegality of the contract upon which the award is based, the trial court is the tribunal which must determine such issue of illegality upon the evidence presented to it. If this were not the rule, courts would be compelled to stultify themselves by lending their aid to the enforcement of contracts which have been declared by statute to be illegal and void. A party seeking confirmation cannot be permitted to rely upon the arbitrator's conclusion of legality for the reason that paramount considerations of public policy require that this vital issue be committed to the court's determination whenever judicial confirmation is sought.

Turning to the record, it appears that the only evidence before the trial court showed without contradiction that the contract upon which the award was based was illegal and void because of respondents' failure to comply with the licensing requirements. According to the application for confirmation and according to the award, which was attached as an exhibit, the contract upon which the award was based was a contract made on February 8, 1945, between "Loving and Evans, a copartnership, Contractors," and "Frank R. Blick, Owner." All the evidence before the trial court, including the affidavit of counsel for respondents, showed that "the firm of Loving and Evans did not hold such a [contractor's] license" and that "H. D. Evans, individually, did not hold such [contractor's] license" either at the time of the making of the contract or at any time while the work was in progress. No evidence purporting to show any attempted compliance with the licensing requirements at any time was offered to the trial court.

This appeal is not in the nature of a so-called judgment roll appeal, and the rules governing the latter can have no application here. The transcript contains the several affidavits submitted to the trial court, and the certificate of the trial judge certifies that said affidavits were "used and considered by me" and that "said affidavits constitute all of the evidentiary matter so used or considered by me in the hearings of said motions [motion for order confirming award of the arbitrator and motion to set aside award of arbitrator]." Under these circumstances, this appeal must be determined upon the facts appearing in the record on appeal (Cf. Engasser v. Engasser, supra, 75 Cal.App.2d 80, 82, 170 P.2d 116), and it follows from what has been said that the trial court erred in confirming the award. It is unnecessary here to enter into the realm of conjecture by discussing the effect, if any, of the disputed facts which are set forth in the briefs but which do not appear in the record. Upon reversal, respondents may present to the trial court any matters which they may claim will show a substantial compliance with the licensing requirements so as to avoid the charge of illegality with respect to the contract in question.

The judgments and orders subject of this appeal are, and each of them is, reversed.

GIBSON, C. J., and TRAYNOR, J., concur.

EDMONDS, Justice.

I concur in the judgment but do not join in that portion of the majority opinion which approves and reaffirms the decision in Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265.

SHENK, Justice.

I dissent. The question whether there had been a substantial compliance with the licensing statute was a matter within the scope of the arbitration. The record on this appeal shows that this question was in issue before and was considered by the arbitrator, but the evidence thereon was not before the trial court. The award in favor of the plaintiffs established a prima facie case of substantial compliance. The award speaks for itself and in the absence as here of evidence taken before the arbitrator which would impeach it the plaintiffs are entitled to the benefit of the presumption established by subdivision 18 of section 1963 of the Code of Civil Procedure "that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them." I would affirm the judgment.

CARTER, Justice.

I dissent.

The problem here presented for determination is whether a recovery should be allowed when a contract was entered into by a duly licensed contractor who subsequently found it necessary to enter into a partnership for financial reasons, the partnership, through no fault of its own, being unable to procure a partnership contractor's license until the completion of the work.

This case presents extenuating circumstances similar to those which prevailed in the cases of Gatti v. Highland Park Builders, Inc., 27 Cal.2d 687, 166 P.2d 265, and Citizens State Bank v. Gentry, 20 Cal.App.2d 415, 67 P.2d 364, and a similar result should be reached. In both cases it was held that where there having been substantial compliance with the licensing statutes, recovery should be allowed to prevent a manifestly unjust and inequitable result.

The only record before us is a so-called judgment roll consisting of an application by Loving and Evans for Order Confirming Award of Arbitrator, Objections by Blick to Award of Arbitrator, Notice of Motion by Blick to set Aside Award of Arbitrator, Affidavit of Arbitrator, Affidavit of Walter L. Maas, Jr., one of the attorneys for Blick Affidavit of Roland S. Woodruff, one of the attorneys for Loving and Evans, Order Confirming Award of Arbitrator, and judgment on award of arbitrator. With the exception of the above mentioned affidavits, no evidence was offered in the trial court, and the evidence taken before the arbitrator was not introduced at the trial and is not a part of the record in this case.

In the affidavit of Roland S. Woodruff which was before the trial court at the time it made its order confirming the award of the arbitrator, he states with reference to the proceeding before the arbitrator:

"That at said hearing evidence was introduced that the original contract for the performance of the alteration, remodeling and repair work was executed by J. P. Loving and Frank R. Blick; that at said time J. P. Loving was doing business as an individual and was properly licensed as a general contractor under the laws of the State of California.

"Evidence was further introduced showing the relationship between J. P. Loving and H. D. Evans, when that relationship was commenced, and other facts relating thereto which were relevant to the question of whether or not said persons had complied with, or were required to comply with, the provisions of the Business and Professions Code of the State of California relating to Contractors' licenses."

In this state of the record it must be presumed that all evidence necessary to support the judgment was received. We may, therefore, assume any state of fact necessary to support the judgment which is not contrary to the admissions and stipulations of the parties appearing in the record. This is the rule announced by this court in the recent case of Transportation Guarantee Company v. Jellins, 29 Cal.2d 242, 174 P.2d 625. At pages 245 and 246, of 29 Cal.2d, at page 627 of 174 P.2d, the court said: "Contrary to the rule contended for by defendant we must, on this appeal, in determining whether the judgment shall be reversed or affirmed, construe all ambiguities in the contracts against defendant and in favor of plaintiff. *This is true, if for no other reason, than that on a judgment roll appeal it will be presumed that all evidence necessary to support the findings was received.* (Freeman v. Gray-Cowan, Inc. (1933), 219 Cal. 85, 88, 25 P.2d 415. In accordance with such rule it is to be presumed that evidence was received establishing that the contracts in question, at least insofar as any ambiguous language is concerned, were prepared and formulated by defendant and hence are to be construed against him. (Civ.Code, § 1654; Payne v. Nueval (1908) 155 Cal. 46, 50, 99 P. 486.) This rule would prevail as to the ambiguous language, under the circumstances shown here, even though it is asserted in plaintiff's brief that 'it is plain from the face of each contract in suit that a stock form of contract was used.' The admission that a 'stock form of contract' prepared by plaintiff was used, does not, on a judgment roll appeal by defendant, require us to assume in favor of reversing the judgment, that any particular clause was formulated by the plaintiff. Obviously, the contract forms were specially filled in to cover the details of the agreement in each case. Such forms, it is entirely possible, and hence, it must be presumed, if necessary, to support the judgment, were furnished in blank by plaintiff to defendant and filled in by the latter in respect to the disputed language. *In any event, the construction most favorable to sustaining the judgment must be indulged.* (2 Cal.Jur., § 511 pp. 871-3; id., § 515, pp. 879–81.) *It is also a rule of construction that a contract 'must receive such an interpretation as will make it lawful * * * if it can be done without violating the intention of the parties.'* (Civ.Code, § 1643), and 'may be explained by reference to the circumstances under which it was made, and the matters to which it relates.' (Civ.Code, § 1647.)" [Emphasis added.]

In view of the state of the record as above narrated and the rule applicable thereto as announced in the Jellins case, supra, we are justified in assuming the factual situation outlined in respondents' briefs and petition for hearing in this court which is substantially as follows:

Respondent Loving, a contractor who held a license from the State of California as required by Article 2, Chapter 9, Divisions 3, of the Business and Professions Code, entered into an oral contract for construction work with appellant Blick. The contract was to be performed on a "cost plus 10% basis." Loving, finding that he would be unable to handle the cost of the work alone, entered into a partnership agreement with respondent Evans whereby Evans was to act solely as financing partner for the partnership. After the work had started, the oral contract was reduced to writing, the only change being that the partnership appeared as contractor, rather than Loving alone. Evans had nothing to do with the actual construction work. His only active participation in the business was the approval of bills incurred.

In section 7026 of the Business and Professions Code "contractor" is defined as synonymous with "builder." Respondent Evans, who never held a license as a contractor, did not come within the meaning of the licensing statutes. He was technically a member of the partnership, but actually it was as if money had been loaned by a bank which had then insisted on supervising the financial affairs of the partnership to protect its investment.

Furthermore, the formation of the partnership with Evans as a financing partner brought about no change in the construction work. In Gatti v. Highland Park Builders, Inc., supra, at page 689 of 27 Cal.2d, at page 266 of 166 P.2d, it was said: "While it is true that during the progress of the work plaintiffs, deeming it advisable and with defendant's approval, entered into a partnership arrangement for the completion of the contract, *it does not appear that such association effected any change in the performance of the contract, which proceeded as from its inception under the direction of both plaintiffs.*" [Emphasis added.] The quotation from the Gatti case is applicable here.

The purpose of the licensing regulations is to protect the public by prohibiting inexperienced persons from engaging in contracting work. The public, or the individual member of the public here concerned, was at all times during the performance of the contract fully protected because the state had licensed Loving as a qualified contractor and he was the only member of the firm who actively engaged in the construction work.

In Stephens v. Southern Pacific Co., 109 Cal. 86, 89, 41 P. 783, 784, 29 L.R.A. 751, 50 Am.St.Rep. 17, the court quoted from Richmond v. Dubuque, etc., R. R. Co., 26 Iowa 191, as follows: "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

In Goodhart v. Mission Publishing Co., 18 Cal.App. 394, 399, 123 P. 210, 212, it was said: "Before relief may be denied because of the unlawful nature of a contract, whereby some rule of public policy is claimed to have been violated, it must appear clearly that the case comes within that class, and that the agreement of the parties in its essential obligations is tainted from improper motives."

Although it is not material, where a contract is sought to be held void as against public policy, that no actual injury to the public did result, it is material to decide whether or not such a contract comes within the class of evil which the statute sought to prevent, and whether actual injury to the public *could* have resulted.

As respondent Loving was at all times a duly licensed contractor and was at all times in complete charge of the construction work, no injury could have resulted to the public.

"Whether a contract is against public policy is a question of law for the court to determine from all the circumstances of each case. The rules which hold a contract void as against public policy should not be unduly extended." 17 C.J.S., Contracts, § 211d; Howard v. Adams, 16 Cal. 2d 253, 105 P.2d 971, 130 A.L.R. 1003; McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800; National Auto. Ins. Co. v. Winter, 58 Cal.App.2d 11, 136 P.2d 22; Nichols v. Hitchcock Motor Co., 22 Cal.App.2d 151, 70 P.2d 654; Andrews v. Horton, 8 Cal.App.2d 40, 47 P.2d 496.

To hold the contract in question here void as against public policy would be to extend unduly and give an unnecessarily strict construction to the licensing requirements.

As a further argument that the requirements of the statute were substantially complied with, the partnership *did* obtain a partnership license as required by law. When the partnership made application for its license at the time the partnership agreement was entered into, the State Contractor's Licensing Board sent them the wrong application papers. These were returned and a delay was experienced before the proper ones were sent. When the correct papers were received, one of the partners was ill and there was a further delay before the papers were filled out. When the application was finally approved by the Licensing Board and the partnership license issued, the work had been completed.

"Where a person complies so far as he can with the requirements of the license law but is unable to procure a license through no fault of his own * * * it is not unlawful for him to engage, without a license, in an occupation or business which is otherwise lawful, and he may enforce contracts made in the course thereof." 37 C.J. 260, § 139, 53 C.J.S., Licenses, § 59.

Meade v. Lamarche, 150 App.Div. 42, 134 N.Y.S. 479, 481, quotes People ex rel. Nugent v. Police Commissioners, 114 N.Y. 245, 21 N.E. 421, 422: "It is both unreasonable and unjust to the citizen to hold that in any case he is subject to a penalty imposed by law for non-performance of a duty when such performance, *without fault on his own part,* is prevented by law. It is far more agreeable to reason to construe such a statute as containing an implied undertaking on the part of the state that performance shall not be hindered or prevented by any legal authority within the limits of the state, and, as a necessary consequence, that when thus hindered and prevented the statute shall not operate as against the citizen or officer thwarted in the attempt at performance." [Emphasis added.]

As the partnership license was eventually issued by the State Contractor's Board, the delay having been caused through no fault on the part of the partners, any matters which might have formed the basis of inquiry as to the qualifications of the partnership must have been considered and favorably passed upon.

If the respondents are not allowed to recover the just obligation owed to them by the appellant when they have substantially complied with the licensing regulations, the result will be an unjust enrichment of the appellant at the expense of the respondents. As was said in the Gatti case, supra, at page 690 of 27 Cal.2d, at page 266 of 166 P.2d: "If defendant is allowed to defeat plaintiffs' legitimate claim on this technical ground, resting on an unnecessarily strict construction of the statutory provision for the additional joint contractor's license * * * the legislative scheme in relation to the licensing of contractors, intended 'for the safety and protection of the public,' would become an unwarranted shield for the avoidance of a just obligation." And, as was said in the Gentry case, supra, at page 420 of 20 Cal.App.2d, at page 366 of 67 P.2d: "In our opinion, where a manifestly unjust and inequitable result would follow from a holding that plaintiff contractor was without capacity to sue on his contract, the individual plaintiff in whose name the license stood at the time the contract was made and the corporate entity organized by him in whose name the license stood at the time the cause of action accrued, should be considered as one."

This case presents a stronger argument for allowing recovery on the contract than does the Gentry case. In the Gentry case, the license of the contractor who entered into the contract and who did the actual work was allowed to expire during the performance of the contract. Although a license was taken out in the name of the corporation which was organized by the contractor and which bore his name, the one who did the actual work was not licensed at all times during the performance of the contract as is required by law. In this case, Loving, the one who was actively engaged in the actual construction work, was licensed at all times during the performance of the contract.

The conclusion is therefore inescapable, that the licensing requirements of the statute have been substantially complied with by the respondents and to deny them recovery would bring about a manifestly unjust, inequitable and unreasonable result. Speaking frankly, I do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics. Its command always is to do justice.

It was provided in the contract that any controversy arising between the parties should be submitted to arbitration. After the completion of the work, appellant paid to the respondents the sum of $13,555.00, but respondents claimed that an additional amount was due. To settle this dispute, the parties entered into a separate "Agreement of Submission to Arbitration" of all their rights and obligations pursuant to sections 1280 to 1293, inclusive, of the Code of Civil Procedure. Under this agreement the arbitrator was empowered to hear the evidence, judge and determine the controversy, and "according to the legal right of the parties" render for them a "*final* award".

The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing. The statutory provisions are designed to avoid useless proceedings and to make the practice simple and as speedy as would be consistent with justice. Since it is the policy of the law to favor arbitration, every reasonable intendment will be indulged to give effect to such proceedings. 3 Cal.Jur. 36, sec. 6; Utah Const. Co. v. Western Pac. Ry. Co., 174 Cal. 156, 162 P. 631.

The Code of Civil Procedure, section 1281, provides that two or more persons may submit in writing to arbitration any controversy existing between them at the time of the agreement to submit, which arises out of a contract or the refusal to perform the whole or any part thereof or the violation of any other obligation.

Appellant contends that the award of the arbitrator in favor of the respondents must be vacated by the court because he was guilty of a "misbehavior" by which appellant's rights were prejudiced. The "misbehavior" of the arbitrator consisted in not allowing the special defense of the appellant—that the respondents had not complied with the licensing requirements. The arbitrator was not guilty of prejudicial error in finding in favor of respondent contractors as they had substantially complied with the licensing regulations.

It was held in Pacific Vegetable Oil Corp. v. C. S. T. Ltd., 29 Cal.2d 228, 174 P.2d 441, that arbitrators need not find facts and give reasons for their awards. The court in Van Doren v. Burns, 106 Cal.App. 224, 288 P. 1107, said that the decision of the arbitrator will be held conclusive and can be impeached only for fraud, or for gross mistake amounting to fraud. There was no fraud or gross mistake here. The contractors, having substantially complied with the licensing regulations, were entitled to recover their just claim from the appellant. For the arbitrator to find otherwise would be to allow one man to be unjustly enriched at the expense of another—a policy which is not favored by the law. A man is entitled to receive compensation for his honest, lawful labor when such is the intent of the parties. And the intent of the parties, one to labor and receive compensation and the other to receive the benefits of that labor and give compensation for it, is evidenced by the contract between them.

In Dugan v. Phillips, 77 Cal.App. 268, 246 P. 566, it was held that a party is not permitted to speculate upon the action of the arbitrators and then refuse to be bound by an adverse award. To permit a man, capable of contracting, to refuse to be bound by the award of the arbitrator, would be to permit him to breach his own contract, into which he entered voluntarily, with the sanction of the court.

"Generally, unless there is a contrary provision in the submission, a valid award operates as a merger and bar of all claims and defenses embraced in the submission and award." 6 C.J.S., Arbitration and Award, § 96; Stockwell v. Equitable F. and M. Ins. Co., 134 Cal.App. 534, 25 P.2d 873.

There is ample authority to the effect that in the absence of a provision to the contrary in the arbitration agreement an arbitrator has power to determine questions of law as well as questions of fact. Matter of Wenger & Co. v. Propper S. H. Mills, 239 N.Y. 199, 203, 146 N.E. 203; see 6 C.J.S., Arbitration and Award, §§ 48, 95, and cases there cited. "Traders may prefer the decision of the arbitral tribunal to that of the courts on such questions. When they have selected their tribunal, the court ought not to interfere with them unless very substantial reasons are shown." Matter of Wenger & Co. v. Propper S. H. Mills, supra, at page 203 of 239 N.Y., at page 204 of 146 N.E. "The reason for the high degree of conclusiveness which attaches to an award made by the arbitrators is that the parties have by agreement substituted a tribunal of their own choosing for the one provided and established by law, to the end that the expense usually incurred by litigation may be avoided and the cause speedily and finally determined. To permit the dissatisfied party to set aside the award and invoke the judgment of the court upon the merits of the cause would be to destroy the purpose of the arbitration and render it merely a step in the settlement of the controversy, instead of a final determination of it." Johnson v. Wells, 72 Fla. 290, 297, 73 So. 188, 190.

The majority opinion states: "But, as will hereinafter appear, *the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award.* When so raised, the issue is one for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator, whether in the nature of a determination of a pure question of law or a mixed question of fact and law, should not be held to be binding upon the trial court." [Emphasis added.]

The foregoing statement finds no support in any of the decided cases and is in direct conflict with every reported decision on the subject of arbitration and award. 3 Cal.Jur. sec. 27, p. 67; 6 C.J.S., Arbitration and Award, § 94; 6 C.J.S., Arbitration and Award, § 103; 3 Am.Jur. sec. 130, p. 951. The latter text states the rule as follows:

"The award of arbitrators acting within the scope of their authority determines the rights of the parties as effectually as a judgment secured by regular legal procedure, and is as binding as a judgment until it is regularly set aside or its validity questioned in a proper manner. *Their decision on matters of fact and law is conclusive, and all matters in the award are thenceforth res judicata,* on the theory that the matter has been adjudged by a tribunal which the parties have agreed to make final—a tribunal of last resort for that controversy. This rule is universally applied with respect to matters actually presented by the parties for the decision of the arbitrators, and it has been held true even in case one of the parties neglects to present portions of his claim, for the reason that the arbitrators proceed pursuant to the contract of the parties and one so contracting who fails to take advantage of his opportunity to present his full case to the arbitrators should be concluded by the award and denied further relief. *To hold otherwise, it is said, would defeat the object of arbitration, which is to avoid litigation, and would, instead, encourage resort to the courts.* In other jurisdictions, however, the courts refuse to regard an award as conclusive upon matters embraced in the submission but not actually laid before the arbitrators. Nevertheless, an award which professes to cover everything in the submission is conclusive unless it clearly appears or is proven that such matters were not considered in reaching the decision.

"An award, if otherwise sufficient, is conclusive and binding irrespective of the question of whether or not the party in whose favor it is made originally had a legal cause of action with respect to the matters submitted." [Emphasis added.] (p. 951.)

The majority opinion further states: "Turning to the record, it appears that the only evidence before the trial court showed without contradiction that the contract upon which the award was based was illegal and void because of respondents' failure to comply with the licensing requirements."

This statement entirely ignores the evidence presented to the arbitrator which is referred to in the affidavit of Roland S. Woodruff, counsel for respondents, hereinbefore quoted, which we are required to consider under the rule announced in Transportation Guarantee Company v. Jellins, supra. To avoid the effect of this rule the majority opinion states: "This appeal is not in the nature of a so-called judgment roll appeal, and the rules governing the latter can have no application here." By this mere ipse dixit the majority would place upon the prevailing party in an arbitration proceeding the burden of presenting to the trial court the evidence he had presented to the arbitrator which was presumptively ample to support the award. The effect of this holding is to entirely destroy the efficacy of an arbitration proceeding. For if a prevailing party in such a proceeding must produce evidence in court to prove that the arbitrator was justified in making an award in his favor, he might just as well bring a court action in the first instance and introduce evidence to prove that he is entitled to the relief demanded in his complaint. It is obvious that by proceeding before the arbitrator he has accomplished nothing even though the evidence presented to the arbitrator is abundantly sufficient to support the award. 3 Am.Jur. sec. 103, p. 951.

The majority has advanced no reason whatever why the determination by the arbitrator of the factual issues in a case such as this should not be binding upon the court. In this connection the majority opinion merely states that: *"the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award."* [Emphasis added.] Why such rules are inapplicable does not appear. None of the cases cited in the majority opinion purport to hold that the determination by an arbitrator of the facts of a controversy is not binding upon the court. All that those cases purport to hold is, that where the illegality of the transaction appears as a matter of law, the award of an arbitrator is not binding upon the court. I agree with the holding of these cases, but it has no application to the case at bar as the majority concede that there was a factual situation to be determined by the arbitrator, but it insists that the determination of the facts by the arbitrator was not binding upon the court. This is where the majority and I disagree, and it has nothing to support its position but a mere ipse dixit. The statutes, court decisions, text writers and any rational concept of the objectives to be achieved by arbitration are diametrically opposed to the position taken by the majority on this issue. 6 C.J.S., Arbitration and Award, § 94.

The majority opinion states: "In ruling here upon the propriety of the arbitrator's decision, the trial court had before it and considered the affidavits of the arbitrator, of counsel for appellant, and of counsel for respondents showing the invalidity of the contract stemming from respondent partners' failure to comply with the state licensing requirements and the partnership's consequent lack of authority to bring or maintain an action or proceeding for the enforcement of the award."

The foregoing is a bald misstatement of the contents of the affidavits appearing in the transcript. The affidavit of Roland W. Woodruff, counsel for respondents, contains the following statement:

> "That at said hearing evidence was introduced that the original contract for the performance of the alteration, remodeling and repair work was executed by J. P. Loving and Frank R. Blick; that at said times J. P. Loving was doing business as an individual and was properly licensed as a general contractor under the laws of the State of California.
>
> "Evidence was further introduced showing the relationship between J. P. Loving and H. D. Evans, when that relationship was commenced, and other facts relating thereto which were relevant to the question of whether or not said persons had complied with, or were required to comply with, the provisions of the Business and Professions Code of the State of California relating to Contractors' licenses."

The majority must not have read the foregoing before making the above quoted statement. It is the settled rule that an award of an arbitrator gives rise to a presumption that the evidence presented to the arbitrator was sufficient to show that the party in whose favor the award was made, was entitled to the relief awarded. 6 C.J.S., Arbitration and Award, § 130; see, also, § 131, and 3 Am.Jur. sec. 165, p. 979. The latter text states the rule as follows: "Once an award regular on its face is established by satisfactory proof, a prima facie case is made, and every presumption is in favor of its validity, the burden of introducing evidence to overthrow the award resting on the party who attacks the award. In the absence of evidence to the contrary, it will be presumed that the arbitrators decided on all points submitted, and that questions passed upon in the award necessarily connected with the transaction or by fair implication within the submission were submitted and were to be acted upon by them." (p. 980.) Therefore, the fact that the arbitrator made an award in favor of respondents in the case at bar gives rise to a presumption that the evidence presented to him was sufficient to show that respondents had complied with the requirements of the licensing statute, and the trial court was justified in indulging in such presumption. In the absence of any showing by appellant either in the trial court or this court that such evidence was not presented to the arbitrator, there is no basis for holding that the arbitrator did not have before him ample evidence that respondents had complied with the licensing statute and the contract here involved was valid and enforceable.

The general rule with respect to the finality of the award of an arbitrator is stated in 6 Corpus Juris Secundum, Arbitration and Award, § 95 as follows: *"As an adjudication or judgment, an award, which is regular on its face and has not been impeached finally concludes and binds the parties on the merits of all matters properly within the scope of the award, both as to the law and the facts, and the courts will make no inquiry as to whether the determination thereon was right or wrong,* for the purpose of interfering with the award, unless there is a statute providing for a court review of an award on the merits, or preventing the award from becoming conclusive before the entry of judgment thereon. The general rule is particularly applicable where the parties have expressly agreed that the award shall be final and conclusive, or that there shall be no appeal therefrom. Ordinarily, however, such a stipulation is not essential to the conclusiveness of the award, for it will usually be given that effect without its being so stipulated, unless it is expressly provided that the award shall not be final or conclusive; but the award is not conclusive, where so-called arbitrators act in a ministerial capacity only, unless the agreement of submission contains a stipulation to that effect, or an intention to be bound conclusively is fairly inferable therefrom." [Emphasis added.] This rule finds support in all of the decisions of this court and the District Courts of Appeal in this state which have given consideration to the problem here involved. Utah Construction Co. v. Western Pac. Ry. Co., 174 Cal. 156, 162 P. 631; Carsley v. Lindsay, 14 Cal. 390; Peachy v. Richie, 4 Cal. 205; In re Frick, 130 Cal.App. 290, 19 P.2d 836. Notwithstanding these authorities the majority opinion states that the trial court was not bound by the factual determination of the arbitrator in this case and reverses the judgment approving and confirming the award of the arbitrator and sends the case back to the trial court with the following direction: "It is unnecessary here to enter into the realm of conjecture by discussing the effect, if any, of the disputed facts which are set forth in the briefs but which do not appear in the record. Upon reversal, respondents may present to the trial court any matters which they may claim will show a substantial compliance with the licensing requirements so as to avoid the charge of illegality with respect to the contract in question." The effect of this holding is that the determination of the issue of fact relative to whether or not respondents has substantially complied with the requirements of the licensing statute was not for the arbitrator but for the trial court. As stated before, the majority opinion cites no authority supporting this holding and all of the authorities are contrary thereto. In legal effect, this holding can result in but one conclusion and that is whenever the question of illegality is raised, or can be raised, in any case where the parties desire to submit a controversy to arbitration, and where such question of illegality is a question of fact, or a mixed question of law and fact, the determination of this issue by the arbitrator is a nullity, as it must be redetermined by the trial court in the event the losing party desires to have the matter relitigated. This is indeed a backward step in the science of jurisprudence and in the administration of justice, as the law favors the submission of matters to arbitration since it affords an expeditious and inexpensive method for determining disputes and relieves the courts of some of their burdens and consequent congestion arising from the necessity of hearing and determining controversies.

Finally, there is no legal basis for the introduction in evidence in the trial court of the affidavits of counsel for the respective parties and the affidavit of the arbitrator which were filed in this case. This conclusion must follow from the settled rule that the award of an arbitrator is conclusive evidence of all matters contained therein and that such an award cannot be impeached or attacked except for fraud or misconduct or unless the error appears on the face of the award. 3 Am.Jur. sec. 166, p. 980; 6 C.J.S. Arbitration and Award, § 131; Utah Construction Co. v. Western Pac. Ry. Co., supra; Carsley v. Lindsay, supra; Peachy v. Richie, supra. In American Jurisprudence, supra, the rule is stated thus:

"In general, the award is the best evidence of the matters determined by the arbitrators; and in proceedings to enforce it, *the award itself is conclusive evidence of all matters therein contained,* provided the arbitrators have not exceeded the powers delegated to them by the agreement of submission. *The courts regard matters submitted as concluded by the award, and in an action thereon they will not review the merits of the arbitrators' findings.* However, the mere fact that certain persons signed the award is not, in itself, sufficient evidence that they were the persons selected by the parties to decide the controversy.

"Parol evidence, of course, is admissible to establish an oral award or an oral submission; *but extrinsic evidence cannot be admitted to alter an award. The award generally speaks for itself, and cannot be altered any more than the verdict of a jury.* It is not open to proof of any understanding or meaning of the arbitrators different from that which it carries with it and is warranted by its terms." (p. 980.) [Emphasis added.]

In 6 Corpus Juris Secundum, Arbitration and Award, § 131, the rule is thus stated: "Impeachment of award. It is often declared broadly that an arbitrator is not a competent witness to impeach his own award, and that his admissions or declarations are not admissible for that purpose. Hence, an arbitrator is not a competent witness to prove his own fraud or misconduct, or the misconduct of a party involving also misconduct of the arbitrator; and admissions made by an arbitrator, after the filing of an award, are not competent evidence for that purpose. However, an arbitrator who has refused to join in the award may testify to acts of partiality or misconduct on the part of other arbitrators; and he may testify as to conduct of a party tending to influence his decision."

It follows from the foregoing authorities that the affidavits presented to the trial court in the case at bar, and on which the majority relies for a reversal of the judgment, were not competent evidence and should not have been considered by the trial court or this court in determining the finality of the award made by the arbitrator.

While the proposition is not discussed in the majority opinion, it is obvious that under the rule therein announced, appellant will not only defeat recovery by respondents of the sum of $5,739.87 awarded to them by the arbitrator, but may also recover from respondents the sum of $13,555.00 voluntarily paid by appellant to respondents before the award was made. Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570; Salada Beach Public Utility Dist. v. Anderson, 50 Cal.App.2d 306, 123 P.2d 86; Miller v. City of Martinez, 28 Cal.App.2d 364, 82 P.2d 519; County of Shasta v. Moody, 90 Cal.App. 519, 265 P. 1032. I cannot believe it was the intention of the framers of this statute or of the members of the Legislature who adopted it that it could ever be invoked to perpetrate such an outrageous injustice. Certainly no injury can result to the public from a holding that the provisions of the statute were substantially complied with in this case. It is the public interest and not private gain which should be given paramount consideration in the interpretation and application of statutes of this character.

For the foregoing reasons, the judgment should be affirmed.

SCHAUER, J., concurs.

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84 Cal.App.2d 653

JUBELT et ux. v. MYERS et al.

Civ. 3589.

District Court of Appeal, Fourth District, California.

March 30, 1948

1. Attachment 🔑166

A promissory note is personal property capable of manual delivery, so that attaching officer must take it into his possession when it can be found in order to make levy legal. Code Civ. Proc. § 542, subd. 3.

2. Garnishment 🔑95

Record failed to establish that note payable to nonresident defendant and deed of trust on realty securing payment thereof were outside the state so as to justify garnishment of debt evidenced thereby as personal property not capable of manual delivery on ground that attaching officer could not take note and deed of trust into his possession. Code Civ.Proc. § 542, subds. 3, 6.

3. Statutes 🔑230

Where a statute is amended by two different acts, passed at different times, the last amendment repeals the first and operates as the only amendment to the original statute.

4. Attachment 🔑1

Since attachment proceedings are purely statutory, the provisions of statute must be strictly followed.

5. Garnishment 🔑193

Attachment of nonresident defendants' interest in realty evidence by note payable to them and deed of trust on the realty as personal property not capable of manual delivery by leaving a copy of writ, description of realty, and notice of attachment with maker and trustor who resided on the realty, was properly dissolved, where no copy of summons and complaint, in action from which writ issued, was served with the garnishment as required by statute. Code Civ. Proc. § 542, subd. 6.

6. Garnishment 🔑29, 95

Pledgor's interest in pledged property can be reached by garnishment, but not by a levy on and by the taking possession of the pledged property. Code Civ.Proc. § 542, subd. 6.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by L. E. Jubelt and wife against Garnett Sketers and wife for personal injuries and property damage sustained in an automobile collision, wherein a writ of attachment was issued and Laurence B. Myers intervened claiming ownership of attached property. From an order releasing the attachment, named plaintiff appeals.

Order affirmed.

Lester N. Gonser, of Fresno, for appellant.

Louis J. Coelho, of Fresno, for respondent.

MARKS, Justice.

This is an appeal by L. E. Jubelt from an order, made on the motion of the intervenor, releasing an attachment in an action wherein L. E. Jubelt and Mildred Jubelt, his wife, are plaintiffs, and Garnett Sketers and Grace Sketers, his wife, are defendants. Intervenor claims ownership of the attached property by reason of its transfer to him by defendants.

The complaint, filed on September 30, 1946, alleges that plaintiffs were injured in a collision between an automobile in which they were riding and the automobile of defendants, on a public highway in Fresno County, about September 17, 1944; that the Jubelt automobile was the property of L. E. Jubelt and that it was damaged in the sum of $700. The complaint contains several causes of action seeking recovery of damages for their personal injuries and including one by L. E. Jubelt seeking recovery of this $700. It is further alleged that defendants were non-residents of the State of California and that about three months after the accident they departed from California and ever since have been and are now residents of Gulf Breeze, Florida.

Mr. Jubelt, on September 30, 1946, secured a writ of attachment by reason of the damage to this personal property in the sum of $700. The record discloses that on September 30, 1946, the interest of defendants in Lot 6 in Block 2 of Cedar Park in Fresno County was attached; "by filing with the County Recorder of Fresno County, a copy of the writ, together with a description of the property, and a notice that it is attached, and by leaving a similar copy of the writ, description and notice with Harold V. McCulley who resides on the property" and "that under and by virtue of the within writ, by me received on the 30th day of September 1946, I did on the 1st day of October 1946 levy upon and attach all moneys, goods, credits and effects, and all other personal property in the possession of Harold V. McCulley belonging to said defendant, or either of them, by leaving with Harold V. McCulley, personally a copy of said writ, with a notice that such property was attached and levied upon in pursuance of said writ, and not to pay over or deliver the same to anyone but myself. I also demanded a statement in writing of the amount of the same, to which I have received no answer."

The record further shows that in June, 1946, Mr. and Mrs. Sketers sold to Harold V. McCulley and Martha M. McCulley, Lot 6, Block 2 of Cedar Park; that they executed a deed of trust on the property securing the payment of a promissory note in the sum of $5500, payable to Mr. and Mrs. Sketers or order in instalments; that in the deed of trust Mr. and Mrs. McCulley were trustors, the San Joaquin Title and Abstract Company was trustee and Mr. and Mrs. Sketers were beneficiaries.

The verified complaint in intervention recites that the deed of trust was duly recorded; that on September 10, 1946, the beneficiaries under it made, executed and delivered an assignment of the deed of trust to intervenor which assignment was recorded on October 29, 1946, and that concurrently therewith they "sold and assigned said promissory note to petitioner and Intervenor herein and ever since said assignment, Intervenor has been and now is the owner of said promissory note and the substituted Beneficiary under said Deed of Trust."

It it not disputed that Mr. Jubelt was entitled to the issuance of a writ of attachmen to secure his claim for damage to his personal property as defendants were not residents of California but were residents of Florida. Subdv. 3, Sec. 537, Code Civil Proc. The real question presented is the sufficiency of the levy which Jubelt sought to have made.

[1] Subdivision 3 of Section 542 of the Code of Civil Procedure provides in effect that personal property, capable of manual delivery, in the possession of the defendant, must be attached by taking it into the possession of the attaching officer. It has been held that a promissory note is personal property capable of manual delivery so that the attaching officer must take it into his possession, when it can be found, in order to make the levy legal. Hoxie v. Bryant, 131 Cal. 85, 63 P. 153; Gault v. Wiens, 32 Cal. App. 1, 161 P. 996; Haulman v. Crumal, 13 Cal.App.2d 612, 57 P.2d 179. Here the attaching officer did not take the note into his possession.

Plaintiffs seek to escape the effect of this rule by arguing that under the facts of this case the note must be considered personal property not capable of manual delivery. They state in their opening brief, without reference or citation to the record, that "at the time of the commencement of said action the defendants resided in the State of Florida and had in their possession within said State a certain promissory note, which note was made by Harold V. McCulley and Martha M. McCulley, both of whom were and are residents of the State of California, which note was payable to Garnett Sketers and Grace Sketers, defendants herein."

They argue that as the note and deed of trust were outside the State it was legally impossible for the officer to take them into his possession so that the debt was subject to garnishment as provided in Subdivision 6 of Section 542 of the Code of Civil Procedure.

[2] We have found nothing in the record supporting the foregoing assertion as to the location of the note and deed of trust. As far as we can determine the record is entirely silent on that subject and the documents might have been in the possession of an agent of defendants in Fresno and thus subject to levy by their being taken into possession by the officer.

[3] Section 542 of the Code of Civil Procedure was twice amended by the legislature in 1945. The first amendment in point of time was approved by the Governor on April 27, 1945, and was filed with the Secretary of State the next day. Stats. 1945, P. 612. The second amendment was approved by the Governor and filed with the Secretary of State on June 9, 1945. Stats.1945, P. 1478. As said in 23 Cal. Juris. page 684: "Where a section is amended by two different acts, passed at different times, the last amendment repeals the first and operates as the only amendment to the original action (section)."

Subdivision 6 of Section 542 of the Code of Civil Procedure, as approved on June 9, 1945, contained the following:

"Debts and credits and other personal property, not capable of manual delivery must be attached by leaving with the persons owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent or in the case of a corporation, with the president of the corporation, vice president, secretary, assistant secretary, cashier, or managing agent thereof, a copy of the writ, *together with a copy of the summons and complaint in the action from which the writ issued,* and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ; * * *." (Emphasis ours.) This amendment was in effect at the time of the garnishment in this case and there is no claim that a copy of the summons and complaint was served with the garnishment.

[4, 5] It is established that, as attachment proceedings are purely statutory, the provision of the statute must be strictly followed or they cannot be upheld. Gow v. Marshall, 90 Cal. 565, 27 P. 422; Brun v. Evans, 197 Cal. 439, 241 P. 86; Brainard v. Rogers, 74 Cal.App. 247, 239 P. 1095; Anaheim National Bank v. Kraemer, 120 Cal.App. 63, 7 P.2d 765. As they were not followed in this case the order dissolving the attachment cannot be reversed.

[6] Nothing we have said conflicts with the holding in the case of Puissegur v. Yarbrough, 29 Cal.2d 409, 175 P.2d 830. There a note was pledged to a bank and a garnishment was served on an officer of the bank but the pledged note was not taken into the possession of the officer. This was held to be in accordance with the procedure laid down for such cases in subdivision 6 of Section 542 of the Code of Civil Procedure. This holding is in accordance with the rule that a pledgor's interest in the pledged property can be reached by garnishment, but not by a levy on, and by the taking possession of the pledged property. Dubois v. Spinks, 114 Cal. 289, 46 P. 95; Houghton v. Pac. S. W. Trust & Savings Bank, 111 Cal.App. 509, 295 P. 1079.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

84 Cal.App.2d 722

HETHERINGTON et al. v. CROSSLEY TRANSP. CO. et al.

CROSSLEY TRANSP. CO. et al. v. HETHERINGTON et al.

Civ. 15986.

District Court of Appeal, Second District, Division 3, California.

April 5, 1948.

1. Automobiles ⚿244(10)

Evidence sustained finding of motorist's negligence in colliding with approaching automobile which was on the wrong side of the highway in full view for about a mile where all that motorist did to avoid the collision was to slow down to about 10 miles an hour and turn to the left side of the highway although there was a 10 foot shoulder on the right side of the highway onto which he could have driven.

2. Appeal and error ⚿996

Implied finding could not be disturbed on appeal, if supported by reasonable inferences.

3. Automobiles ⚿245(62)

Whether negligence of motorist in colliding with an approaching automobile was the proximate cause of a subsequent collision occurring when a large tank truck and trailer ran into both automobiles was a question for the jury.

4. Automobiles ⚿245(78)

In an action for damages sustained when two automobiles collided and a large tank truck and trailer crashed into both automobiles after they stopped on the highway, whether speed of tank truck of 35 miles an hour was negligent was properly submitted to the jury. Vehicle Code, § 515.

5. Automobiles ⚿245(89)

In action for damages sustained when two automobiles collided and a large tank truck and trailer crashed into both automobiles after they stopped on the highway, contributory negligence of the driver of the truck in traveling on the wrong side of the highway was properly submitted to the jury.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Marie Hetherington and Albert J. Hetherington against the Crossley Transportation Company, a corporation, and Bert James Karber to recover for damages resulting from a collision between an automobile owned by Marie Hetherington and driven by Albert J. Hetherington and a truck owned by Crossley Transportation Company, a corporation, and driven by Bert James Karber, wherein the defendants filed a cross-complaint against the plaintiffs. From a judgment for the defendants on their cross-complaint, the plaintiff appeals.

Judgment affirmed.

Fred O. Reed and Murchison, Myers & Gray, all of Los Angeles, for appellants.

Parker, Stanbury & Reese, Harry D. Parker and Kermit J. Morgan, all of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

On the 26th day of September, 1944, at about 5:45 A.M., at a point on U. S. Highway 60, some 13 miles east of the city of Riverside, a Hudson car belonging to appellant, Mary Hetherington, and being operated by her husband, Dr. Albert J. Hetherington, in a easterly direction, collided with a Ford car being driven by one James Keesheen in a westerly direction, the left front portions of the two cars coming into contact. The highway was 28 feet wide, divided by a white line, with shoulders at least 10 feet wide. There was testimony that the Hetherington car came to rest across this line and extended in a southeasterly direction over most of the south half of the paved highway. The Keesheen car came to rest on the north side of the highway facing in a northwesterly direction. The distance between the two cars was estimated at from five to ten feet. A few minutes thereafter, while plaintiffs were still in their car, a truck and trailer of Crossley Transportation Company, driven by its employee, Karber, traveling in an easterly direction, collided with both cars, continued for a considerable distance down and off the highway, where the truck tipped over, caught fire and was demolished. Hetherington and wife sued the Crossley Company and Karber for damages and these defendants, in a jury trial, recovered judgment on their cross complaint against Hetherington and wife. The Hetheringtons appeal.

The questions on appeal are whether there was sufficient evidence that Dr. Hetherington was negligent and whether respondents were guilty of contributory negligence as a matter of law.

Dr. Hetherington testified that his headlights were on and that he saw the approaching Keesheen car when it was about a mile away weaving back and forth across the middle white line; that pretty soon it got onto the south side of the highway and came on toward him; that when the car was nearly upon him, 25 or 50 feet away, on the south half of the highway, he turned his car to the left so that it extended about a foot over the middle line into the north half of the street where his left front fender came in contact with the left front fender of the Keesheen car. The lights of both cars were extinguished by the first accident. Respondent Karber testified that the equipment he was driving was some 60 feet in length, was loaded with fuel oil and weighed approximately 67,000 pounds; that he had been traveling within a mile or so of 40 miles an hour; that his right front bumper hit the Hudson car; that about 250 or 300 feet west of the point of impact he came into a fog bank and in doing so slowed down his truck to about 35 miles an hour; that the eastern edge of the fog bank was approximately 75 feet from the point of the accident; that he judged the fog was about 50 feet thick but would not call it a dense fog; that at the speed he was going he could have stopped his vehicle in from 150 to 200 feet, and that when he entered the fog bank he could not see that far ahead of him. Karber did not testify at the trial to having seen the Hetherington car before the collision, but it was shown that he had testified in a deposition and at a former trial that when he emerged from the fog bank he saw an object on the highway about 75 or 80 feet in front of him and that he applied his brakes and tried to pull around the two cars. He was rendered unconscious and remained so for some ten days. Keesheen also was seriously injured. He was called as a witness but was unable to recall any of the immediate circumstances preceding or following the accident.

The case is clearly not one in which we can hold either the implied finding of negligence on the part of Dr. Hetherington or the absence of contributory negligence on the part of Karber to be unsupported by the evidence.

A conclusion of negligence is deducible from the testimony of Dr. Hetherington that the Keesheen car was entirely on the south side of the highway as it approached him and that when it was about 25 or 50 feet away from him he turned to the left in order to allow it to pass to his right. No other witness testified that the Keesheen car was on the wrong side of the highway. Photographs of the front end of the Hudson car show that the right front fender was undamaged. Dr. Hetherington testified that the first collision was a slight one and from this testimony and the fact that he crossed the middle line it could be reasoned that had he not done so the collision would not have occurred.

[1] Moreover, if Dr. Hetherington's account of the accident had been believed it would have furnished additional reasons for a finding of negligence on his part. There was at least a 10-foot shoulder along the south side of the highway for a considerable distance west of the point of collision. A fruit stand was located about 35 feet south of the highway and directly opposite the point of collision. From a point some 50 feet west of the fruit stand the shoulder of the highway gradually broadened from 10 feet to about 35 feet at the fruit stand, and to the east there was an even longer area, equally wide. Dr. Hetherington had a clear opportunity and ample time to drive onto the shoulder so that his car would have been entirely free of the paved portion of the highway. If, as he testified, he

saw the Keesheen car as it traveled the last mile and realized that it was on the south side of the highway, it would have required no sudden decision on his part to move far enough to the right to avoid all danger of being struck. We find in his testimony no account of precautions taken to avoid being hit by the Keesheen car except that he slowed down to 10 miles an hour and turned to the left. The decision of the jury indicates the belief that in the exercise of ordinary care he should have given the oncoming car a wide berth. We are in agreement with the jury on this point.

[2, 3] It is suggested by appellants that even if Dr. Hetherington was negligent his negligence was not a proximate cause of the second collision. Aside from the fact that this was a question for the jury, and the implied finding in favor of cross-complaints on this issue may not be disturbed if it is supported by reasonable inferences, we are of the opinion that it would have been difficult for the jury to have reached a different conclusion. The blocking of the highway as the result of the first accident was the immediate cause of the second one, unless negligence of Karber was proved to have been the sole proximate cause of the collision.

[4, 5] We must assume that the jury believed the testimony of Karber that he drove through a fog bank which obscured his vision, saw no objects ahead of him on the highway until he was within 75 or 80 feet of the stationary cars, and endeavored in this emergency to pass between them. It is argued that he could have turned to the right off the highway, but his failure to do so does not by any means carry the weight as evidence of negligence that is attributable to the failure of Dr. Hetherington to turn to the right, or off the highway. Karber's decision to try to pass between the two cars was formed in an emergency, whereas, Dr. Hetherington had sufficient time for reflection and the exercise of deliberate judgment. The verdict reflects a correct understanding of the rule applicable to these facts under which greater responsibility rested upon Dr. Hetherington than upon Karber. While there was testimony estimating the speed of the truck as high as 50 miles per hour, Karber testified that when he struck the fog bank he slowed down to 35 miles per hour, and this speed was not an unlawful speed under section 515 of the Vehicle Code, nor a negligent speed as a matter of law. While there was testimony to the effect that the night was sufficiently clear to enable witnesses to see the truck while it was still approximately a mile to the west of the point of collision, it is to be presumed that the jury believed that Karber encountered a fog bank as he testified. It is quite obvious that it would have required a heavy fog to blot out the headlights of the approaching truck, whereas, a considerably less amount could have rendered obscure stationary and unlighted objects on the highway. An officer of the state highway patrol, who drove east from Riverside to the scene of the accident, a distance of some 13 miles, testified that he drove through a number of fog banks that were from 300 to 400 feet wide. Karber also testified that he had stopped his truck that morning near Pomona, pulled off the road and had slept for some two hours, because of a heavy fog which made driving too difficult.

Upon the evidence which we have outlined, the conclusions of the jury upon the issues of negligence and contributory negligence are conclusive upon the appeal.

The judgment is affirmed.

WOOD, J., and VALLEE, Justice pro tem., concur.

84 Cal.App.2d 624

In re WHITE'S GUARDIANSHIP.

Civ. 7426.

Sac. 5866.

District Court of Appeal, Third District, California.

March 29, 1948.

1. Guardian and ward 🔑25

Evidence supported probate court's order terminating minor child's paternal grandmother's guardianship of child and awarding his custody to his mother on grounds that guardianship was no longer necessary, that mother was proper person for child's custody, and that award of custody to her was for child's best interest. Probate Code, § 1580, subd. 8.

2. Guardian and ward 🔑25

The District Court of Appeal, on appeal from probate court's order terminating minor child's paternal grandmother's guardianship of child and awarding his custody to his mother, is bound by probate court's findings on conflicting evidence as to mother's fitness for child's custody. Probate Code, § 1580, subd. 8.

3. Guardian and ward 🔑25

When guardianship of minor child is no longer necessary, probate court, on petition of child's parent for termination of guardianship, with adequate proof of petitioner's fitness for child's custody and best interest of child, may award custody to such parent in exercise of sound discretion, and District Court of Appeal may not interfere with such determination, in absence of abuse of discretion. Probate Code, § 1580, subd. 8.

4. Parent and child 🔑2(4)

When minor child's custody is awarded to one of its parents, probate court need not find that other parent is unfit for child's custody, but parent's unfitness must be determined only when child's custody is awarded to another than one of its parents.

5. Guardian and ward 🔑25, 27

The probate court, which originally granted letters of guardianship of minor child's person and estate, is authorized by statute to remove guardian and appoint another guardian for any of causes mentioned therein. Probate Code, § 1580, subd. 8.

6. Guardian and ward 🔑25

On mother's petition for termination of her minor son's guardianship by his paternal grandmother on ground that guardianship was no longer necessary and for award of child's custody to petitioner on ground of child's welfare, probate court retained authority to determine what was for child's best interest and to award his custody accordingly. Probate Code, § 1580, subd. 8.

7. Guardian and ward 🔑25

A court having jurisdiction to grant letters of guardianship has jurisdiction to revoke them. Probate Code, § 1580, subd. 8.

8. Guardian and ward 🔑25

A probate court, appointing guardian of minor child's person and estate, retains continuing supervisory jurisdiction over estate's affairs and guardian's handling thereof, and removal of guardian for statutory reasons rests within such court's broad discretion. Probate Code, § 1580, subd. 8.

9. Guardian and ward 🔑29

A parent or other relative of minor child under guardian's control may seek child's custody by petition.

10. Guardian and ward 🔑25

A probate court, which originally granted letters of guardianship of minor child's person and estate, retained jurisdiction to terminate guardianship as no longer necessary and to award child's custody to his mother on her petition. Probate Code, § 1580, subd. 8.

11. Guardian and ward 🔑25

The statute providing that minor ward's marriage or attainment of majority terminates guardianship, where guardian was appointed solely because of ward's minority, and that, in all other cases, guardianship is terminated only by court's order on guardian's or ward's application after notice to the other, is inapplicable to removal of guardian on petition of minor ward's parent for termination of guardianship and award of child's custody to petitioner on grounds that guardianship is no longer necessary and that award of custody to petitioner is for child's best interest. Probate Code, §§ 1580, subd. 8, 1590.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the guardianship of the person and estate of David Theodore White, Jr., a minor. From an order terminating the minor's paternal grandmother's guardianship and awarding his custody to his mother, the guardian and the minor's father appeal.

Affirmed.

Frank L. Murphy, of Sacramento, for appellants.

Van Dyke & Harris, J. A. Montgomery and Leo M. Fitzwilliam, all of Sacramento, for respondent.

THOMPSON, Justice.

The paternal grandmother of David Theodore White, Jr., was appointed guardian of the person and estate of said minor child, who was two and a half years of age. Upon subsequent petition of the mother of the child, which was served on both the guardian and the father of the child, the probate court terminated the guardianship, under Section 1580, subdivision 8, of the Probate Code, and awarded his custody to his mother. From that order both the guardian and the father have appealed.

The appellants contend that the order is not supported by the evidence, that the court was without jurisdiction to terminate the guardianship, or to award the custody of the child to the mother without specifically finding that the father was not a fit or proper person to assume his custody.

February 1, 1942, David Theodore White and Zelma Maxine Kauffman were married. Soon thereafter he entered the United States military service and was first stationed at Florence, South Carolina. His wife accompanied him to that place. The child in question was born as issue of the marriage in 1942. The military service required Mr. White to go overseas. The mother then returned to Sacramento, which was their former home. She received $100 per month, and sometimes more, from his compensation and the Government allotment, as maintenance for herself and their child. The child had no estate. The allowance was insufficient for their maintenance, and the mother was therefore required to accept employment. She was then living in Sacramento. To provide for care of the child while the mother was working she consented to the appointment of the petitioner, Thelma V. White, the paternal grandmother, as guardian of the person and estate of the minor child. The letters of guardianship were issued January 3, 1945. Mr. White returned to the United States on January 22, 1945, and was discharged from military service in July, 1945. His wife had been keeping company with William S. Mitcham. He was the father of a girl born to Zelma White, April 3, 1944. Mr. White, upon his return, procured a divorce from Zelma in the State of Nevada in June, 1945. The decree of divorce made no provision for the custody of the child, David Theodore White, Jr. Mr. White married another woman February 2, 1946. Zelma White married Mr. Mitcham July 3, 1945. That marriage had the effect of legitimating their child. (Civil Code, sec. 215.) Mr. Mitcham and his wife Zelma immediately established a home at Rio Linda, near Sacramento, where they now reside. They are desirous of obtaining possession and custody of her son, David.

The petition to terminate the guardianship of David and to recover his custody was filed by his mother, Zelma, in Sacramento, July 11, 1946. Process was served on both the guardian and Mr. White, who appeared, answered the petition and participated in the hearing which occurred October 30, 1946. Both opposed the petition and testified as witnesses at the hearing. Mr. White did not ask for the personal custody of the child.

The court adopted findings favorable to the petitioner in accordance with the foregoing statement of facts, determining: That Zelma, the mother of the child David, consented to the granting of letters of guardianship of the child on account of the necessity then existing that she was obliged to accept employment to aid in the maintenance of herself and said minor; that said necessity for a guardian no longer exists; that Zelma and her present husband, Mr. Mitcham, are now living together in their home and are desirous of having the custody and control of the child; that, despite her previous conduct, the mother, Zelma, is a fit and proper person to have the custody, care and control of the minor child; and that it is for the best interest of the child that his mother, Zelma, should assume his custody and control.

The court thereupon ordered that the letters of guardianship of the person and estate of the minor child, David, be revoked and terminated, and that he be awarded to the custody and control of his mother, Zelma Maxine Mitcham, with the privilege granted to his father to visit him at all reasonable times and places. A motion for new trial was denied. From the order terminating the guardianship and awarding the child to the mother, both the guardian and Mr. White, the father of the child, have appealed.

[1, 2] We are of the opinion the findings and order terminating the guardianship and awarding the custody of the child to his mother are adequately supported by the evidence. The probate court determined that guardianship of the child was no longer necessary, that the mother was a fit and proper person to assume his custody, and that it was for the best interest of the child to award him to her custody. The fitness of the mother and the welfare of the child were direct issues in this proceeding. The father opposed the awarding of custody to Zelma, but made no application for the child's custody in his own behalf. We assume that the father was entirely fit and proper. While the evidence is conflicting regarding the fitness of the mother, we are bound by the findings of the court in that respect. We are satisfied the court did not abuse its discretion in determining that it is for the best interest of the child in awarding him to the custody of the mother.

[3] When it appears that the guardianship of a minor child is no longer necessary, the Probate Code authorizes the termination of his guardianship (Probate Code, sec. 1580, subd. 8), and upon petition therefor, with adequate proof of the fitness of the parent and the best interest of the child, in the exercise of its sound discretion the court may award the custody of the child to such parent. In the absence of an abuse of discretion, we may not interfere with that determination. Guardianship of Case, 57 Cal.App.2d 844, 135 P.2d 681; Guardianship of Riley, 72 Cal.App.2d 742, 165 P.2d 555; Guardianship of Russell, 21 Cal.2d 767, 772, 135 P.2d 369; Warder v. Elkins, 38 Cal. 439, 441; Guardianship of McCoy, 46 Cal.App.2d 494, 116 P.2d 103; Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229.

In the Riley case, supra, under circumstances similar to those of the present proceeding, an order terminating the guardianship on the ground that "it is no longer necessary" and awarding the custody of the minor to her mother, who had previously consented to the guardianship, was affirmed on appeal. Regarding the discretion of the probate court to make that order, it is said, 72 Cal.App.2d at page 747, 165 P.2d at page 557: "Since the probate court retains continuing supervisory jurisdiction over guardianship matters, the removal of a guardian for any of the reasons specified in the code, Prob.Code, § 1580, rests within the broad discretion of the court, and where, as in the instant case, the court found that the mother was a fit and proper person and concluded that the guardianship was no longer necessary, the court properly removed the guardian and restored the custody of the child to her mother."

[4] When the application for custody of a minor child is awarded to one of the parents, it is not necessary to find that the other parent is unfit for its custody. The unfitness of a parent of a minor child is required to be determined only when its custody is awarded to one other than its parents. Stever v. Stever, supra.

[5] The probate court which originally grants letters of guardianship is authorized under Section 1580 of the Probate Code to remove the guardian of the person and estate of a minor child and to appoint another person in his place, for any of the causes

mentioned in that section. Guardianship of Howard, 218 Cal. 607, 24 P.2d 486. In the case last cited, in which the father of the child petitioned for the discharge of the mother as guardian, on the ground that she "removed from this state", and to appoint him in the wife's place, the court said, 218 Cal. at page 611, 24 P.2d at page 487: "The power of the appointing court to direct, restrain, and control a guardian in the performance of his duties, *and even to remove him, and put another in his place,* is settled beyond controversy. However, the removal of guardians is not an arbitrary or capricious, but a judicial, discretion, to be exercised with due regard to the legal rights of all concerned. [Citing authorities.]"

[6] In the present case the mother's petition was not only based on the ground that the guardianship "is no longer necessary", but it also asked for the custody of the minor child on the ground of its welfare. The fitness of the mother and the welfare of the infant child were the chief issues in this case. The probate court retained authority, upon that petition, to determine what was for the best interest of the child, and to award its custody accordingly.

[7] In 39 Corpus Juris Secundum, Guardian and Ward, § 50d, it is said: "The court having jurisdiction to grant letters of guardianship has jurisdiction to revoke them."

[8] In the matter of the Guardianship of Russel, supra, 21 Cal.2d at page 772, 135 P.2d at page 371, the Supreme Court said: "The Probate Court retains a continuing, supervisory jurisdiction over the affairs of the estate and the guardian's handling thereof, and the removal of a guardian for the reasons specified in the code rests within the broad discretion of that court."

[9] And in 39 Corpus Juris Secundum, Guardian and Ward, § 57, it is said: "The parent or other relative may by petition seek the custody of the ward, where the guardian has control."

In the matter of the Guardianship of Case, supra, the essential facts are similar to those of the present case. In that proceeding, as the issue of the marriage of Mr. and Mrs. Case, a child named Louis was born in 1935. The mother died. The maternal grandmother took possession of the child and was appointed guardian of the person and estate in 1937. The father was then serving in the United States Navy. He returned to his home in 1940 and later filed a petition in the guardianship matter, asking the probate court to discharge the guardian, under Section 1580 of the Probate Code, on the ground that "It is no longer necessary to have a guardian," and also asked the court to award to him the custody of the minor child. The application was contested by the grandmother. The court found that "the welfare of the minor will best be served by terminating the guardianship and restoring the child to his father." [57 Cal.App.2d 844, 135 P.2d 682] The father was found to be a fit and proper person. That order was made. The guardian appealed. On appeal the court said: "When the appointment of a guardian for a minor of tender years is found to be necessary, such appointment is a duty of the Superior Court. When it appears to the court that a guardianship is no longer necessary for such ward the court must thereupon remove the guardian. § 1580, subd. 8, Prob.Code. Inasmuch as a natural parent has superior right to the custody of his child when possessed of such character as to make him a fit custodian thereof, the reason for the guardianship of the minor ceases and its continuance is improper. In re Santos' Estate, 185 Cal. 127, 132, 195 P. 1055. Since the father is competent and has therefore the preferential right to have the custody of his child, even though he were impecunious, the court is powerless to maintain the grandmother as guardian of his person. [Citing authorities.]"

[10] We conclude that the Probate Court, which originally granted the letters of guardianship of the person and estate of the minor child, retained jurisdiction upon this petition to terminate the guardianship on the ground that it was no longer necessary, and to award the custody of the child to his mother.

[11] The appellants contend that the court was without jurisdiction to terminate the guardianship except upon "application

of the guardian or the ward." (Prob.Code, sec. 1590.) That section provides:

> "(1) Where the appointment of a guardian was made solely because of the ward's minority, the marriage of a minor ward terminates the guardianship of the person; and the guardianship of the estate of a minor female ward is terminated upon her attaining majority as provided in Section 25 of the Civil Code.
>
> "(2) If the appointment of a guardian is made solely because of the ward's minority, the guardianship is terminated by his attaining majority.
>
> "(3) In all other cases the guardianship is terminated only by order of the court *upon application of the guardian or the ward,* after such notice *to the other* as the court or judge may require." (Italics added.)

We think the foregoing section has no application to the removal of a guardian, upon petition of a parent of a minor child on the grounds specified in Section 1580 of the Probate Code, or for the custody of the child by said parent. Section 1590 apparently contemplates only the termination of a guardianship of a minor when the ward obtains the age of majority or has married, in either of which events, the application for termination would naturally be made by the guardian or the ward. That construction is apparent, for the last subdivision of that section provides that, under such circumstances, the order may be made only "after such notice *to the other.*" The section makes no reference to the awarding of the custody of a minor to his parents on the ground that it is for its best interest, or otherwise. Naturally, the parties most interested in the welfare of a minor, who is to be relieved of its guardianship, are the parents. The termination of guardianship on the ground that the ward has attained majority or has married is not included in Section 1580. Section 1590 is confined to the termination of guardianships on the grounds mentioned therein. In the event of the subsequent marriage of a ward, or the attaining of majority, whether he be a male or a female, it is apparent that both the guardian and the ward would then be qualified to apply for a termination of the guardianship upon giving "notice to the other." But when the gist of the application is for custody of an infant by a parent, for the best interest and welfare of the child, under such circumstances as exist in this case, the limited notice specified by Section 1590, to the guardian or ward only, would be utterly inadequate since the other parent, if living, would be entitled to notice of that proceeding. We conclude that the provisions of Section 1590, with respect to the parties who may petition for termination of a guardianship, and the notice there required, has no application to Section 1580, or to a petition for custody of an infant minor.

The order terminating the guardianship and awarding the custody of the minor child, David Theodore White, Jr., to his mother, Zelma Maxine Mitcham, is affirmed.

ADAMS, P. J., and SCHOTTKY, J. pro tem., concur.

ZARAGOSA v. CRAVEN. *

Civ. 7448.

District Court of Appeal, Third District, California.

March 30, 1948.

Hearing Granted May 27, 1948.

1. Judgment 🔑693

Final judgment on the merits in action by husband for his injuries sustained in automobile collision was res judicata of issues of subsequent action by wife for her injuries and for special damages sustained in the same collision, and estopped wife from maintaining such action, since issues were identical, and since wife, although not named as a party plaintiff in husband's action, was in privity with husband because of her community interest in his cause of action, and because, if wife recovered, husband would profit to extent of his community interest in the judgment, notwithstanding determination against him on the merits. Code Civ.Proc. §§ 370, 378, 382, 1908, 1910; Civ.Code, § 164.

* Subsequent opinion 202 P.2d 73.

2. Judgment 🔑678(1)

A judgment or order is operative not only upon parties but to the same extent upon their privies, the term "privity" denoting mutual succession or relationship to the same rights of property.

See Words and Phrases, Permanent Edition, for all other definitions of "Privity".

3. Husband and wife 🔑260

Wife's community interest vested in husband's chose in action to recover for personal injuries and in any judgment which might be recovered bv husband. Civ.Code, § 164.

4. Judgment 🔑634

In determining plea of res judicata, three questions are pertinent, namely, was issue decided in prior adjudication identical with one presented in present action, was there a final judgment on merits, and was party against whom plea is asserted a party or in privity with a party to prior adjudication.

5. Judgment 🔑693

Section 370 authorizing a married woman to maintain a suit for damages for injury to her person does not mean that such a suit may not be barred by estoppel where husband's action for his injuries arising out of same accident has gone to final judgment, since such section must be read with sections 1908 and 1910 declaring the doctrine of res judicata. Code Civ.Proc. §§ 370, 1908, 1910.

6. Husband and wife 🔑260

A chose in action or right to sue for damages for personal injuries sustained by either husband or wife during the marriage is a community property interest and damage received falls into the community as property acquired during marriage regardless of which spouse prosecutes action. Code Civ.Proc. § 1910; Civ.Code, § 164.

7. Judgment 🔑693

Where wife was in privity with husband in his action for personal injuries and evidence of judgment in husband's action, which was properly received against wife in her subsequent action against same defendant for her injuries arising out of same accident, indicated that she and defendants must be considered to have been on opposite sides in former case, defendants could invoke estoppel by judgment against wife. Code Civ.Proc. § 1910.

8. Judgment 🔑693

The term "privity", includes, but is not confined to, property rights acquired by spouses by inheritance, succession or purchase from other parties subsequent to marriage and, when applied to a judgment, refers to one whose interest has been legally represented at the trial, and applies to a wife who acquires after marriage or owns a property interest with her husband in a chose in action. Civ.Code, § 164; Code Civ.Proc. §§ 367, 370, 378, 382, 427, 1910.

9. Judgment 🔑678(1)

The term "privies" includes persons who are parties to or have an interest in any action or thing, or any relation to another; those who are partakers of, or have an interest in, any action or thing; persons connected together, or having a mutual interest in the same action or thing, by some relation other than that of actual contract between them.

See Words and Phrases, Permanent Edition, for all other definitions of "Privies".

10. Husband and wife 🔑249

The test in determining whether a chose in action is community property is whether it is property and whether it was acquired during marriage. Civ.Code, § 164.

11. Husband and wife 🔑262(2)

Where defendant in action for injuries sustained in an automobile collision interposed a plea of estoppel by judgment by reason of a final judgment in action by plaintiff's husband for his injuries arising out of same accident, burden was upon plaintiff wife to prove any antenuptial agreement between spouses to effect that property interests in chose in action and in former judgment would not become community property as a matter of defense to alleged estoppel, and upon her failure to prove such agreement, former judgment was controlling on the issue and a bar to wife's action. Civ.Code, § 164; Code Civ. Proc. §§ 1908, 1910.

12. Negligence ⚷89(2)

The negligence of a husband which contributes to injury of his wife will be imputed to wife and bar her from recovering judgment for her injuries on that account, since recovery would be community property. Civ.Code, § 164.

13. Judgment ⚷693

Where, in husband's action for injuries arising out of an automobile collision, jury determined that defendant was not guilty of negligence and that husband was contributorily negligent, either of such defenses, established by final judgment in husband's action, would be good against wife, precluding her from recovering judgment for her injuries received in the same collision. Code Civ.Proc. §§ 367, 370, 378, 382, 1908, 1910.

14. Judgment ⚷948(3)

Liberality should be exercised in granting motions to amend answer setting up former judgment as res judicata of issue involved. Code Civ.Proc. §§ 1908, 1910.

15. Judgment ⚷948(3)

Where husband's action was pending and undecided at time wife's action was commenced, both of which actions sought recovery for personal injuries arising out of same automobile accident, court did not abuse discretion in permitting defendant to amend answer in wife's action, after judgment against husband became final, to set up judgment in husband's action as an estoppel and as res judicata. Code Civ.Proc. §§ 1908, 1910.

◆

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by Jennie Zaragosa against Jerry Albert Craven to recover for personal injuries sustained in an automobile collision. From a judgment sustaining defendant's plea of res judicata and estoppel by judgment, plaintiff appeals.

Affirmed.

C. Ray Robinson, Willard B. Treadwell and Margaret A. Flynn, all of Merced, for appellant.

Stammer & McKnight, of Fresno, for respondent.

THOMPSON, Justice.

Judgment was rendered against the plaintiff in a suit for personal injuries and for special damages growing out of an automobile collision. She was riding in the car with her husband who was operating it at the time of the accident. A prior judgment was rendered against the husband, in a suit brought by him only, for his personal injuries sustained in the same accident. The wife was not an actual party plaintiff in the first action. In this suit the answer pleaded the first judgment as res judicata and estoppel to this action, setting up the fact that plaintiff was riding with her husband in their car at the time of the accident; that both actions are based on the same casualty, and that the chose in action was, and any judgment which might be recovered would be, their community property. The question of estoppel was first tried by agreement. The judgment roll in the husband's case was admitted in evidence, over the objection of plaintiff that it was incompetent. Upon oral and documentary evidence adduced, the court found against plaintiff on all issues, and rendered judgment against her on the ground that the first judgment was res judicata, and that plaintiff is estopped from maintaining this action on that account. From that judgment this appeal was perfected.

The appellant contends that the prior judgment against the husband is not res judicata or an estoppel from maintaining this suit by the wife for her own personal injuries sustained as a result of the accident because she was not a party to the first suit and not in privity with him under Sections 1908 and 1910 of the Code of Civil Procedure; that the husband's contributory negligence, which was an issue in the first case, could not be imputed to the wife, and that the community interests in a judgment for her personal injuries might have been abrogated by an "antenuptial agreement".

The amendment to the answer in this case alleges that Joe Zaragosa, the husband of plaintiff, previously filed suit against this defendant for damages for personal injuries resulting from the same automobile accident on account of which Mrs.

Zaragosa now seeks in this separate action to recover damages for her personal injuries; that the plaintiffs in said actions were, at all times mentioned, husband and wife, and that "the causes of action of each of said plaintiffs arising out of said automobile collision were and are the community property of both of them;" that Mrs. Zaragosa knew of her husband's said action and "was present in court at the trial thereof"; that at the time of the accident Mrs. Zaragosa was riding in their machine, which was then being operated by her husband; that the issues of defendant's negligence and plaintiff's contributory negligence were both determined by a jury adversely to the plaintiff in that action, Mr. Zaragosa, and a judgment was accordingly rendered against him, to the effect that there was no valid cause of action; that no appeal was taken from that judgment and it became and is final; that said judgment is res judicata of the essential issues of this case, and estops and bars the wife from recovering damages against that defendant growing out of that same casualty. The former judgment determined there was no liability on the part of the defendant.

The foregoing facts were all determined by the court favorable to the defendant. A judgment was rendered accordingly.

[1] We are of the opinion the court properly found that the judgment which was previously rendered in the suit brought by the husband for personal injuries sustained by the same automobile casualty is res judicata of the issues of this case, and that Jennie Zaragosa is thereby estopped from maintaining this action for her personal injuries and for special damages incurred in that accident. In this case the court found that the respective parties plaintiff were husband and wife; that both cases were based on the same automobile casualty; that this plaintiff was in privity with her husband in the first action; that the judgment was rendered in the first suit on the grounds that Mr. Zaragosa was guilty of contributory negligence and the defendant was not guilty of negligence; and that the property interests involved "were and are the community property of both" of the spouses.

It is true that this plaintiff was not named as a party plaintiff in the first action, but she had a community interest in that chose in action and in any judgment which her husband might have recovered. She must, therefore, be deemed to have been in privity with him, and consequently bound by the issues determined in that action. In 15 California Jurisprudence, page 191, section 220, it is said:

[2] "It is an elementary principle, recognized by the code, that a judgment or order is operative not only upon parties, but to the same extent upon their privies. The term 'privity' denotes mutual succession *or relationship* to the same rights of property."

[3] The plaintiff's community interests vested in the former chose in action and in any judgment which might have been recovered by her husband in that prior suit. In accordance with Section 1908(2) of the Code of Civil Procedure, the Supreme Court said in Bernhard v. Bank of America, 19 Cal.2d 807, at page 813, 122 P.2d 892, at page 895:

[4] "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one present in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party *or in privity* with a party to the prior adjudication? (Citing authorities.)"

Applying the preceding test to the present case, we must answer the first two questions in the affirmative. In reply to the last question we must assume that this plaintiff was in privity with her husband in that suit on account of her community interest in the property involved. In Atchison, T. & S. F. Ry. Co. v. Nelson, 220 F. 53, 57, 135 C.C.A. 621, the federal court said regarding the parties to a suit for personal injuries received by the wife as the result of tort, in a suit by the husband for her injuries and consequential damages to himself on that account, that "the judgment recovered in either case was community property, and by reason of that fact *the wife was in privity* with the husband and an actual party to each suit. (Citing California authorities.)" There is reason for that conclusion, which appears in applying the principle to this action. The husband brought suit for his personal injuries resulting from the automobile casualty, and refrained from making his wife a party plaintiff. He lost the suit because it was determined the defendant was not guilty of negligence, and upon the contrary that he was guilty of contributory negligence. The wife then brought the present suit for her personal injuries and for special damages for medical care, growing out of the same casualty. If she could recover damages he would profit to the extent of his community interest in the judgment, notwithstanding the fact that the merits of the casualty were determined against him in a former suit. In the former suit it was determined there was no valid cause of action. That is the reason given by many authorities for applying the doctrine of res judicata under circumstances similar to this case.

[5] It is true that the California statute authorizes a married woman to maintain a suit for damages for injury to her person. C.C.P., sec. 370. But that does not mean that a suit may not be barred by estoppel under the circumstances of this case. Both statutes should be read together in determining the merits of the action.

Every action must be prosecuted in the name of the real party in interest. C.C.P., sec. 367. A married woman may sue for damages for injury to her person, without joining her husband. C.C.P., sec. 370. The plaintiff may unite several causes of action growing out of the same transaction, resulting in "injuries to person", provided that a suit brought by the husband and wife, to recover damages to the husband for injury to his wife, in the nature of consequential damages resulting from his loss of services and companionship, may be recovered "without separately stating such cause of action." C.C.P., sec. 427.

[6] In this case the appellant suggests that she was not in privity with her husband or bound by the adverse judgment against him in the former action for his personal damages growing out of the same automobile casualty; that even though she would be an interested party in the first suit on account of her community interest in any judgment he might have recovered, she had no similar community interest in the husband's right of action or chose in action, as distinguished from her property interest in whatever judgment he might have secured. Franklin v. Franklin, 67 Cal.App.2d 717, 722, 155 P.2d 637. But the California authorities, with the exception of the last one cited, appear to be unanimous in holding that a chose in action or right to sue for damages for personal injuries sustained by either a husband or wife during the marriage is a community property interest, regardless of which spouse prosecutes the action. Solko v. Jones, 117 Cal.App. 372, 374, 3 P.2d 1028; Giorgetti v. Wollaston, 83 Cal.App. 358, 362, 257 P. 109; Cutting v. Bryan, 206 Cal. 254, 258, 274 P. 326; Moody v. Southern Pacific Co., 167 Cal. 786, 790, 141 P. 388; Justis v. Atchison, Topeka & Santa Fe Ry. Co., 12 Cal.App. 639, 642, 108 P. 328; 41 C.J.S., Husband and Wife, § 473b. In the text last cited, which is supported by several cited California cases and authorities from other jurisdictions, including W. W. Clyde & Co. v. Dyess, 10 Cir., 126 F.2d 719, it is said:

"* * * As a general rule, unless some special provision therefor is made by statute, damages received in compensation for injuries to either the husband or the wife, or to both are held to fall into the community as property acquired during the marriage. *The chose in action or the right to sue for damages is community property in like manner, and the damages after recovery fall into the community regardless of which party has prosecuted* the action." (Italics added.)

Section 378 of the Code of Civil Procedure provides that "All persons may be joined in one action as plaintiffs who have an interest in the subject of the action." And Section 382 of that code provides in part that "* * * those who are united in interest must be joined as plaintiffs or defendants."

While the wife who brought this action was not actually named as a party in the former suit of her husband for personal injuries received, since she owned a community interest in that chose in action she must be deemed to have been in privity with him and to have been a constructive party thereto so as to bind her by the judgment which was rendered against him, for the reason that her husband represented her interest in the former suit as completely as though she had been actually named therein as a party. Cutting v. Bryan, supra; C.C.P., sec. 1910. The section last cited provides that:

"The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either."

[7] If the wife was in privity with her husband in that suit and therefore deemed to have been a constructive party thereto, as the Cutting case determines that she was, the evidence of the former judgment, which was properly received in this case against her, indicates that she and the defendants must be considered to have been on "opposite sides in the former case," and it follows that the judgment "could * * * have been made between them." That construction of the facts of this case brings it within the provisions of Section 1910, supra.

[8] It is suggested that the wife was not in privity with her husband in ownership of said property rights in the chose in action, because the term "privity" is confined to property rights acquired by spouses "by inheritance, succession, or purchase" from other parties subsequent to the marriage. 50 C.J.S. Judgments, § 788.

It is true that the definition of "privity" includes the foregoing statement. But the same section of 50 Corpus Juris Secundum, last cited, includes a much broader definition of that term. It reads:

"With respect to the application of the doctrine of res judicata to those in privity with parties to a suit, there is no generally prevailing definition of 'privity' which can be automatically applied to all cases, and the determination of who are privies requires careful examination into the circumstances of each case as it arises. According to many decisions, privity means a *mutual* or successive relationship to the same rights of property, or such an identification in interest of one person with another as to represent the same legal rights; and *the term 'privity' when applied to a judgment or decree refers to one whose interest has been legally represented at the trial.*"

[9] The foregoing text is supported by a multitude of authorities from most of the states of our Union, including the Cutting case, supra, by our Supreme Court. The definition of the term "privies" uniformly includes "persons who are parties to, or *have an interest in any action or thing,* or any relation to another; those who are partakers of, or have an interest in, any action or thing; * * * *persons connected together, or having a mutual interest in the same action or thing,* by some relation other than that of actual contract between them." 50 C.J. 406, sec. 1; Century Dict. and Enc. In 3 Bouv. Law Dict., Rawle's Third Rev., page 2723, it is said: "Privy. One who is a partaker or has any part or interest *in any action, matter, or thing.*"

We conclude the term "privity" applies to a wife who acquires after marriage and owns a property interest with her husband in a chose in action, under the circumstances of this case.

In the case of Cutting v. Bryan, supra, Minetta, the wife of Henry Cutting, brought suit in her name alone to determine her community interest in mining claims. On motion of one of the defendants to dismiss the action, his affidavit showed that Henry Cutting was a party to a suit then pending in the Federal court involving his interest in the community property; that the property was then in the hands of a receiver by virtue of an order of the Federal court. The action in the state court was thereupon dismissed. On appeal that judgment was affirmed. The appellant contended that since the wife was not an actual party to the Federal suit, she was not bound by its decision. In the Cutting case the Supreme Court held that, in spite of the fact that the wife was not an actual party to the Federal suit, since the community interests of the spouses were involved therein, she was in privity with her husband in that action, and that she was represented therein by her husband "as fully as though she had been expressly made a party thereto." The court said [206 Cal. 254, 258, 274 P. 327, 328]:

"The fact that the plaintiff was not expressly made a party to the action which had theretofore been commenced and was being prosecuted in the federal court does not, in our opinion, militate against the application of the foregoing principle, for the reasons set forth in certain of the cases above cited, and *for the additional reason that the husband of the plaintiff was the principal party defendant in said action, and as such was representing the community interest of himself and also of his wife in said property, and that as to such interest the plaintiff herein was in privity with her husband, and was represented in said action by him as fully as though she had been expressly made a party thereto.* (Citing authorities.)" (Italics added.)

The Franklin case, supra, in which a hearing was denied, appears to be in conflict with the former decisions of the Supreme Court to the effect that a chose in action, as well as a judgment recovered for personal injuries sustained by either a husband or wife during marriage, is community property. Both the California and Southern California Law Reviews recognize that conflict. 18 S.C.R. 278; 33 C.L.R. 627. The first of these cited reviews of that case, after stating that "by recognizing that the judgment would be community property, it is material and necessary to establish *the cause of action* as community property", concludes by saying that "Until such time as the judgment recovered upon such action is deemed to be separate property, it must be inevitable that the chose in action on which the judgment is based must be classified community property." The latter cited review of that case, after stating that the Franklin case is in conflict with previous California authorities, mentioning the Solko case, and others, says that "If the cause of action is property, it accrues to the community estate at its inception." After stating that such judgment is community property, the author says, "This is the present law of California." In commenting on the Franklin case, the review suggests that it "is not so much that the result is wrong but that the previous rules of law are questionable." But our Supreme Court has frequently held that the right of action for personal injuries to spouses is not separate personal property belonging to the husband, and it has specifically refused to overrule the principle declaring that it is community property inuring to the benefit of both spouses. In the case of Moody v. Southern Pacific Co., supra, after citing numerous authorities and reiterating the rule that the right of action for tort resulting in personal injuries is community property, the court said, at page 791 of 167 Cal., at page 390 of 141 P.:

"We are now asked to overrule these decisions. [Reciting the appellant's reasons therefor.] * * * The reasoning is forceful, but the rule has been followed so long and so often that it should be considered settled. * * * The remedy for any hardships or anomalies resulting from this long-settled rule rests with the Legislature."

In Waters v. Waters, 75 Cal.App.2d 265, 170 P.2d 494, it was held that an action for a fee, which was recovered in a suit for that purpose by the defendant who was an attorney, was community property and properly distributed to Mr. and Mrs. Waters in a divorce suit between them, in spite of the fact that the action for attorney's fees was merely pending and not yet determined when the interlocutory decree of divorce was awarded in which it was divided between the spouses as community property. That case was decided in 1946, a year and a half after the Franklin decision was rendered.

[10] The theory upon which it has so frequently been held that a chose in action acquired by spouses after their marriage is community property, just as the judgment rendered thereon is also community property, is that the judgment is founded on, or stems from, the same cause of action, and the character of the property rights is the same with respect to both. In considering the community rights of spouses there are but two types of property involved, namely, separate and com-

munity property. Assuming that the judgment when rendered is community property, as the Franklin case concedes, if the chose in action is not the same character then it must necessarily be separate property. It is inconsistent to hold that the mere right to bring the suit is separate property while the judgment obtained therein is community property. We are unable to perceive what method of reasoning or principle of law could result in transforming separate property into community property under such circumstances. The test is, was the chose in action property, and was it acquired during marriage. If so, then it must be community property, just as the judgment which is the result of that litigation is community property. The authorities are uniform in holding that a chose in action is property. The right to maintain the action for personal injuries to both the husband and the wife accrued during their marriage. Sections 162 and 163 of the Civil Code provide that all property owned by either spouse before marriage, and that which is afterward acquired by "gift, bequest, devise, or descent, with the rents, issues, and profits thereof" is separate property. Section 164 of that code provides that "All other property acquired after marriage by either husband or wife, or both, * * * is community property." Until the legislature, or the Supreme Court, definitely draws a distinction as to the character of property between a chose in action acquired after marriage and a judgment rendered thereon, we must assume that both are community property.

[11] The appellant, however, asserts that she is not estopped from maintaining this suit because there might have been an antenuptial agreement between the spouses to the effect that the property interests in the chose in action and in the former judgment would not become community property. But, in this case, there is no evidence of any such antenuptial agreement. The burden was on the plaintiff to prove that agreement, if any such existed, as a matter of defense to the alleged estoppel. She failed to prove that agreement. The former judgment is therefore controlling on that issue.

[12] The appellant further suggests that the issue of imputing the negligence of the husband to the wife, who was riding in the car at the time of the accident, was not decided in that case. The California authorities appear to be uniform to the effect that the negligence of a husband which contributes to the injury of his wife will be imputed to the latter and bar her from recovering judgment for her injuries on that account. Giorgetti v. Wollaston, supra; Martin v. Costa, 140 Cal.App. 494, 498, 35 P.2d 362; Solko v. Jones, supra; Dicken v. Souther, 59 Cal.App.2d 203, 210, 138 P.2d 408; 9 Blashfield's Cyc. of Auto. Law and Practice, Perm.Ed., § 5862. In the Giorgetti case it is said in that regard [83 Cal.App. 358, 362, 257 P. 111]:

> "A right of action for personal injuries to the wife is community property (citing authorities); and though as provided by statute she may sue alone (sec. 370, Code Civ.Proc.), yet if the negligence of her husband proximately contributed to her injuries, the right of either or both to recover is barred (citing authorities)."

[13] In the prior case of Mr. Zaragosa, the issues of his contributory negligence and defendant's freedom from negligence were both tried and determined against him. If the defendant was not guilty of negligence, that would be a complete defense to the present action. If the jury determined that the husband could not recover because he was guilty of contributory negligence, under the foregoing authorities that negligence would be imputed to his wife and she would thereby be barred from recovery for her injuries in this suit. In either event she would be precluded in this action from recovering judgment for her injuries.

[14, 15] The trial court did not err in granting defendant's motion to amend his answer by setting up the former judgment as res judicata of the issues involved and a bar in this action. Liberality should be exercised in granting such amendments. 21 Cal.Jur. pp. 183–186, secs. 127 and 128. The complaint was filed in this case June 26, 1946, but the cause was not tried until May 14, 1947. In the meantime the former suit of the husband was tried and judg-

ment was rendered against the plaintiff October 31, 1946. A motion for new trial was not denied in that case until December 2, 1946, and the judgment did not become final until after that date. On motion of the defendant in this case, after the former judgment became final, the order was properly made authorizing him to file an amendment to his answer setting up the former judgment as a bar and as res judicata. There was no abuse of discretion in making that order. The trial of the issues of res judicata and estoppel were heard by the court, sitting without a jury, by stipulation of respective parties. The plaintiff participated in that trial. Evidence was adduced thereat. There was no error in that proceeding.

For the foregoing reasons the judgment and the order are affirmed.

ADAMS, P. J., and PEEK, J., concur.

84 Cal.App.2d 649

BEAULAC v. BEAULAC.

Civ. 16120.

District Court of Appeal, Second District,
Division 1, California.

March 30, 1948.

1. Divorce 🔑221

Where no counsel fees were asked for by wife before trial and there was no stipulation concerning them, court had no jurisdiction to grant wife attorney's fees for services rendered in the past.

2. Divorce 🔑296

The amount which may be awarded for support of children in a divorce action is within the trial court's reasonable discretion.

3. Divorce 🔑291, 297

Court, in exercise of its discretion in making an award in a divorce action for support of children, is not controlled by the pleadings of the parties, or their written agreements.

4. Divorce 🔑308

Court did not abuse its discretion in divorce action wherein wife was granted a divorce, in awarding wife $80 a month for support of two minor children, though husband's answer to cross-complaint admitted that $100 a month was a reasonable sum for support, where at time of trial husband's salary had been reduced from $400 a month to $300 a month.

5. Divorce 🔑249(3)

In divorce action, wherein the wife was granted a divorce, award to husband of $450 out of $900 earned by wife after separation from her husband was erroneous. Civ.Code, § 169.

◆

Appeal from a judgment of the Superior Court of Los Angeles County; Leslie E. Still, Judge. Modified and Affirmed.

Action for divorce by Harold L. Beaulac against Jane C. Beaulac, wherein the defendant filed a cross-complaint. From a judgment awarding the defendant a divorce but granting her no alimony or attorney's fees, awarding her $80 a month for support of minor children, and awarding plaintiff $450 of defendant's separate property, defendant appeals.

Judgment modified and, as modified, affirmed.

Cameron & Perkins and W. E. Cameron, all of Long Beach, for appellant.

E. O. Leake and J. J. Leake, both of Los Angeles, for respondent.

BARTLETT, Justice pro tem.

This is an action for divorce. At the time of the trial it was announced in behalf of plaintiff that no evidence would be introduced in support of the complaint. Therefore, the case proceeded to trial upon the issues raised by the cross-complaint filed by the wife and the answer thereto. An interlocutory decree was granted to the wife on the grounds of extreme cruelty and adultery. She appealed from the judgment insofar as it awarded her no alimony or attorney's fees, and also from those portions of the decree which awarded her $80.00 per month for the support of the minor children and awarded to her husband $450.00 of her separate property.

In her opening brief, the appellant makes no mention of the question of the failure of the court to award her alimony, so we will not discuss that matter.

[1] As far as appellant's complaint that no attorney's fees were granted to her is concerned, no application for attorney's fees was made before trial and there was no stipulation concerning them. The attorney's fees asked for were strictly in payment for services rendered in the past. Under such circumstances, the court has no jurisdiction to make the award requested. White v. White, 96 Cal.App. 765, 274 P. 990; Smith v. Superior Court, 89 Cal.App. 177, 264 P. 573.

Appellant urges that the court exceeded its power in awarding her as small a sum as $80.00 per month for the support of the two minor children for the reason that her husband in his answer to the cross-complaint admitted that $100.00 per month was a reasonable sum for their support. The cross-complaint alleges that the ages of these children were 6½ and 2½ years, respectively.

[2, 3] Between the time her husband filed the answer and the time of trial, his salary had been reduced from $400.00 per month to $300.00 per month with "take-home pay" of $270.00 per month. The amount which may be awarded for the support of children is within the reasonable discretion of the trial court. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582; Sawyer v. Sawyer, 57 Cal.App.2d 582, 134 P.2d 868. In exercise of that discretion, the court is not controlled by the pleadings of the parties or their written agreements and this includes the right to reduce the amount provided for children's support as conditions change as well as the right to increase them.

In Adams v. Adams, 2 Cal.App.2d 173, 37 P.2d 729, 731, the parties had entered into a contract settling their property rights in which it was provided that the plaintiff should pay $125.00 per month for the support of the minor children. The interlocutory decree provided for payment of $125.00 per month. A little over a year later, the trial court modified the decree to provide for payments of but $75.00 per month. In its decision, the court said:

"'The fact that the order is in conflict with the provisions of the property settlement contract which was executed by the parties with respect to the maintenance of the child does not impair the validity of the order. While it is true that the discretion of the court to make an allowance for the maintenance of a minor child is limited to the conditions and financial ability existing at the time of the order (9 Cal.Jur. 802, § 143; Schammel v. Schammel, 105 Cal. 258, 38 P. 729), the parents may not abridge the rights of the minor to deprive her of an adequate support by any prior agreement. 9 Cal.Jur. 803, § 144; Lewis v. Lewis, 174 Cal. 336, 163 P. 42; Parkhurst v. Parkhurst, 118 Cal. 18, 50 P. 9. The amount is within the reasonable discretion of the court. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582.' See, also, Karlslyst v. Frazier, 213 Cal. 377, 2 P.2d 362; Moog v. Moog, 203 Cal. 406, 264 P. 490; Smith v. Superior Court, 89 Cal.App. 177, 264 P. 573.

"Plaintiff urges that the trial court must be governed by consideration of the welfare of the minor in making an award for support; that reducing the amount formerly allowed for support cannot promote such welfare; that therefore the court in changing an award cannot reduce but can only increase it. We cannot follow the logic of this argument. Under many circumstances and for many reasons the reduction of the amount of support money might be made solely out of consideration of the best interest and welfare of a child. Among the many cases affirming orders reducing awards formerly made for support of minor children, the following may be cited: Beal v. Beal, 218 Cal. 755, 24 P.2d 768; McMillan v. McMillan, supra, [215 Cal. 435, 10 P.2d 465,] and Soule v. Soule, supra, [4 Cal. App. 97, 87 P. 205.]"

[4] A review of the record in the case at bar convinces us that the court proper-

ly exercised its discretion in this matter.

Appellant calls attention to the fact that the judgment contains the following provisions:

"5. That upon the entering of the final decree the parties are entitled to have assigned to them as his or her separate property the portions of the community property as follows:

* * * * * *

"(d) To Harold L. Beaulac, $450.00 of the $900.00 now in the possession of the defendant and cross-complainant."

Mrs. Beaulac was the innocent party in this proceeding. The testimony shows without conflict that after her separation from Mr. Beaulac, Mrs. Beaulac secured a position as a school teacher and while separated from her husband saved from her earnings the $900.00 to which the judgment refers. This provision in the judgment is based on this finding by the court:

II. * * *

"e. That there is community property of the parties consisting of the following items:

* * * * * *

"(5) $900.00 in cash in the possession of cross complainant, which are monies saved by her from her earnings as a school teacher since the separation of the parties."

[5] This finding is clearly erroneous and is in direct contravention to the provisions of section 169 of the Civil Code which reads as follows:

"The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife."

Also, it is held in Fox v. Fox, 18 Cal. 2d 645, 117 P.2d 325 that the court may not assign the separate property of one of the spouses to the other.

The $900.00 here in question has at all times been in the possession of the appellant, is not placed in issue in the pleadings, and no order concerning it is necessary.

It is therefore ordered that the findings of fact and conclusions of law be modified by striking therefrom paragraph II, e, (5) of the Findings of Fact and paragraph 7 of the Conclusions of Law. It is further ordered that the judgment be modified by striking out subdivisions "c" and "d" of paragraph 5 thereof.

As so modified, the judgment is affirmed, the appellant to recover her costs on appeal.

DORAN, Acting P. J., and WHITE, J., concur.

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84 Cal.App.2d 632

RAMBO v. RAMBO.

Civ. 3549.

District Court of Appeal, Fourth District, California.

March 29, 1948.

1. New trial 🔑**93**

The exercise of statutory power to grant a new trial where reporter's transcript becomes unavailable is discretionary. Code Civ.Proc. § 953e.

2. Appeal and error 🔑**980**

An order denying a new trial where reporter's transcript becomes unavailable should not be reversed except for an abuse of discretion. Code Civ.Proc. § 953e.

3. Appeal and error 🔑**980**

Whether trial court abused discretion in denying a new trial where reporter's transcript becomes unavailable depends upon the facts. Code Civ.Proc. § 953e.

4. Appeal and error 🔑**980**

One appealing from order denying a new trial on ground that reporter's transcript is unavailable is not required to show facts indicating that a different result would be obtained on a retrial but must make a showing sufficient to indicate substantial issues, which are material to the appeal and disclosing both necessity for a reporter's transcript and reasonable diligence on appellant's part to procure transcript. Code Civ.Proc. § 953e.

5. New trial ⚷93

Motion for new trial on ground that reporter's transcript has become unavailable should ordinarily be granted where a reasonable showing is made that such a transcript is necessary in order to present substantial issues, that a transcript cannot be procured for reason covered by the statute, and that proper diligence to procure transcript has been exercised. Code Civ.Proc. § 953e.

6. Appeal and error ⚷980

Discretion allowed to court by statute authorizing a new trial where reporter's transcript becomes unavailable is not abused when a reasonable showing is not made that such a transcript is necessary in order to present substantial issues, that a transcript cannot be procured for one of reasons covered by statute, and that proper diligence has been exercised. Code Civ. Proc. § 953e.

7. Appeal and error ⚷980

Where appellant did not indicate that substantial issues for which a reporter's transcript would be required were desired to be raised or facts showing impossibility of obtaining a transcript for reasons covered by statute, and what, if anything, was done in attempting to ascertain whether reporter's notes were in fact available and whether they could be transcribed by others, trial court did not abuse discretion in denying motion for new trial on ground that reporter's transcript was unavailable. Code Civ.Proc. § 953e.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by Becca Rambo against Wayne A. Rambo for a divorce, a division of community property, and for an allowance for support and maintenance. From an order denying defendant's motion for a new trial, defendant appeals.

Order affirmed.

Jamison & Jamison, of Porterville, for appellant.

Ward G. Rush and Fred J. Heid, both of Tulare, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a motion for a new trial made under section 953e of the Code of Civil Procedure.

The action is one for a divorce on the grounds of extreme cruelty, for a division of community property, and for an allowance for support and maintenance. The court found in favor of the plaintiff, allowed her $3000 from the community property, and ordered the defendant to pay her $60 per month until such payments amount to the sum of $3000.

An interlocutory decree was entered on June 6, 1946. The defendant's motion for a new trial was denied on July 29, 1946. A notice of appeal and a request for a transcript were filed by the defendant on August 22, 1946. On August 28, 1946, the defendant filed notice of a motion to vacate the interlocutory decree and for an order granting a new trial under the provisions of section 953e, together with an affidavit in support thereof. A hearing was had on September 3, 1946, and an order was entered on that day denying this motion.

[1-4] The defendant has appealed from this order, contending that the court abused its discretion in denying his motion since he had proceeded in the customary manner, and had acted with promptness when he ascertained that a reporter's transcript could not be obtained. He relies on Weisbecker v. Weisbecker, 71 Cal.App.2d 41, 61 P.2d 990, and Fickett v. Rauch, Cal. Sup., 187 P.2d 402. In the Weisbecker case, an order denying a motion for a new trial based upon the impossibility of obtaining a reporter's transcript, due to the death of the reporter, was reversed. It was there pointed out that the supporting affidavit contained a full recitation of facts showing the existence of substantial issues and the necessity of a reporter's transcript in order to present the same to a reviewing court. In the Fickett case the previous cases are cited, and to some extent reviewed, and the general rules are reaffirmed, namely, that the exercise of the power conferred by section 953e is discretionary, that an order denying such relief

should not be reversed except for an abuse of discretion, and that whether such discretion has been abused depends upon the facts of a particular case. It is also pointed out in that case that while an appellant is not required to show facts indicating that a different result would be obtained on a retrial, it is incumbent upon him to make a showing sufficient to indicate substantial issues which are material to the appeal and disclosing both the necessity for a reporter's transcript and reasonable diligence on his part. It was held that the necessary factual showing there appeared and the order denying a new trial was reversed.

[5, 6] It should be obvious that such motions as this should not be arbitrarily denied. In accordance with the purpose and intent of this statute, it may also be said that such motions should ordinarily be granted where a reasonable showing is made that such a transcript is necessary in order to present substantial issues, that a transcript cannot be procured for one of the reasons covered by the statute, and that proper diligence has been exercised. On the other hand, the discretion allowed to the court by this statute cannot be said to have been abused when a reasonable showing along these lines has not been made. This is in accord with the rules outlined and followed in Fickett v. Rauch, as we understand that decision.

In the instant case, the notice of motion filed states that a motion would be made to set aside the interlocutory decree and grant a new trial on the grounds that the defendant had requested a reporter's transcript, and that he "has been informed that the reporter's transcript cannot be obtained or transcribed due to the fact that the reporter's whereabouts are unknown * * * and that his stenographic notes cannot be found or transcribed." It is then stated that the motion will be made upon the affidavit served and filed therewith, upon all of the records of the case, and under the provisions of section 953e, Code Civ.Proc.

The accompanying affidavit, by one of appellant's attorneys, was the only one presented to the court. Affiant states therein that when he filed his first motion for a new trial he requested a reporter's transcript; that he was informed by the clerk that the address of the reporter who acted at the trial was unknown to her and she was unable to give notice to him to prepare a transcript; that he endeavored, but after diligent effort was unable, "to obtain the whereabouts of the reporter" or to procure said reporter's notes for transcribing; that by reason thereof he was not able to present a transcript to the court, and for that reason a new trial was denied; that thereafter he filed a notice of appeal with a request for a transcript; and that he was then notified in writing by the clerk that the address of this reporter was unknown, and "we are unable to give notice to the reporter of the filing of the appeal."

Affiant then states that on July 11, 1946, he received a letter from the trial judge stating that the first motion for a new trial was set for hearing on July 22, 1946, and requesting him to be present. This letter further stated that the reporter in question was committed to the State Hospital in Stockton in the latter part of the preceding March, that the judge had been informed "that he left the hospital about two weeks ago intending to go to Seattle," that he had also been informed "that he was in San Francisco about two weeks ago," and that he had been unable to learn where he might be located. The letter further stated that the judge might get a reporter in San Francisco to transcribe this reporter's notes in this case although this was doubtful, that if this could be done a reasonable sum would have to be deposited to cover the expenses, and that if it was desired to have the proceedings written up he would make a further effort to have it done. The affidavit then contains a copy of the affiant's reply to the judge's letter in which he refers to the fact that this reporter "has not yet been contacted and it will probably be impossible to contact him," says that since it will be impossible to obtain a reporter's transcript in time for the hearing of the motion for a new trial the matter should be continued "until we can secure the transcript or be informed that we will be unable to obtain the same," and that if arrangements can be made to have this reporter's notes transcribed by a reporter in San Francisco the charges would be paid upon receiving notice thereof. The affidavit then states: "That affiant, after receipt of said notification in regard to the whereabouts of said reporter being unknown, attempted to obtain the whereabouts of said reporter but has been unable to do so. That by reason thereof defendant has been and will be deprived of obtaining the reporter's transcript of the testimony taken at the time of the trial of said action, and the preparing of briefs on appeal by defendant and appellant will depend upon the transcript of the testimony taken at the time of the trial of the action, and that by reason thereof defendant should be granted a new trial of said action as provided under Section 953E of the Code of Civil Procedure * * *".

Section 953e now provides that the trial judge shall have power to vacate a judgment or decree and to order a new trial when it is impossible to obtain a transcript because of the death or disability of the reporter, or because of the loss or destruction of the reporter's notes. The notice here stated that the motion would be made on the grounds that the reporter's transcript could not be obtained or transcribed due to the fact that the reporter's whereabouts are unknown, and that his stenographic notes cannot be found or transcribed. The first of these grounds, that the reporter's whereabouts are unknown, is one which is not included in the provisions of 953e. Assuming that the second ground stated, that this reporter's notes cannot be found or transcribed, is sufficient under the "loss or destruction" provision of section 953e no serious attempt was here made to prove that this reporter's notes could not be found. The affiant's statement that he had been unable to "procure" these notes seems to have been based on the connected statement that he had been unable to locate the reporter. Nothing is said in the affidavit as to what steps, if any, had been taken to try to locate the notes. The most reasonable inference to be drawn from the affidavit as a whole is that the stenographic notes were not lost and could be found. In his letter, set forth in the affidavit, the judge states that it is possible he might get a reporter in San Francisco to transcribe the notes of the reporter in this case. This indicates that the notes were available, and the judge further stated that if desired he would make an effort to have them written up. No further showing was made either in the affidavit or at the hearing of the motion here in question that this reporter's notes were unavailable, that they could not be written up, or that any further attempt had been made either to locate them or to have them written up.

While it incidentally appears from the judge's letter which appears in the affidavit that this reporter was committed to the State Hospital at Stockton the preceding March, it also appears that he left the hospital the latter part of June. At the hearing on the motion here in question on September 3, 1946, the judge remarked concerning this reporter "I haven't heard as to where he has been for the last three or four weeks. He has been in and out of the Stockton State Hospital, I understand. I haven't been able to contact him personally, and I have endeavored to do so." The notice of this motion did not give the disability of the reporter as one of the grounds to be relied on. The affidavit made no mention of such disability or of any facts relating thereto. Such a disability, if it existed, was not mentioned at the hearing with the exception of the judge's remarks, above quoted. The reporter's transcript of the proceedings at the hearing shows that the motion was presented on the general ground that a reporter's transcript could not be had because the address of the reporter was not known. In presenting the case appellant's attorney said: "I think in this case it has been shown by the affidavit and also by the knowledge of the Court that the reporter's transcript cannot be procured and the address of the reporter is unknown."

[7, 8] The showing here made reveals a lack of anything to indicate that it was desired to raise substantial issues for which a transcript would be required, of facts showing the impossibility of obtaining a transcript for reasons covered by the statute, and of what, if anything, was done in attempting to ascertain whether the reporter's notes were in fact available and whether or not they could be transcribed by others. The showing made was not sufficient to require a ruling in appellant's favor.

Under these circumstances it cannot be held that the court abused its discretion in denying this motion.

The order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

84 Cal.App.2d 694

KHATCHADOURIAN v. DAVIDIAN.

Civ. 3577.

District Court of Appeal, Fourth District, California.

March 31, 1948.

Hearing Denied May 27, 1948.

1. Appeal and error 🔑1054(1)

In action by purchaser for specific performance of a contract for sale of land, error, if any, in allowing purchaser's witness to testify as to how much he paid for land similar in character and in general vicinity of the land to establish value of land was not prejudicial, where there was other substantial and competent evidence on the subject and claimed error was presented on vendor's motion for new trial which was denied, and trial was before court sitting without a jury.

2. Appeal and error 🔑1011(1)

Determination of trial court on conflicting evidence will not be disturbed on appeal.

3. Appeal and error 🔑843(2)

District Court of Appeal, affirming judgment granting purchaser specific performance of land sales contract, would not determine issue presented in reference to portion of judgment restraining vendor from removing crops grown on premises since date purchaser was to have possession under contract and ordering vendor to account to purchaser for profits derived therefrom, where determination would only be academic in view that parties had mutually agreed, after rendition of judgment, that crops could be removed and sold and as to the method of accounting.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by George Khatchadourian against Rachel T. Davidian for specific performance of a contract for sale of real property. From an adverse judgment, defendant appeals.

Affirmed.

See also 79 Cal.App.2d 539, 179 P.2d 853.

Van E. McCarty, of Kingsbury, and David E. Peckinpah and L. N. Barber, both of Fresno, for appellant.

Harry Sarkisian and Lawrence W. Young, both of Fresno, for respondent.

GRIFFIN, Justice.

On September 11, 1946, the trial court ordered specific performance of a contract for the sale of real property. On January 3, 1946, plaintiff and defendant entered into an agreement in the form of written instructions signed by both and deposited with the title company for the sale to plaintiff of certain real property of defendant consisting of 40 acres of orchard and vineyard situated near Kingsburg, in Fresno County, together with certain trays and other farming implements located thereon, for the sum of $23,000, of which $13,000 was to be paid in cash, and $10,000 in deferred payments to be secured by trust deed. The complaint was in the usual form and alleged that the value of the property at the time of the execution of the contract did not exceed the sum of $23,000, and that the contract was in all of its provisions fair and reasonable as to defendant.

The answer denied these allegations and alleged that the value of the property was in excess of $35,000.

The court found in accordance with the allegations of the complaint and entered judgment for the delivery of a deed and bill of sale conveying the property to plaintiff, upon the payment of the cash consideration and delivery of the note and deed of trust provided by the contract, directed defendant to account to plaintiff for all the rents, issues and profits received by her from the property after the making of the contract, and enjoined her from removing any crops growing on the property.

According to defendant's brief, which plaintiff concedes is a fair statement of the testimony, defendant testified that she was a widow of about the age of 70 years; that she became acquainted with the plaintiff about three years before the trial of this action; that at that time he offered to buy her 40 acres for $23,000 and that she refused; that on February 2nd, 1945, plaintiff became a real estate salesman and on June 1st, 1945, defendant signed a card listing her 40 acres with plaintiff as broker for the selling price of $37,000. On the card it was estimated that the gross income from the property in 1944 was $14,000. The sale was to include the crop for 1945. The authorization for such sale was to remain in full force for 30 days and thereafter until revoked by defendant in writing. Defendant further testified that she did not see plaintiff again until she went to his office on December 31, 1945; that no one went out to look at her place and plaintiff was not there during that time. When she stopped in to see plaintiff on December 31st, 1945, she said she asked him why he could not sell her place and that he told her she was asking too much for it and that he claimed that it had certain defects which he enumerated as affecting the sale price; that he said he wanted to buy the place himself and "be a nice neighbor of hers"; that he did not say anything about the price at that time but she could "see that he wouldn't put any more than $23,000" into it; that she met him again on January 2, 1946, and asked him if he would give any more than that; that he replied that he would not and that she signed the agreement to take that amount; that she knew nothing about real estate values at that time and had made no investigation of her own; that she trusted him in every word he said "because he talked so nice"; that a few days thereafter, when she told other people about her sale they asked her "why in the world you sold that so cheap." Thereafter she repudiated the sale.

Plaintiff testified that he met defendant in October, 1944, when he went to buy her grapes and that he had a conversation with her in reference to selling her place; that he asked her her price and she wanted $24,000; that he offered her $20,000 and she refused; that she then offered it to him for $23,000 and he refused; that after he became a real estate salesman she asked him to advertise her property for sale at $37,000; that he did so but secured no customers. However, he did testify that he had an offer of $30,000, with the crop. He then testified that on July 1, 1945, defendant came to his office and told him not to make any further effort to sell the property, and that he did not try to sell it after that. Defendant denied this conversation. Plaintiff then said that on December 31, 1945, defendant came to his office and asked him if he was still interested in buying her place himself; that he told her he would if the price was right; that she asked $22,000; that he thought a bit and told her that was all right and asked her to make the papers out that day; that she said she would have to see her boy and would return on January 2nd; that on that day she told him that her boy would not sell for less than $23,000; that he told her that in view of the fact that she had paid the taxes, that if she would turn over to him the insurance on the house and such equipment as was on the place, he would pay the price. He denied making any misrepresentations as to the condition of the vines, trees or soil or as to the value of the property. As to the value of the land at the time he purchased it, he said he thought he had paid $2,000 more than it was worth on the market, although at the time of trial, with the crop, he figured the value was around $27,000 or $28,000.

Defendant called several expert witnesses, real estate men, who gave an opinion that the value of the 40 acres on January 3, 1946, was around $31,000 or $32,000, because they were familiar with market values of improved land in that vicinity.

Plaintiff called two similar expert witnesses who testified that they had had many years of experience in the real estate business in that community and had managed vineyards and peach orchards all over the county; that they went to the property here involved and examined it for the purpose of making an appraisal as of that date; that the reasonable value of the property was then $23,015. It was stipulated that these experts would testify that they sold no property in the vicinity and made no other investigation other than looking at the property themselves.

One of the questions raised on this appeal involves the testimony of one Friesen, called as a witness by plaintiff, who testified that he lived in the general vicinity of the property here involved; that he owned 10 acres similar in character to that owned by the defendant. Counsel for plaintiff then asked him: "What did you pay for it?" An objection was interposed under the claim that plaintiff was not permitted to prove the value of his property by what similar property was bought or sold for. The court allowed the question to be answered. The reply was $5500.

A judgment was entered in accordance with the findings and a motion for new trial was denied.

This appeal is taken upon the following grounds: (1) That the court erred in overruling objections to the testimony of the witness Friesen for the reasons claimed and that such error was prejudicial to the substantial rights of the defendant, citing Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 284 P. 1072; Hibernia Savings & Loan Society v. Ellis Estate Co., 132 Cal.App. 408, 22 P.2d 806; and 10 Cal. Jur. 1027, secs. 281-282.

[1] Plaintiff argues that even if the admission of Friesen's testimony as to the price he paid for his property was erroneous, it was not such an error as to prejudicially affect the substantial rights of the appellant since there was other substantial and competent evidence on the subject; that this claimed error was presented on a motion for a new trial which was denied, and since the trial was before the court sitting without a jury, no prejudicial error resulted, citing Sooy v. Kunde, Cal.App., 181 P.2d 758. We are inclined to this same conclusion. Thompson v. Stoakes, 46 Cal.App.2d 285, 292, 115 P.2d 830; Atchison, Topeka & S. F. Ry. Co. v. Southern Pacific Co., 13 Cal.App.2d 505, 512, 57 P.2d 575; City of Los Angeles v. Hughes, 202 Cal. 731, 736, 262 P. 737; Reclamation District No. 730 v. Inglin, 31 Cal.App. 495, 500, 160 P. 1098.

[2] Defendant's next attack involves the argument that the consideration for the contract was inadequate, that the contract itself was not just or reasonable, and that because of the asserted confidential relationship between herself and plaintiff, under section 3391, subdivision 3 of the Civil Code plaintiff is precluded from having his contract specifically enforced. The evidence on these subjects was conflicting and the trial court determined this conflict in favor of the plaintiff. The determination of the trial court will not be disturbed. Estate of Kay, Cal.Sup., 181 P.2d 1, and authorities there cited.

The last objection involved that portion of the judgment which restrains defendant from removing from said real property any crops and products grown thereon, from the third day of January, 1946, or "now growing thereon." It is argued that plaintiff had no interest in the crops which entitled him to such an injunction as would prevent her from harvesting and removing them so long as she remained in possession of the property, citing Fritcher v. Kelley, 34 Idaho 468, 201 P. 1037. In this connection it is further argued that that portion of the judgment is also erroneous which requires the defendant to account to the plaintiff for all receipts of rents, issues and profits derived from the property since January 3, 1946; that since the complaint does not contain a prayer for an accounting and since there is no finding and no facts produced which would support a finding as to any alleged rents, issues or profits, respondent's measure of damages for the wrongful retention of the land was the reasonable value of the use and operation of it, citing Coleman v. Dawson, 110 Cal.App. 201, 294 P. 13; and Chase v. Blair, 105 Cal.App. 744, 288 P. 681.

In answer to this contention plaintiff points out in his brief that after the rendition of the judgment herein a contract was entered into between plaintiff and defendant under which defendant was permitted to remain in the uninterrupted possession of this property pending the disposing of this case on appeal; that under the terms of the contract defendant agreed to care for the property and produce the crops and a fixed percentage of the proceeds of the crops was made payable to plaintiff "as and for the value of the use and occupancy of the property" by the defendant after the date of the contract of sale; that the contract provides: "It is agreed that the judgment entered in said action shall be read together with this agreement to the end that each party hereto shall get whatever each party is entitled to. Where there is a conflict, the provisions of this agreement shall prevail"; that the contract provides for the repayment to defendant of all proceeds of crop money received by plaintiff, should the final judgment be in defendant's favor, and the right to keep all such sums so received by plaintiff should the final judgment be in plaintiff's favor.

This issue was partially presented and discussed in an appeal from an order appointing a receiver. Khatchadourian v. Davidian, 79 Cal.App.2d 539, 179 P.2d 853, 854. It was there pointed out that under the issues presented by the complaint and answer the right of the plaintiff was to receive a deed to the land upon his paying certain money and giving certain security. The defendant was testing plaintiff's right to receive a deed and was holding the property under a claim of right until that issue could be decided, and it was there said:

> "It is well settled in this state that the party in possession, under such circumstances, is entitled to the crops produced on the land in controversy until such time as a conveyance has been made or a judgment entered, and that the other party, if successful in his efforts to obtain possession of the property, would then be limited to a right of action for the value of the use and occupation of the property during such time as such possession had erroneously been withheld from him."

There was no mention in the escrow instructions about growing crops or profits. It did provide, however, that defendant would give possession of the real property within 30 days from January 3rd, 1946.

[3] The portion of the judgment thus complained of restrains defendant from removing crops grown on the premises since January 3, 1946, and orders her to account to plaintiff for profits derived therefrom. It clearly appears that a determination of this issue would be, as to the parties here involved, only academic, and would not determine any rights between them because they have, as set forth in the brief, mutually agreed that the crops could be removed and sold and each party has agreed as to the method of accounting. Under these circumstances, a decision of the legal question presented in reference to that portion of the judgment would be of no benefit to either party and a reversal of that portion of the judgment would be ineffectual. Wright v. Board of Public Works, 163 Cal. 328, 125 P. 353; 2 Cal.Jur. p. 981, sec. 580.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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84 Cal.App.2d 709

PEOPLE v. JEFFERSON.

Cr. 2021.

District Court of Appeal, Third District, California.

April 2, 1948.

1. Jury 🔑131(8)

It is not the province of counsel on voir dire examination of prospective jurors to instruct them on matters of law and refusal of trial court to permit counsel on voir dire examination of prospective juror to go into the difference between the degree of proof required in civil and criminal cases and ascertain whether prospective juror would follow the rule applicable to criminal cases was not error.

2. Criminal law 🔑1166½(6)

Any error in limiting examination of prospective juror was not prejudicial where juror was subsequently successfully challenged by the prosecution and counsel for defendant expressed himself as satisfied with the jury finally selected, and the court properly instructed the jury on subject matter of examination by defendant.

3. Criminal law ⚷1053, 1166½(12)

A statement by the court after making ruling adverse to defendant that if the court had erred the defendant had right of appeal could not be complained of on appeal where no exception was taken and no admonition to the jury was requested, and in any event court's statement could not have prejudiced the defendant.

4. Criminal law ⚷1159(3)

Where there is evidence in the case which together with reasonable inferences therefrom is sufficient to support the verdict of the jury court cannot on appeal set aside verdict on defendant's assertion that the evidence was conflicting and that testimony of state's witnesses was improbable.

5. Assault and battery ⚷92

Evidence sustained conviction of assault with a deadly weapon.

6. Criminal law ⚷1144(13)

On defendant's appeal the court must disregard conflicts in the evidence and consider the evidence in the light most favorable to the prosecution.

7. Criminal law ⚷1170½(5)

Any error in limiting cross-examination was not prejudicial where witness was subsequently called as a witness for defendant and was examined without restriction concerning matters which had been restricted on cross-examination.

8. Criminal law ⚷1054(1)

Where no exception was taken to court's ruling restricting cross-examination of witness the defendant could not complain of the ruling on appeal.

9. Criminal law ⚷964

The court's denial of motion for new trial was its final conclusion which could not be impeached by a mere prior expression of opinion on one matter allegedly inconsistent with such final conclusion.

10. Witnesses ⚷350

In prosecution for assault with a deadly weapon and possession of a revolver after conviction of a felony the state was entitled to cross-examine defendant as to the nature of the offense of which he had been convicted notwithstanding stipulation that defendant had been previously convicted of a felony.

◆

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Henry Jefferson was convicted of an assault with a deadly weapon and of having in his possession a revolver after conviction of a felony, and he appeals.

Affirmed.

Wyatt, Green & Carr, of Stockton, for appellant.

Fred N. Howser, Atty. Gen., and Doris Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

On April 28, 1947, appellant was convicted by a jury on both counts of an information which charged him, in the first count, of an assault upon the person of one L. T. Releford with a deadly weapon, to wit, a thirty-eight calibre revolver, and, in the second count, with having in his possession the said revolver he previously having been convicted of a felony in the state of Texas and served a term of imprisonment for said crime.

After his conviction a motion for a new trial was denied, and defendant has appealed from the judgment rendered, contending that the judgment should be reversed on seven grounds, which will be dealt with in the order stated by defendant in his brief.

[1] The first contention is that the trial court erred in limiting defendant's voir dire examination of a prospective juror, Nellie W. Keitle. The record shows that what defendant's counsel sought to elicit from Mrs. Keitle was whether she knew the difference in proof required in civil and criminal cases—whether she knew that a civil case is to be decided upon a preponderance of the evidence, while in a criminal case a

juror must be satisfied beyond a reasonable doubt and to a moral certainty. Mrs. Keitle's answers were that she knew the difference between the rules of law, that she would apply the rule applicable to criminal cases and would not hesitate to acquit defendant if she were convinced only by a perponderance of the evidence. At this point the trial judge advised counsel that the preponderance of evidence was not involved in the case, that the jury would be instructed as to the degree of proof required, that is, that they must be satisfied beyond a reasonable doubt, that the law to be applied was a matter for the court in its instructions, and that counsel should not attempt to pre-instruct the jury on issues of law, but should leave such matters to the court. We are satisfied that no error was committed by the court in this connection. It is not the province of counsel on voir dire examination of prospective jurors to attempt to instruct them on matters of law. Such matters are for the trial court. It is said in 35 C.J. 390, 391, § 437, 50 C.J.S., Juries, § 275: "The court may and should exclude [on voir dire of jurors] * * * which tend to mislead or confuse the juror * * *; which call for * * * his understanding of the meaning of legal terms and expressions. * * *"

In the case of People v. Conklin, 175 N. Y. 333, 67 N.E. 624, 626, which is often cited, the court said:

"The juror was asked whether he knew that, in law, the accused in a criminal case was to be presumed innocent until proved guilty, and that the proof in a criminal case must be stronger, in order to convict, than in a civil case involving like issues. The objection to these questions was properly sustained. The qualifications of a juror do not depend in any degree upon his knowledge or want of knowledge of the law of evidence as applicable to criminal trials. These were all matters of law, which the juror was bound to take from the court. A juror cannot be a law to himself, but is bound to follow the instructions of the court in that respect, and hence his knowledge or ignorance concerning questions of law is not a proper subject of inquiry upon the trial of the challenge for cause."

Also see State v. Douthitt, 26 N.M. 532, 194 P. 879, 880, quoting from People v. Conklin.

[2] Nor can it be said in this case that the defendant was in any way prejudiced by the limitation put upon his examination of this prospective juror. She did not sit in the case, as she was challenged by the prosecution. Counsel for defendant expressed himself as satisfied with the jury finally selected, and it does not appear that he was not granted sufficient latitude to determine, on his examination of such jurors as sat in the case, that they were in a proper state of mind to try the case. Defendant did not exercise all of his peremptory challenges. The trial court correctly and adequately instructed the jury as to reasonable doubt, and no error in the giving of instructions is asserted. This court said in People v. Chambers, 22 Cal.App.2d 687, 705, 72 P.2d 746, 754:

"It has been said that, while it is true that a reasonable latitude should be granted by the court in the examination of jurors on their voir dire with the object of ascertaining their state of mind with relation to the presence or absence of bias and prejudice, it is not only the privilege, but it is the duty of the court, to restrict the examination of prospective jurors within reasonable bounds so as to expedite the trial. People v. Semone, 140 Cal.App. 318, 326, 35 P.2d 379."

[3] Appellant's next alleged ground for reversal is that after its ruling in the foregoing matter the court said: "If the court has made an error in its ruling you have the right of appeal." No exception was taken to the remark, and no admonition to the jury requested; and we fail to see how it could have resulted in prejudice to defendant. See People v. Danford, 14 Cal. App. 442, 451, 112 P. 474; People v. Savage, 66 Cal.App.2d 237, 245, 152 P.2d 240; People v. Bishop, 134 Cal. 682, 686, 66 P. 976; 8 Cal.Jur. 510; State v. Young, 105 Mo. 634, 16 S.W. 408.

Appellant next claims that the evidence in the case was not sufficient to overcome the presumption of innocence of defendant, and to prove him guilty beyond a reasonable doubt, his argument in this connection being that the testimony of the complaining witness and his wife was so inherently improbable as to be wholly unworthy of belief, and that their testimony was conflicting.

[4] All of appellant's argument in this behalf goes to matters properly determinable by a jury in considering the weight to be given to such testimony and the credibility of the witnesses. None of the respects in which the testimony is alleged to be improbable is such as justifies an appellant court in reversing a judgment of conviction where there is evidence in the case which, together with reasonable inferences therefrom, is sufficient to support the verdict of the jury. See People v. Jackson, 63 Cal.App.2d 586, 147 P.2d 94, and cases therein cited.

[5, 6] There is evidence in the case that the complaining witness, L. T. Releford, parked his car in front of appellant's house, and then, accompanied by his wife and his brother and sister-in-law, went to a bar where they stayed about two and one-half hours; that when Releford and his wife returned to their car appellant and a friend were standing on the steps of appellant's house; that appellant ordered Releford to "get the hell out of here," and then turned to his friend and said for him to wait a minute as he would need him to witness a killing; that Releford told Jefferson to mind his own business, whereupon the latter went back into his house, returned with a gun, came part way down the steps and pointing the gun at Releford, fired one shot. The bullet did not strike Releford, but struck the wall of a house on the opposite side of the street. It was later extracted and found to have been fired from defendant's gun. Upon the later arrest of defendant he obtained the gun from his bedroom and gave it to one of the officers to whom he admitted using it. This testimony is sufficient to support the verdict, and on this appeal this court must disregard conflicts and consider the evidence in the light most favorable to the prosecution. People v. Eggers, Cal.Sup., 185 P.2d 1.

[7] The fourth alleged error is that the court erred in refusing to permit defendant's counsel to cross-examine Releford regarding his activities during the evening preceding the alleged assault, for the asserted purpose of "determining, if possible, something of his condition at the time all this occurred"; that "in view of the character of his testimony it would seem quite relevant to an inquiry into those occurrences to know what he had been doing and the extent of his drinking, his condition, powers of observation and recollection and things of that sort." The court ruled that appellant could go into the extent of Releford's drinking that evening, but counsel stated he knew what the answer to that would be and was not concerned with that; that if he could not ask him concerning his actions he would not go into it. He did, however, call Releford as his own witness, and examine him to considerable length regarding the events of the evening preceding the shooting, and without restriction by the trial court. We are unable to see that defendant suffered any injury by reason of the ruling of the trial court, and it does not appear that any testimony which he desired to elicit from the witness was not educed on the subsequent examination. See San Francisco Iron & Metal Co. v. American Milling, etc., Co., 115 Cal.App. 238, 250, 1 P.2d 1008.

[8] Appellant next complains that he was unduly restricted in his cross-examination of Henry Schwinden, a police officer called by the prosecution, who testified that after the shooting he went to defendant's house and talked to Jefferson, and that the latter took a gun from the dresser in his bedroom and gave it to the witness; that the revolver held five cartridges and an empty chamber; and that defendant said that was the gun he had discharged in front of his residence. In the course of his cross-examination of this witness counsel for defendant said: "Officer, what are you dodging? Why don't you tell me what happened there? What did he tell you what had happened?" The court thereon stated: "Just a minute, Counsel. You have no right to accuse this witness of dodging any issue." Counsel replied: "Very well," made no objection to the court's statement, and did not ask that the jury be instructed to disregard it. While the answers of the

witness may have been unsatisfactory to counsel, we cannot say that they justified counsel in accusing him of "dodging"; and, since defendant's attorney took no exception to the ruling of the court, this court cannot say that defendant was prejudiced thereby. See 8 Cal.Jur. 510, sec. 522, for the applicable rule on alleged misconduct of a court. Also see People v. Lawlor, 21 Cal.App. 63, 66-68, 131 P. 63.

[9] That the trial court erred in denying appellant's motion for a new trial is the next ground for reversal urged, appellant stating that at the time that order was made the court said: "Anyway I believe there was quite a disturbance in the yard and that was the cause of the thing." This was in accord with the testimony of defendant and the friend who was with him, which was that Releford had pulled his wife from the car and was mistreating her, and that when defendant protested Releford made an attack upon him, and even attempted to enter his house when defendant retreated. However, appellant omitted the portion of the court's statement that followed, which was: "I never could see any reason why he had for going into the house and getting the gun and coming out with it on any theory that he acted under self defense." In this conclusion the trial court was correct, for the testimony shows that when defendant returned with the gun and fired the shot Releford was in his car, and was in no way menacing the defendant. At any event the statement of the court was but an expression of opinion on one matter, and the denial of the motion for a new trial was its final conclusion. See People v. Driggs, 111 Cal.App. 42, 44, 295 P. 51; Diaz v. Schultz, Cal.App., 183 P.2d 717; Krebs v. Los Angeles Ry. Corp., 7 Cal.2d 549, 552, 61 P.2d 931.

[10] The final ground for reversal urged is that though at the close of the people's case it was stipulated that defendant had previously suffered a conviction of a felony, as set out in the second count of the information, on cross-examination of the defendant the prosecuting attorney was permitted to ask him the nature of the offense of which he had been convicted. This, it is argued, was prejudicial because defendant's answer was that the previous conviction was for assault. No authority is cited in support of appellant's position, and the weight of authority supports the rule that a defendant may be asked the nature of a felony of which he has been previously convicted. See People v Willams, 27 Cal.2d 220, 228, 165 P.2d 692, citing People v. David, 12 Cal.2d 639, 646, 86 P.2d 811, and People v. Craig, 196 Cal. 19, 28, 235 P. 721.

We find no grounds for reversal of the judgment rendered, and it and the order denying a new trial are accordingly affirmed.

PEEK and THOMPSON, JJ., concur.

In re COE'S ESTATE.

EBERT et al. v. STATE et al. *

Civ. 7385.

District Court of Appeal, Third District, California.

March 31, 1948.

Hearing Granted May 27, 1948.

1. Escheat 🔑8(2)

Under escheat statute, custody of the funds of an unclaimed estate by state treasurer is a prerequisite to the running of the period of limitations against claims thereto, and period does not run from decree of distribution, so that claim filed more than five years after entry of decree of distribution, but within one month of actual delivery of funds to state treasurer, was timely. Code Civ.Proc. 1272a; Probate Code, § 1027.

2. Escheat 🔑8(2)

In determining whether period of limitations ran from date of decree of distribution of funds of unclaimed estate or from date estate was delivered to state treasurer, court would construe ambiguous escheat statute with reference to purposes to be accomplished by statute, and any inconvenience or unnecessary hardships resulting from a given construction would be considered. Code Civ.Proc. 1272a; Probate Code, § 1027.

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* Subsequent opinion 202 P.2d 1022.

3. Escheat ⚿2

Escheat statutes are statutes of forfeiture and of limitation whereby the rights of inheritance are cut off, and such statutes should be strictly construed against one asserting them and in favor of one whose rights, or interests would be terminated.

4. Statutes ⚿181(2), 184, 190

Where a statute is ambiguous, the court may construe it with reference to the purposes to be accomplished by it and may consider any inconvenient or necessary hardship which may result from a given construction.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding in the matter of the estate of H. D. Coe, deceased, wherein the State of California, Charles G. Johnson, as Treasurer, and others, opposed petition of Madge Ebert and others to be determined to be the persons entitled to succeed to the estate of deceased which had been ordered distributed to the State when no heirs appeared to claim estate when probated. From judgment in favor of petitioners, the opponents appeal.

Judgment affirmed.

Fred N. Howser, Atty. Gen., and E. G. Benard, and William J. Power, Deputy Attys. Gen., for appellants.

Brandenburger & White, of Sacramento, for respondents.

PEEK, Justice.

This is an appeal from a judgment of the probate court decreeing that respondents are entitled to share equally in the estate of H. D. Coe, deceased, and ordering distribution accordingly.

The facts pertinent to the one issue presented are not in dispute and reveal that H. D. Coe, who used various aliases during his lifetime, died intestate in Butte county on July 3, 1938. Probate of his estate was instituted in said county, and no heirs appearing to claim the estate, the probate court on May 6, 1940, entered its decree settling the final account of the administrator and ordering distribution of the entire estate to the State of California. The estate was retained by the treasurer of Butte county and was not actually delivered to the State Treasurer until January 26, 1946, or more than five years after the entry of the decree.

Within approximately three weeks from the date of the delivery of the property to the State Treasurer, respondents, whose interests and relationship are not questioned, instituted proceedings pursuant to the provisions of section 1272a of the Code of Civil Procedure claiming to be the persons entitled to succeed to said estate. The pertinent portions of said section are as follows:

"When an estate, or any portion thereof, of any decedent *has been received by or deposited with the State Treasurer* pursuant to a distribution thereof to the State of California * * * the superior court of the county of Sacramento, State of California, shall have full and exclusive jurisdiction to determine the title to the property and all claims thereto." (Italics added.)

The respondents' petition was opposed by appellants, primarily on the grounds that it was barred by the provisions of Probate Code section 1027. Said section in part provides:

"If the money or other personal property belonging to an estate has been deposited in the county treasury prior to the date of distribution to the State of California, upon the rendition of the decree of distribution, any money so distributed *shall forthwith be delivered to the State Treasurer by the county treasurer.* * * *

"*The property so distributed shall be held by the State Treasurer for a period of five years from the date of the decree making such distribution,* within which time any person may appear in the superior court for the county of Sacramento and claim the estate or any part thereof. * * *

"Any person who does not appear and claim, as herein required, shall be forever barred, and such property, or so much thereof as is not claimed, shall vest absolutely in the State." (Italics added.)

[1] At the conclusion of the hearing upon the issues so made the court concluded that petitioners had filed their petition within the time required and judgment was entered in their favor. The appeal from the judgment so entered presents but one question for determination: Where in the absence of known heirs an estate in probate is distributed to the State of California under the provisions of Probate Code section 1027, but the estate is not actually delivered to the State Treasurer until more than five years have elapsed after date of distribution, does the period of limitation as provided in said section begin to run from the date of the distribution so as to bar a claim filed more than five years after the entry of such decree but within one month of the actual delivery of the estate to the State Treasurer? In answer to the question so presented we conclude, as did the trial court, that respondents are not barred.

Appellants' first contention is that by the express language of section 1027 the right of a claimant is absolutely barred "five years from the date of the decree" of distribution, or as stated otherwise at the time of oral argument the property "shall be held not to exceed five years" from that date. In support of such argument appellants rely upon Estate of Lindquist, 25 Cal.2d 697, 154 P.2d 879. The point, however, was not directly at issue in that case nor is there any indication that the court in referring to the distribution in its conclusion intended to establish a rule of law applicable to the situation here presented or that it intended in any way to decide or pass upon the point. We cannot then take the dictum as controlling here or even as an expression of opinion by the court.

Respondents' answer to this position is that such a contention fails to consider the provision that "the property so distributed shall be held by the State Treasurer" for the period.

Appellants further assert that the actual transmission of the funds is purely an intergovernmental transaction or a bookkeeping entry, and that the holding by the county treasurer was a holding by a state officer. In oral argument the appellants further contended that the county treasurer in so holding the funds was acting as agent or trustee for the state.

In answer to respondents' contention that the construction of section 1272a contended for by appellants would result in the anomalous conclusion that respondents had lost their right before they had their remedy, appellants, in their reply brief argue that in any event the fact that the State Treasurer was not in actual possession of the estate does not affect the jurisdiction of the Superior Court of the County of Sacramento to determine title under section 1272a, and therefore respondents could have filed suit within five years following the decree and thereby preserved their rights.

[2] It is quite obvious from a summary of the arguments of counsel that whichever of the contentions so made by them be taken as correct, either the phrase "shall be held by the State Treasurer for a period of five years" or the phrase "from the date of the decree" must be disregarded and the section held to be ambiguous. Therefore it follows that the problem so presented is wholly one of statutory construction, and in view of the interpretation we have placed upon the wording thereof the other arguments urged in support of the trial court's decision are immaterial to such determination.

[3] Preliminarily it may be said that inasmuch as escheat statutes are statutes of forfeiture and of limitation whereby the rights of inheritance are cut off, such statutes should be strictly construed against the one asserting the same (the state in this case) and in favor of the one whose rights or interest would be terminated (the respondents herein). Where the statute is ambiguous the court may construe it with reference to the purposes to be accomplished by it and may consider any inconvenience or necessary hardship which may result from a given construction. Carter v. Chevalier, 100 Cal.App. 567, 28 P. 706; In re La Belle, 37 Cal.App.2d 32,

98 P.2d 778; Reithardt v. Board of Education, 43 Cal.App.2d 629, 111 P.2d 440.

Section 1027 as originally enacted in 1933, although providing for ultimate holding of the property of the estate by the State Treasurer, did not direct an immediate transfer of the property by the county treasurer to the State Treasurer. However, now by virtue of the 1939 amendment thereto, if there are no known heirs to whom distribution can be made, then *distribution must be made forthwith* to the state and the *property transmitted forthwith to the State Treasurer.* Furthermore said section relieves the state of affirmatively establishing an escheat in a proceeding under section 1269 of the Code of Civil Procedure which, prior to the adoption of section 1027 was the sole means available to the state. In addition to providing a simpler means for the escheat of property to the state, section 1027 has the further purpose of giving to heirs, either known or unknown, a reasonable opportunity to appear and present their claims within the five year period or thereafter be barred. The further effect of the provisions of the section is to cast upon an heir, unknown at the time of distribution the burden of instituting proceedings, within the period therein set forth, to perfect his right to the estate under the provisions of section 1272a of the Code of Civil Procedure.

The provision for the transfer *forthwith* of the property to the State Treasurer and the further provision that such property "shall be held by the State Treasurer for a period of five years from the date of the decree" can have but one meaning—that *forthwith* the property actually should be distributed to and be held by that official for the required period. And it may be added that an interested person would have the right to assume that the responsible officials would comply with the statute.

At this point it should be noted that if known heirs fail to appear prior to the decree of distribution their subsequent action, if any, to establish their rights, is governed by section 1274a of the Code of Civil Procedure. Said section provides that one year after the next county settlement, property theretofore distributed to known heirs shall be delivered to and deposited with the State Treasurer, and any property so deposited, if not claimed within "five years from the date of such deposit" shall become the property of the state. If the construction of section 1027 urged by appellants be correct, then an heir who is known has a full five year period commencing not with the decree of distribution, but with the actual deposit with the State Treasurer, whereas an heir who is unknown, and therefore in need of greater consideration, would have his claim defeated even though at no time, during the five year period following the decree of distribution did the State Treasurer have actual possession of the property, and thus give the heir the additional notice which such deposit would afford.

By reason of our conclusion herein, that custody of the funds by the State Treasurer pursuant to the statute is a prerequisite to the running of the period of limitations, it is unnecessary to decide any of the remaining questions posed by the parties.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

84 Cal.App.2d 778

PEOPLE v. NANEZ et al.

Cr. 587.

District Court of Appeal, Fourth District, California.

April 8, 1948.

1. Criminal law 🔑1144(13)

Reviewing court must assume the truth of testimony in support of jury's verdict.

2. Criminal law 🔑406(7)

Evidence that defendant late at night entered aunt's house without her consent, went to 15-year-old girl cousin's bedroom, and grabbed her by the neck, sufficiently established corpus delicti of charged offense of burglary, first degree, with intent to commit rape, to admit extrajudicial statements of defendant and codefendant, who accompanied him to house, disclosing that such was their intent.

3. Criminal law ⚿747

The jury is the sole judge of any conflict in the evidence.

4. Burglary ⚿41(1)

Evidence sustained conviction of burglary, first degree, with intent to commit rape.

◆

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Joe Nanez and Gilbert Corralez were convicted of burglary, first degree, with intent to commit rape, and, from judgment of conviction and order denying a new trial, they appeal.

Judgment and order affirmed.

J. M. Lopes, of Visalia, for appellants.

Fred N. Howser, Atty. Gen., and Robert K. Meyers, Dist. Atty., and Russell R. McKinney, Deputy Dist. Atty., both of Visalia, for respondent.

GRIFFIN, Justice.

Defendants and appellants, brothers, were charged with and were convicted by a jury of the crime of burglary, first degree, with intent to commit rape.

On the night of July 30, 1947, Mrs. Bertoldo lived with her husband and two daughters, Virginia, aged 15, and Helen, in a little house in Visalia. About 12 o'clock midnight, someone came to the kitchen, turned on the light, closed the bedroom door leading to the bedrooms occupied by her and her husband. Virginia was sleeping on a couch in an adjoining room. The screen door was opened and a chair was put against it to hold it open. Mrs. Bertoldo coughed. She then heard someone run out through the kitchen and turn out the light. She arose and noticed the two defendants outside talking. She latched the kitchen door and ran to the nearby home of her son for help. Defendant Joe Nanez, a nephew of Mrs. Bertoldo, came up to her and said he wanted to see his Aunt Teresa. She told him he better leave or he would wake up in jail. Defendants left in the car. She closed the doors, latched them, and went to bed. About 3 a. m. she was awakened and opened the curtains leading to Virginia's room. She heard her scream and defendant Nanez had her by the neck choking her; he ran out of the house, jumped in the car which was "ready to pull out right away" and the two defendants left. The officers were called. A neck chain and cross Virginia was wearing was found broken on her bedroom floor.

Virginia testified that she did not hear defendant (Joe) the first time he came to her house that night; that sometime during the night, however, she found she could not breathe and she was suddenly awakened when Joe grabbed her by the neck.

Officers appeared at the home and the family were all excited. The door casing near the latch had been defaced with a knife. The defendants were found parked in their car asleep several miles up the road. They were placed under arrest. At that time there was no evidence of their staggering or of their drunkenness.

At the trial strenuous objection was made to the admission of their claimed conversation with the officers and of a signed written statement. A conversation with Corralez was related by the officer who stated that Corralez told him that Joe had suggested they go out to the Bertoldo residence and get Virginia and take her to a quiet place he knew of and at that point they were to rape her; that they went to her residence; that he remained in the car; that Joe gained entrance to the house in some manner unknown to him; that Joe said he would keep Virginia quiet but that Joe didn't do a very good job because he heard her scream; that the lights came on and Joe ran out to the car, jumped in and said: "Step on the gas. We better get out of here." It was stipulated that this statement was binding only against Corralez, and the court so instructed the jury. On cross-examination the officer testified that Corralez stated that about a week before, Joe had gone to his cousin's home, knowing his cousin was uptown, and sat on the bed occupied by the cousin's wife; that the cousin came home and they had a fight.

The court interpreter then testified, over objection, that on the morning of July 30th he and the sheriff questioned the defendants separately; that Corralez stated that he and his brother Joe had been doing a little drinking; that they went to the Bertoldo home and were chased away; that they had a few more drinks and that they recalled a fight between Joe and the cousin; that Joe then took a beating and that the more "we thought of it" the "sorer we got," so he says "we talked it over and we had this grudge, we were going back to the house, and we planned then that Joe was going to break into the house and Joe was going to get Virginia and that I was to be in the car with the motor running, so we could make a quick get-away and he would bring Virginia out into the car and we would go out on the roadside and rape her," as revenge for the fight they had out there the week before.

He then testified that Joe Nanez was questioned; that they duly admonished him that anything that he would say could be used against him and that the defendant's statements were free and voluntary; that Joe said he and his cousin Pete had had a fight the week before about a taxicab fare; that he went to Pete's home to tell his wife that her husband might be thrown in jail; that he had been in there "since the lights were out" and was in there only five minutes when Pete came home and "beat him up"; that he didn't think he had that beating coming; that he and Gilbert went out the first time to the Bertoldo home to pick a fight with them and were chased away; that after a few drinks they began to think about this fight and being beat up the week before and they agreed that they would go back again and go into the house and "get Virginia and bring her out" to the car, and Gilbert was to wait for him with the motor running so they could make a get-away and get her out on the roadside and rape her; that he walked into the house, grabbed Virginia by the neck and choked her; that she screamed and awakened her mother; that he ran out to the car and told Gilbert to "get away from here"; that they drove up the road and were arrested a few minutes later.

It was stated by the deputy sheriff that while they were booking the defendants and while they were together, he asked Joe Nanez why he had done this and he simply stated "he didn't know."

The people then rested their case. In the absence of the jury, defendants moved for dismissal on the ground that no corpus delicti had been established sufficient to admit the extrajudicial statements. The motion was denied.

Defendant Joe Nanez then testified generally that that evening he went out there the first time to have a fight with "any" of the boys out there; that they had a grudge against them over the fight the week before; that as he was about to grab hold of the front door his aunt told him to "get out of there" so he and Gilbert left, had some drinks (beer) and went back; that he went in the front door but it was not locked; that he thought he knew where the "boys" slept and he went in the room and made a grab and by mistake grabbed hold of the girl, thinking he was grabbing one of the boys; that he heard her scream and that he got into the car and left. He admitted conversing with the officers and claimed they came in and told him Gilbert had confessed and they "showed me the paper where he had confessed and signed his name"; that he did not read the paper; that they threatened to "beat him up and everything"; that he told them the story related by the officers because he had been beaten up before and thought he would tell them that story "to get rid of them"; that he could not remember which officer said he would beat them up. He denied entering the house for the purpose charged, and denied being drunk on that occasion.

Corralez then testified that he went with Joe to the home but remained in the car; that Joe went in to beat up the boys and that he was not going to get into it unless it was to "see a fair fight"; that there was nothing planned about taking Virginia away or doing anything to her; that he told a false story to the officers because they "acted like they were going to beat us up" when they placed us under arrest.

After argument the court fully instructed the jury. A verdict of guilty as charged resulted. A motion for new trial was denied.

The only points raised on this appeal are: (1) That the evidence is not sufficient to support a judgment of conviction of the offense charged; (2) that the court erred in denying the motion for an instructed verdict; and (3) that defendants were convicted on their extrajudicial statements alone, citing such cases as People v. Davis, 47 Cal.App.2d 331, 117 P.2d 917; People v. Weston, 32 Cal.App. 571, 163 P. 691; People v. Landman, 103 Cal. 577, 37 P. 518.

There can be no question about defendant Joe Nanez entering the premises "in the night time" and without the consent of the Bertoldos. Gilbert knew he was so entering the premises and went to that home with him, in his car, for that purpose. The only question is whether, at the time Joe entered therein, he went in for the purpose indicated by him, that is, "to beat up on the boys" or whether he entered for the purpose of committing rape on Virginia.

[1] If we believe the testimony of Mrs. Bertoldo, defendant Joe was in the house on the first occasion with the light on, and the door was propped open. He at that time must have seen the sleeping accommodations and the girl occupying the couch in the room. Assuming the truth of this testimony, which we must do in support of the verdict of the jury (People v. Feld, 149 Cal. 464, 86 P. 1100), the testimony of defendant Joe Nanez, i. e. that he believed that "boys" were sleeping in that room and on that couch, must be cast aside as improbable. There must have been some more logical motive to account for defendant's presence in the girl's bedroom at 3 o'clock in the morning than the one indicated by him.

The jury had the right to infer from the facts related, independent of the defendants' extrajudicial statements that the defendants had planned and intended to criminally attack the little girl, either out of their own lustful desires or as a means of getting even with their relatives over some grudge they allegedly entertained.

[2-4] There was sufficient evidence of the corpus delicti to admit the extrajudicial statements, which statements are entirely incompatible with the defendants' testimony as to what their actual intent was at the time. People v. Flores, 34 Cal.App. 393, 167 P. 413; People v. Vertrees, 169 Cal. 404, 146 P. 890; People v. Swaile, 12 Cal. App. 192, 196, 107 P. 134. The jury was the sole judge of any conflict in the evidence. People v. Sears, 119 Cal. 267, 51 P. 325. The evidence, in addition to the extrajudicial statements, sufficiently support the judgment and verdicts as rendered. The motion for an instructed verdict and the motion for a new trial were properly denied.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.

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84 Cal.App.2d 657

GRANER et al. v. HOGSETT et al.

Civ. 15907.

District Court of Appeal, Second District, Division 1, California.

March 31, 1948.

Rehearing Denied April 20, 1948.

Hearing Denied May 27, 1948.

1. Appeal and error 🔑931(1)

On appeal all conflicts in the evidence are resolved in favor of the judgment.

2. Trover and conversion 🔑40(3, 4)

In action for conversion, evidence justified findings against plaintiff, that, with respect to personal property, plaintiff did not own it and defendants did not convert it.

3. Action 🔑37

An action which purports to be one for trover, if the proof justifies, may be treated as an action for money had and received for value of personal property wrongfully converted.

4. Licenses 🔑39

The amount paid for a security issued in violation of the Corporate Securities Act may be recovered in an action for money had and received, which sounds in assumpsit, without the necessity of pleading a violation of Corporate Securities Act. Gen. Laws, Act 3814.

5. Licenses ⚷39

Where letter stating agreement of the parties for sale of an interest in a limited partnership was never acted upon by the parties, no recovery could be had in an action for money had and received on theory of sale of an interest in a limited partnership in violation of Corporate Securities Act. Gen.Laws, Act 3814.

6. Appeal and error ⚷758(3)

Mere assertion that certain transactions disclosed by evidence violated the Corporate Securities Act, without pointing out wherein the transactions violated such act, was insufficient. Gen.Laws, Act 3814.

7. Sales ⚷233(1)

Where plaintiffs in trover for conversion of mining and milling machinery were not the owners thereof and never had a legitimate claim to it, having defaulted on their contract to buy the property, they were not entitled to recover against persons who subsequently acquired property from seller named in plaintiffs' contract.

8. Trover and conversion ⚷2

Trover does not lie for the conversion of real estate.

9. Cancellation of Instruments ⚷37(5)

Allegation that there was no consideration for deed, without stating any facts which would show that deed was procured by fraud or undue influence or which would show its invalidity, was insufficient to state a cause of action to set aside deed; a consideration not being necessary to the validity thereof. Civ.Code, § 1040.

10. Appeal and error ⚷762

Appellants' attack upon rulings on motions to strike testimony and objections to introduction of evidence, made in closing brief, would not be considered where such matters were not even referred to in opening brief and no meritorious reason was given for that omission.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Louis E. Graner and another against O. W. Hogsett and others to recover in one cause of action for conversion of personal property and in a second cause of action for conversion of real estate. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Arthur C. Fisher, of Los Angeles, for appellants.

Avery M. Blount, of Los Angeles, for respondents.

BARTLETT, Justice pro tem.

In the first cause of action set forth in the amended complaint, it is alleged that within three years last passed defendants "wilfully, wrongfully and illegally converted to their own use," certain personal property; together with a demand for the return, and damages in the sum of $20,000 by reason of such conversion. The second cause of action alleged defendants wilfully, wrongfully and illegally converted to their own use certain real estate in Yuma County, Arizona; that plaintiffs received no consideration for the deed and that the property was of the value of $15,000. Save an admission that a demand was made for the property described in the first cause of action, the answer denied all of the material allegations of both causes of action.

[1] Resolving all conflicts in the evidence in favor of the judgment, the record shows the following: On January 4, 1941, plaintiff Louis Graner entered into a contract with one Mary Bradbury to purchase the property described in plaintiff's complaint for $3,000 to be paid as follows: $50 down, $600 in 30 days, $750 before 60 days, $1,000 on or before 90 days, $1,000 on or before 120 days. The contract provided that when the entire amount was paid the property would be conveyed to the plaintiff. It also provided that upon "failure of the party to make any of the payments herein provided, this contract shall cease and determine." Thereafter, plaintiff paid in all the sum of $1,300 his last payment being made March 13, 1941. He never paid any of the $2,000 remaining to

be paid by him and no part of the property was ever conveyed to him.

In May, 1942, over a year after his last payment was made by plaintiff, Avery M. Blount, the attorney for the respondents herein, representing a Mr. Flumerfelt who desired to purchase the real estate described in plaintiff's second cause of action, and the respondent O. W. Hogsett, who desired to purchase the personal property described in the first cause of action, had a conversation with Miss Bradbury and her agent relative to purchasing this property for this sum of $2,000, $1,500 for the real estate and $500 for the personal property. Thereafter, Flumerfelt forwarded to Blount the sum of $1,500 and respondent Hogsett gave him $500, both of which sums Blount placed in a trustee account. It then developed that appellant Louis Graner, although he was then in default for over a year on his payments under the contract, made some claim to the property. Blount then had a meeting with Graner and Hogsett. Graner at the time was an employee of a partnership known as Forrester Milling & Mining Company, which was doing some work at Twenty-nine Palms, California. Blount outlined the proposed deal between Flumerfelt and Hogsett with Miss Bradbury. Graner then wanted to know what he was to get out of it and Hogsett said he would convey to him a 10% interest in a partnership to which this personal property would be delivered. Graner said he wanted some memorandum in writing and thereafter Hogsett delivered to him a letter which reads as follows:

"May 13, 1942

"Louis E. Graner, and
"S. N. Graner
"1350 S. Hope Street
"Los Angeles, California

"Dear Mr. Louis E. Graner and S. N. Graner:

"In consideration of your executing a Deed and Bill of Sale conveying certain real estate, mining claims and mining and milling machinery all located *ner* Bouse, Arizona, said property being more particularly described in said Bill of Sale and Deed executed by you on this date.

"I hereby agree that I will cause to be organized within Thirty (30) days a limited partnership in which S. N. Graner will be *disignated* as one of the partners and will receive by reason thereof a 1/10 interest in said partnership. Said limited partnership will own, control, and operate the mining property and milling business located near 29 Palms, California, and such other businesses and properties as it has or shall receive or may acquire by reason hereof or by any other reason agreeable to the members of the limited partnership.

"Yours very truly,

"O. W. Hogsett
"O. W. Hogsett

"OWH:ML"

S. N. Graner, referred to therein, is the wife of Louis E. Graner.

As part of the same transaction, Blount paid Miss Bradbury $2,000 and she in turn executed a bill of sale and deed to Graner who in turn executed similar documents to Hogsett who executed a deed to the real estate in Arizona to Flumerfelt. The personal property bought from Miss Bradbury by Hogsett was still on the real estate in Bouse, Arizona, and was not in the possession of the appellants. Therefore, Graner and Hogsett went to Arizona, got the personal property and conveyed it to Twenty-nine Palms, California. The letter of May 13, 1942, which we have set forth herein, was never acted upon by the parties. Instead it developed that an interest amounting to 10% in the existing partnership at Twenty-nine Palms, for which Graner was working and in which Hogsett was a partner, was transferred on the books of the partnership to Graner wtih a provision that Graner would not be held personally liable for the debts of the partnership so long as he did not participate in its control and management. Graner raised no objection to this way of handling the matter, continued to work for the partnership for eight months and during that time, for a period, managed and was in charge of its work.

In the brief statement of the case in appellant's opening brief, they omit many material facts and state as facts matters which have been found against them by the court. In the three pages which they devote to argument they suggest four grounds as to why the judgment should be reversed and cite one authority. These contentions are as follows:

(1) That the findings are unsupported by the evidence; (2) the transaction violated the provisions of the Corporate Securities Act; (3) no limited partnership was created; and (4) respondent gave no consideration for the property transfer by appellants.

[2] Appellants make no attempt to direct our attention to wherein the evidence is insufficient to justify the findings, but content themselves with the mere statement that it is. Nevertheless, we have carefully reviewed the evidence and while it is conflicting in many respects, there is ample evidence to support the findings.

The first cause of action is one in trover for damages for the conversion of personal property. In such an action the appellants cannot prevail. The court has found that in the first place they did not own the property in question, and in the second place that respondents did not convert it. The evidence also discloses that the property was not even in the possession of appellants but was in the possession of Mary Bradbury and that Louis Graner assisted in the removal of the property from Bouse, Arizona to Twenty-nine Palms, California.

[3-6] So far as the contention that this transaction violated the Corporate Securities Act is concerned, it is true that while the action purports to be an action for trover and was evidently tried on that theory, if the proof justifies, it can be treated as an action for money had and received for the value of personal property wrongfully converted. Bank of America Nat. Trust & Savings Ass'n v. Hill, 9 Cal.2d 495 at page 498, 71 P.2d 258 at page 259; Los Angeles Drug Co. v. Superior Court, 8 Cal.2d 71, 63 P.2d 1124. Neither is it necessary in such a case, as the respondent contends, to plead a violation of the Corporate Securities Act. Gen. Laws, Act 3814. The amount paid for a security issued in violation of law may be recovered in an action for money had and received, which sounds in assumpsit. Pollak v. Staunton, 210 Cal. 656, 293 P. 26. Here again the appellants fail to point out wherein the transactions referred to violated the Corporate Securities Act, but merely assert that they do and cite, without comment, one case, People v. Woodson, 78 Cal.App.2d 132, 177 P.2d 586. That was a criminal case in which the court stated that the question involved therein was not whether a partnership could be organized without a permit from the Corporation Commission, and held that the transaction therein set forth did constitute a sale of an interest in a limited partnership in violation of the Corporate Securities Act. The facts in the instant case are such that no recovery could be had in an action for money had and received. The letter of the respondent Hogsett of May 13, 1942, was never acted on by the parties.

[7] As stated by appellant, the limited partnership referred to was never formed because the parties as shown by the evidence decided to handle the matter in another manner. Appellant Louis E. Graner worked for respondents for eight months thereafter and at one time managed the business. In fact no dispute ever arose until respondents objected to the manner in which said appellant conducted the business. In any event there was nothing for which appellants could recover as they were not the owners of the property in question and from the evidence never at any time had a legitimate claim to it.

[8] The second cause of action is one in trover for a conversion of the real estate in Arizona. As suggested by respondent, the complaint herein is defective for the reason that such an action will not lie for the conversion of real estate. 24 Cal.Jur. 1021, 1030; Vuich v. Smith, 140 Cal.App. 453, 35 P.2d 365. There is no theory upon which it can be held that a cause of action is stated.

[9] In addition to the allegations of conversion, the only fact set forth is that there was no consideration for the deed, without stating any facts which would show it was procured by fraud or undue influence or which would in any manner show its in-

validity. A consideration is not necessary to the validity of a deed. Civil Code, sec. 1040.

[10] Appellants in their closing brief for the first time attack rulings of the trial court on motions to strike testimony and objections to the introduction of evidence. These matters are not even referred to in their opening brief, and as no meritorious reason is given for that omission, will not be considered here. Gould v. Richmond School Dist., 58 Cal.App.2d 497, 136 P.2d 864; Monk v. Ehret, 192 Cal. 186, 219 P. 452.

The judgment is affirmed.

DORAN, Acting P. J., and WHITE, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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84 Cal.App.2d 637

MEARS v. CROCKER FIRST NAT. BANK OF SAN FRANCISCO et al.

Civ. 13478.

District Court of Appeal, First District,
Division 1, California.
March 30, 1948.

As Modified March 31, 1948.

Hearing Denied May 27, 1948.

1. Appeal and error 🔑919

On appeal from judgment dismissing action after sustaining demurrer to amend complaint the allegations of the amended complaint must be taken as true.

2. Trover and conversion 🔑1

Where pursuant to agreement of a mining company, its transfer agent and stock exchange, common shares of the company could not be traded in unless converted into blocks of 20 shares each, transfer agent was required on proper demand to make necessary conversion and was liable as for a conversion when it wrongfully refused to do so. Civ.Code, § 2343.

3. Corporations 🔑111½

The repeal of section of the Civil Code imposing a limitation on the liability of a corporate officer for unwarranted refusal to transfer stock by providing a maximum penalty and limiting the time within which an action for recovery might be brought did not warrant an inference that legislature intended that there should be no liability under any circumstances but court was required to assume that in failing to specifically legislate upon the subject the legislature intended that the general principles applicable to agents should thereafter apply. Civ.Code, § 324

4. Courts 🔑92

Where section of the Civil Code imposing a limitation on the liability of an officer of a corporation for unwarranted refusal to transfer stock by providing a maximum penalty and limiting the time within which an action for recovery might be brought was in effect when court stated that while the corporation may be liable for such refusal to act on the part of its secretary, if wrongful, in the absence of any statutory provision the secretary is not personally liable for such an official act, such statement was without the issue to be decided and was therefore dictum. Civ.Code, § 324.

5. Trover and conversion 🔑5

It is not necessary to a "conversion" that there should be a manual taking of the thing in question.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

6. Trover and conversion 🔑2

Shares of corporate stock, as well as stock certificates, are subjects of conversion.

7. Property 🔑11

One of the incidents of ownership is the free and unhampered right to dispose of property without limitations imposed by strangers to the title.

8. Appeal and error 🔑863

On appeal from judgment dismissing action on demurrer to amended complaint which showed that transfer agent of mining company had wrongfully refused to convert into blocks of 20 shares each certificates of stock so that they might be traded in on stock exchange, court could not consider the alleged reasonableness of six weeks' delay on account of certain wartime regulations pertaining to securities, which was a matter for a consideration of trial court on a trial of the case.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Action by John William Mears against Crocker First National Bank and another for conversion of certain mining stock. From a judgment dismissing the action as to the named defendant, the plaintiff appeals.

Judgment reversed.

Eugene H. O'Donnell and Ralph Bancroft, both of San Francisco, for appellant.

Chickering & Gregory and John Philip Coghlan, all of San Francisco, for respondents.

FINLEY, Justice pro tem.

This appeal is from a judgment dismissing the action after the trial court had sustained the demurrer of defendant Crocker First National Bank of San Francisco without leave to amend. Defendant I. X. L. Mining Company is a foreign corporation, was not served with summons and was not before the court.

The amended complaint after first alleging the corporate existence of both defendants reads as follows: "That on February 15th, 1946 plaintiff was the owner and holder and entitled to the possession of 20,000 shares of the common stock of defendant I. X. L. Mining Company, which shares were and are represented by certificate No. 4747 for 9,000 shares and certificate No. 7075 for 11,000 shares.

"That said shares were at all the times herein mentioned listed for the purpose of sale upon the San Francisco stock exchange; that the application for listing stock on the San Francisco Stock Exchange contains a stipulation that every corporation having securities listed upon the Exchange must, in accordance with the rules of the exchange, maintain (a) a transfer agent and (b) a registry agent, both in the City of San Francisco, or the State of California; that in compliance with said stipulations and the rules of said Stock Exchange the defendant Crocker First National Bank of San Francisco, a corporation has been at all times herein mentioned and now is the duly appointed, qualified and acting Transfer Agent for and on behalf of the defendant, I. X. L. Mining Company.

"That for the purpose of sale on the stock exchange, it was necessary by reason of an agreement entered into between defendant I. X. L. Mining Company, defendant Crocker First National Bank of San Francisco, and the San Francisco Stock Exchange that common shares of the I. X. L. Mining Company should be converted into blocks of 20 shares each before they could be offered for sale or sold on the San Francisco Stock Exchange.

"That on the 15th day of February, 1946, the plaintiff duly made demand in writing to the defendant Crocker First National Bank of San Francisco at its place of business at San Francisco to have the above described certificates cancelled and certificates for blocks of 20 shares per block issued to him in their stead; that said defendant declined and refused to make said transfer and declined and refused to permit the plaintiff to have said certificates converted into blocks of 20 shares.

"That on April 3rd, 1946, plaintiff received a letter from defendant Crocker First National Bank of San Francisco which is in words and figures as follows, to-wit: 'Crocker First National Bank of San Francisco Established 1870 Cable Address "Crockfirst" San Francisco, 20 April 3, 1946 3084 Mr. John W. Mears, 5366 The Toledo, Long Beach, 3, California. This is to inform you that we have received from I X L Mining Company authority to convert certificates Nos. 4747, for 9,000 shares and No. 7075 for 11,000 shares of Philippine Registry to San Francisco Block shares.

"'We accordingly are now prepared to convert such shares upon receipt, from you, of the above certificates, duly endorsed, with your signature quaranteed by a bank

of trust company. Yours very truly, F. P.
FPG:awr
Gray/ Assistant Trust Officer.'

"That on the 15th day of February, 1946, the date on which plaintiff made his demand the said stock of the corporation defendant I. X. L. Mining Company was of the market value of $5,500; that the refusal of defendants to transfer said stock or to convert the same to Block shares and to issue certificates for block shares therein constituted a conversion of said stock to the damage of plaintiff in the sum of $5,500.00."

As will be noted, the only point to be decided is whether a stock transfer agent for a corporation, having entered into a three way agreement with the corporation and the stock exchange limiting sales of the corporation's stock on the exchange to blocks containing a certain specified number of shares, can by reason thereof be held liable to a stockholder in conversion for refusal upon proper demand to convert the stockholder's holdings of the corporate stock into blocks containing the number of shares specified in said agreement.

[1, 2] Respondent bank argues as a general principle that an agent is not liable to a third person for a mere nonfeasance, the failure to perform a duty owed solely to the principal, which failure on the part of the agent might incidentally affect adversely the interests of such third party. Whatever merit this argument may have as an abstract principle of law it is not applicable here for in the instant case the agent went further, according to the allegation in the complaint which we must assume for purposes of this appeal to be true, and actively participated in exercising some degree of dominion over plaintiff's stock. This exercise of dominion consisted of first entering into the agreement imposing conditions upon the free exercise of plaintiff's right to sell, convey or dispose of his stock and by then refusing to perform a resultant duty. This duty was that of placing plaintiff in position to comply with the imposed condition. Where his certificates represented larger blocks than were acceptable for sale on the stock exchange under the agreement it was the transfer agent's duty on proper demand to make the necessary certificate adjustments.

This case is distinguishable from Lacoe v. Wolfe, 133 Cal.App. 159, 23 P.2d 831, 832, relied upon by respondent bank. Lacoe v. Wolfe was not an action in trover, alleging a conversion of stock, but was an action brought against the directors and the secretary of a corporation seeking damages for refusal of the "company" to transfer plaintiff's stock pursuant to his request. In the first paragraph of the opinion it is stated that the action was brought on the theory that the directors and secretary "had entered into a conspiracy to induce and prevent the *secretary* from transferring the stock in question to plaintiff." (Emphasis added) The second paragraph outlines the allegations of the complaint as follows: "This complaint, after alleging certain facts about the organization of the corporation, the amount of its stock, and the acquiring of practically all of the same by the plaintiff, alleges that the plaintiff demanded of the *company* that the stock be transferred; that the defendants conspired to induce the *company*, through its secretary, to refuse to transfer the stock for the purpose of defrauding the plaintiff as owner and holder of the stock; that in pursuance of such conspiracy the defendants directed, requested, and advised the *company* through its defendant secretary, not to make the transfer requested; that by the exercise of threats, persuasions, and promises the defendants induced the *company* through its said secretary to refuse to make said transfer; that said *company* by reason thereof refused to make such transfer; that such refusal was wrongful; that as a result of such interference on the part of defendants plaintiff was deprived of his rights as owner and holder of the stock." (Emphasis added)

As will be noted there is some difference between the theory of the case as outlined by the court in the first paragraph and that to be gleaned from the resume of the allegations in the complaint as outlined by the second paragraph. However, at the bottom of page 161 of 133 Cal.App., page 832 of 23 P.2d we find this statement: "While the appellant insists that the gist of his action is a conspiracy to prevent the secretary from acting, the fact that the act complained of was the act of the corporation is recognized in the many allegations of the complaint that the transfer was requested of and refused by the 'company.' "

[3, 4] Obviously, while there may be many points of similarity in rules governing the conduct, obligations and responsibilities of a transfer agent who is not an officer or employee of a corporation, and one who is, there are also points of difference. Ordinarily an officer or employee would be duty bound to handle registrations or transfers according to corporate rules or instructions without any question of a contract or agreement as to what the agent's course of conduct would be. With an agent disassociated from the principal and acting merely as agent for a specific purpose an agreement such as that alleged here might well be not out of order. In the instant case the complaint first sets forth the limitation placed upon disposal of plaintiff's stock by reason of the agreement to which defendant as transfer agent was a party and then alleges plaintiff's demand upon the agent in writing and its refusal to make the transfer. It is not alleged that the corporation refused to make the transfer or that it instructed, sanctioned or ever knew of the refusal. It is undoubtedly true that even though the corporation took no part in refusing plaintiff's demand it would still be liable for such an act on the part of its agent if wrongful. We do not subscribe, however, to respondent bank's contention that Lacoe v. Wolfe, supra, is authority for the proposition that when an agent acts independently of instructions from its principal that said agent may not be held severally liable under such circumstances as we have here. In the absence of statutory provision to the contrary there is no sound reason we can ascribe why a stock transfer agent should be placed in any different legal category than any other agent. Section 2343 of the Civil Code renders an agent responsible to third persons when his acts are wrongful in their nature and it can hardly be maintained that an unjustified refusal to transfer stock which would admittedly constitute conversion if done by the principal could be considered as not wrongful in nature if done by an agent. Lacoe v. Wolfe, supra, was decided under former section 324 of the Civil Code which imposed a limitation on the liability of an officer of a corporation for unwarranted refusal to transfer stock by providing a maximum penalty and limiting the time within which an action for recovery might be brought. This section was repealed upon adoption of the Uniform Stock Transfer Act in 1931 and no new statutory limitation governing such liability was enacted. We do not believe that in repealing this section the Legislature intended to decree that thereafter there should be no liability under any circumstances. We must assume that in failing to specifically legislate upon the subject is was intended that the general principles applicable to agents should thereafter apply. Inasmuch as the decision in Lacoe v. Wolfe, supra, was decided while sec. 324 was still in effect, the statement at page 161 of 133 Cal.App., page 832 of 23 P.2d, that "While a corporation may be liable for such a refusal to act on the part of its secretary, if wrongful, in the absence of any statutory provision, the secretary is not personally liable for such an official act," was without the issue to be decided and was therefore dictum. It is without the issue here insofar as an officer of a corporation acting as transfer agent, and sans any agreement, is concerned, and we do not purport to decide it. We are dealing here only with an independent agent acting under an alleged agreement between the agent, its principal and a third party. Bearing on the question of liability in general, attention is directed to the following language from two comparatively recent cases. "The true rule is, of course, that the agent is liable for his own act, regardless of whether the principal is liable or amenable to judicial action." James v. Marinship Corp., 25 Cal.2d 721, 742, 743, 155 P.2d 329, 341, 160 A.L.R. 900. "* * * directors and officers of a corporation are liable equally with the corporation for its torts in which they participate." Thomsen v. Culver City Motor Co., Inc., 4 Cal.App.2d 639, 644, 41 P.2d 597, 600.

Turning now to a consideration of those acts which constitute conversion we find in Kee v. Becker, 54 Cal.App.2d 466, 470, 129 P.2d 159, 161, the following language: "The jealous regard of the common law for the right of a person to have his property kept free from unauthorized interference has given rise to 'a class of cases in which the tort consists in the breach of what may be called an absolute duty * * *' to borrow from Byer v. Canadian Bank of Commerce, 1937, 8 Cal.2d 297, 300, 65 P.2d 67, 68, a part of its quotation from earlier authorities. In Gruber v. Pacific States Sav. & Loan Co., 1939, 13 Cal.2d 144, 148, 88 P.2d 137, 139, we find these definitions of 'conversion,' the second being quoted from Hull v. Laugharn, 1934, 3 Cal.App.2d 310, 315, 39 P.2d 478:

" 'It is settled that conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.'

" ' "Conversion consists in the unwarranted interference by defendant with the dominion over the property of plaintiff, from which injury to the latter results. * * * Dominion is defined in law lexicons as 'perfect or complete property or ownership in a thing' (Bouvier's Law Dict.); 'complete ownership; absolute property,' (Anderson's Dict. of Law); and 'ownership or right to property,' (Black's Law Dict.)" ' "

In Mier v. Southern California Ice Co., 56 Cal.App. 512, 517, 206 P. 83, 85, the rule is stated as follows: "Any act of ownership or exercise of dominion over the property of another, in defiance of his rights, is a conversion of that property." In Lusitanian-American Development Co. v. Seaboard D. C. Corp., 1 Cal.2d 121, 34 P.2d 139, the Supreme Court at page 129 of 1 Cal.2d, 34 P.2d 139 quotes the above rule of the Mier case together with the rule laid down in Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L.R.A. 605, 25 Am.St.Rep. 110, which latter involved a sale of property belonging to another, and then has the following to say at page 129 of 1 Cal.2d, page 143 of 34 P.2d: "The rules above stated as to what constitutes conversion have been the settled law of this state since the decision in the case of Swim v. Wilson [supra]."

[5, 6] It is not necessary to a conversion that there should be a manual taking of the thing in question. Dodge v. Meyer, 61 Cal. 405, 420; Gruber v. Pacific States Sav. & Loan Co., 13 Cal.2d 144, 149, 88 P.2d 137; Kee v. Becker, 54 Cal.App.2d 466, 471, 129 P.2d 159. It is also well settled in California that shares of corporate stock are subject to an action in conversion. Ralston v. Bank of California, 112 Cal. 208, 213, 44 P. 476; Jackins v. Bacon, 63 Cal.App. 463, 468, 218 P. 1027; People v. Flanagan, 60 Cal. 2, 44 Am.Rep. 52; Payne v. Elliot, 54 Cal. 339, 35 Am.Rep. 80; Nichols v. Leach, 114 Cal. App. 545, 550, 300 P. 103. This rule applies as well to the shares represented by a certificate as to the actual certificate. Payne v. Elliot, supra. Furthermore, it is not necessary that possession of the certificate evidencing title be disturbed. Payne v. Elliot, supra; Dodge v. Meyer, supra. In Ralston v. Bank of California, supra, the following statement appears at page 213 of 112 Cal., page 477 of 44 P.: " 'where a corporation refuses to allow a transfer of shares upon its books, the assignee may treat this as a conversion of his shares, and sue the company for their value.' Morawetz, Priv. Corp. § 217. Such is the law as declared and enforced in this state." See, also, Kimball v. Union Water Co., 44 Cal. 173, 13 Am.Rep. 157.

[7, 8] One of the incidents of ownership is the free and unhampered right to dispose of property without limitations imposed by strangers to the title. Defendants in their briefs urge that there was no such contract as that alleged in the amended complaint; that it was only reasonable on account of certain wartime regulations pertaining to securities or stock in Philippine corporations that defendants should have been cautious in transferring such stock and that under the circumstances a six weeks' delay was not unreasonable. These are all matters of defense which might be properly urged upon a trial but which we cannot consider here. For purposes of this appeal, where the matter comes up by reason of the sustaining of defendants' demurrer without leave to amend, all of the allegations in the complaint must be regarded as true. Thus when, according to the complaint defendant transfer agent became a party to an agreement which very effectively limited plaintiff's right to dispose of his stock when, where and how he chose, and then refused to convert his stock into the twenty share blocks required under the agreement, it is obvious that it thereby participated in the

exercise of unwarranted dominion over plaintiff's property and consequently rendered itself liable to plaintiff in conversion.

We therefore hold that it was an abuse of discretion for the trial court to sustain the demurrer without leave to amend. We do not decide, however, that the amended complaint was not subject to special demurrer, and the trial court may in its discretion require the clarification of any uncertainties or ambiguities therein.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

84 Cal.App.2d 679

BOARD OF SUP'RS OF MERCED COUNTY et al. v. COTHRAN.

Civ. 7481.

District Court of Appeal, Third District, California.

March 31, 1948.

1. Schools and school districts 🔑97(7)

Where any one of the stated purposes for which school bonds are issued is unauthorized, and a single aggregate sum is specified for all the purposes, the whole must fail.

2. Schools and school districts 🔑97(1)

Where the purposes for which school bonds may be issued were fixed by statute, bonds may not be issued for any other purpose, nor may bonds be issued to raise funds for matters otherwise provided for by statute, and bonds issued for an unauthorized or improper purpose are void.

3. Shcools and school districts 🔑97(1)

Section of the Education Code providing for issuance of bonds for purchase of "school lots" does not authorize issuance of bonds for a school "laboratory farm", since operation of a "farm" is not traditionally a "school" and the word "lot" is not analogous to the word "farm". Education Code, § 7401.

See Words and Phrases, Permanent Edition, for all other definitions of "Farm", "Laboratory Farm", "Lot", "School" and "School Lot".

4. Schools and school districts 🔑97(1)

The power of the school district to issue bonds does not expressly or by implication authorize issuance of bonds for acquisition of a farm. Education Code, §§ 7401, 7403, 7404, 19621–19623, 19628.

5. Schools and school districts 🔑97(7)

Unauthorized purpose for which school bonds were voted was not cured by subsequent validating act specifically providing that it should be limited to correction of defects, irregularities, omissions and ministerial errors in complying with statutory requirements. St.1947, p. 2889.

6. Constitutional law 🔑193

A curative act or a conclusive evidence clause in a statute is effective to cure all defects resulting from a failure to comply with provisions that are merely directory of the mode of exercising the power, but defects and omissions going to jurisdiction to act at all, and which make their action absolutely void, cannot be cured in such manner.

◆

Proceeding for writ of mandamus by the Board of Supervisors of the County of Merced and Merced Union High School District, a school district duly organized and existing under the laws of the State of California, petitioners, against R. W. Cothran, County Clerk and Ex-Officio Clerk of the Board of Supervisors, County of Merced, respondent, to compel respondent to sign certain bonds.

Writ denied.

Frank C. Hale, Dist. Atty., and Samuel V. Cronell and Wm. R. Elam, Deputy Dist. Attys., all of Merced, for petitioners.

Orrick, Dahlquist, Neff, Brown & Herrington, of San Francisco, for respondent.

ADAMS, Presiding Justice.

By this proceeding the Board of Supervisors of the County of Merced and the

Merced Union High School District seek a writ of mandate to compel respondent, who is the county clerk of Merced County, to sign certain bonds in the sum of $800,000.00, which bonds were voted at a special election held by the Merced Union High School District on May 16, 1947, for the purpose of securing authorization to issue the aforesaid bonds. The purposes for which said bonds were proposed to be issued, as stated in the notice of the election, was to raise money for

(a) The purchase of a school laboratory farm.

(b) The building or purchase of school buildings.

(c) The making of alterations or additions to the school building or buildings other than such as may be necessary for current maintenance, operation, or repair.

(d) The repairing, restoring, or rebuilding of any school building damaged, injured, or destroyed by fire or other public calamity.

(e) The supplying of school buildings with furniture or necessary apparatus of a permanent nature.

(f) The permanent improvement of the school grounds.

The voters at said election voted in favor of the issuance of said bonds, but respondent has refused to sign them for three reasons: (a) that one of the purposes for which said bonds were voted, to wit, "the purchase of a school laboratory farm," does not conform to the purposes for which a school district may issue bonds as set forth in section 7401 of the Education Code, and that a school district is not authorized to incur indebtedness or to issue and sell bonds for such a purpose; (b) that two separate polling places were established for one election precinct, to wit, precinct No. 18, and that all of the votes cast in said precinct should be rejected and that upon such rejection said bond issue failed to carry by the required two-thirds of all of the votes cast at said election; (c) that different polling hours were fixed in the different precincts into which said district was divided for the purpose of said election contrary to Sections 7403 and 7404 of the Education Code in that the hours during which the polls should have remained open should have been uniform through said district and in each and every precinct thereof for the purpose of said bond election.

[1, 2] The law seems to be well settled in this state that where any one of the stated purposes for which bonds are issued is an unauthorized purpose and a single aggregate sum is specified for all of the purposes, the whole must fail since it is impossible to separate the good from the bad. Our own Supreme Court has so held in City of San Diego v. Potter, 153 Cal. 288, 292, 95 P. 146, and Streator v. Linscott, 153 Cal. 285, 287, 95 P. 42, 43. In the latter case one of the declared purposes for which certain school district bonds were issued was "for the purpose of raising money for purchasing school lots, for building one or more schoolhouses, or insuring the same * * *." The court said that the act of 1893 (the statute then in force) did not authorize the issuance of bonds for the purpose of insuring school houses or other property, and that therefore the bonds were void. In Santa Ana School District v. Talbert, 19 Cal.App. 104, 107, 124 P. 872, 873, there was added to the declaration of purposes for which school bonds were voted, the words "and afford better facilities for educating the school children within said school district." The court held that said phrase did not in itself amount to a declaration of a purpose and should therefore be disregarded; but it also said that if, as contended by respondent, the bonds were issued and sold for purposes not contemplated by the statute, the invalidity of the bonds was conceded. In Allard v. Board of Education, 101 Ohio St. 469, 129 N.E. 718, the board of education submitted to the electors the question of a bond issue for three specified purposes, one of which was the purchase of motor trucks and wagons. In an action brought to enjoin the issuance of the bonds, it was held that the purchase of motor trucks and wagons was not one of the purposes for which authorization for the issuance of bonds was given by statute, and that therefore the entire bond issue must be enjoined. In 56 C.J. 577, sec. 696, it is said: "The purposes for which bonds may be issued are generally fixed by

statute, and where so fixed bonds may not be issued for any other purpose, nor may bonds be issued to raise funds for matters otherwise provided for by statute, and bonds issued for an unauthorized or improper purpose are void."

The question, then, is whether "the purchase of a school laboratory farm" is a purpose for which the issuance of bonds by school districts is authorized by statute. Section 7401 of the Education Code provides and limits the purposes for which such bonds may be issued and sold, the only one pertinent here being: "(a) The purchasing of school lots."

Petitioners contend that the term "school lots" is sufficiently broad to include a "school laboratory farm." We have not been enlightened as to what is meant by a school "laboratory" farm, but we are satisfied that in the general acceptation of the word "farm" it is not analogous with the word "lot," nor do the words "school lots" connote a "school farm." A farm is generally defined as a tract of land used for raising crops or rearing animals—one devoted to agriculture, stock raising or some allied industry. See 16 Words and Phrases, Perm.Ed., pages 248–252; 25 C.J. 670–672; 35 C.J.S., Farm, pages 746, 747; Hagenburger v. City of Los Angeles, 51 Cal.App.2d 161, 164, 124 P.2d 345. And the word "farming" in both the popular and legal meaning of the term is the cultivation of the soil for the production of crops therefrom; the act of cultivating the land; the business of tilling the soil.

The word "school" is variously defined as an institution or place for instruction or education; a place for learned intercourse and instruction; a place for acquiring knowledge and mental training; a place for the instruction of children; a place where instruction is imparted to the young; an educational establishment. See 56 C.J. 167, and note 3; State v. Boyd, 217 Ind. 348, 28 N.E.2d 256, 264; Board of Education v. Ferguson, 68 Ohio App. 514, 39 N.E.2d 196, 198.

[3] Traditionally the practical farming and the operation of a farm have not been a part of the curricula of our common schools, nor farms a part of their school property; nor does the word "lot" suggest to the mind the word "farm," though it may not necessarily exclude it. But in order to justify the issuance of bonds for the acquisition of a farm by a common school district, something more than the authority to issue such bonds for the acquisition of "school lots" is essential.

Section 7401 of the Education Code, above cited, is found in chapter 17 of Division 3 of that code, entitled "Bonds." The section is derived from section 1880 of the Political Code enacted in 1881 (Stats. 1881, p. 62) which provided for the issuance of bonds by a school district for the purpose of raising money for building or purchasing school houses, for furnishing same, and for liquidating the indebtedness for school houses already erected. It did not provide for the purchase of school lots. In 1885 (Stats.1885, p. 8) the section was amended to remedy this defect and to provide for the issuance of bonds for the added purpose of purchasing school lots. In 1889 (Stats.1889, p. 196) it was further amended to provide for the issuance of bonds for purchasing school lots, for building school houses and supplying same with furniture and necessary apparatus, for improving the grounds, and for liquidating any indebtedness already incurred for such purposes. In 1893 (Stats.1893, p. 267) it was amended by adding to the purposes the insuring of school houses. It was amended again in 1895 (Stats.1895, p. 245), 1899 (Stats.1899, p. 94), and 1909 (Stats.1909, p. 897); but in none of said amendments was any provision made for the issuance of bonds for the purpose of purchasing school farms.

In 1909 section 1745 of the Political Code was enacted as a part of Art. XIV, chapter 3, title 3 of part 3, said article being entitled "Establishment and Government of High Schools and High School Districts." Said section 1745 (Stats.1909, p. 488) provided for the issuance of bonds by high school districts for "the purpose of raising money for purchasing high school lots, for building or purchasing one or more high school buildings or making alterations or additions to the high school building or buildings, for repairing, restoring or rebuilding any high school building damaged, injured or destroyed by fire or other public calamity, for insuring high school buildings, for supplying high school buildings with furniture or necessary apparatus, for improving the grounds, for liquidating any indebtedness already incurred for said purposes, or for refunding any outstanding valid indebtedness of such district, evidenced by bonds or warrants thereof." In 1913 said section was amended (Stats.1913, p. 772) but without change as to the purposes for which high school districts might issue bonds. Upon the adoption of the School Code, section 4.960 thereof provided the purposes for which any school district might issue bonds and apparently superseded both sections 1880 and 1745 of the Political Code; and with the adoption of the Education Code said section 4.960 was superseded by section 7401, supra. It will be noted that in none of said enactments was any authority given to issue bonds for the purchase of school laboratory farms or school farms of any kind.

In 1945 the legislature added chapter 12 to Division 9 of the Education Code, Division 9 being entitled "Environment and Equipment," and chapter 12, "School Farms" (Stats.1945, ch. 533, sec. 1). Section 19621 in said chapter 12 provides: "The governing board of any district maintaining a secondary school, or schools, may, for the purpose of providing practical instruction in agriculture, establish one or more school farms for any one or more of such schools whenever in its judgment it is advisable to do so." However, it also provides that the cost of purchasing and equipping a high school farm and all other costs not met from the receipts of operation of the farm shall be a charge against the funds of the district. Section 19622. Section 19623 authorizes the governing board of the high school district to provide for the general supervision of the farm, the cost thereof to be a charge against the funds of the district. It also provides that the board may buy feed, livestock, etc., for the farm, and sell the products thereof. Section 19628. But this new enactment makes no provision for the issuance of bonds for the purpose of acquiring school farms, but, on the contrary, obviously provides that they must be paid for out of the general school funds; and no amendment of section 7401 has been enacted to extend the purposes for which bonds may be issued by school districts. Furthermore, section 7401 applies to all school districts, while section 19621 applies to high school districts only. And if, as contended by petitioners, the authority to issue bonds to purchase "school farms" is to be inferred from the authority to issue bonds to purchase "school lots," then we would have this curious situation: School districts other than high school districts could acquire farms with bond moneys, while high school districts could not; and legislative provision would exist for the acquisition of livestock, etc., for high school farms, the management of same and the disposition of the products, while no such provisions would have been made regarding other school district farms. Also, section 19621 of the new chapter 12 would have been entirely superfluous, unless it was intended to limit the acquisition and conduct of farms by high school districts without placing similar limitations upon other districts. For those reasons we are of the opinion that petitioners' contention in this behalf cannot be sustained.

Such conclusion is fortified by such cases as Hyatt v. Williams, etc., 148 Cal. 585, 84 P. 41, and Von Schmidt v. Widber, 105 Cal. 151, 38 P. 682, 685. In the former case, where bonds had been issued by the city of Stockton for the purpose of constructing and maintaining an electric lighting plant for the purpose of lighting the streets and other public places and to furnish the inhabitants with light, the question arose whether the city had the power, under its charter, to engage in the business of furnishing lights to the citizens for their private use. The charter authorized the city council to provide for lighting the streets, avenues and public places, and to provide for such lights as were necessary for the convenient transaction of public business. The decision of the court was that these powers did not include the power to maintain works and carry on the business of supplying the inhabitants with light; that the municipal corporation could only exercise the power granted by express words or by necessary or fair implication from the powers granted, or essential to the declared objects and purposes of the corporation. In Von Schmidt v. Widber, it was also stated, quoting from 11 Dillon on Municipal Corporations, 4th Ed., sec. 89, that a municipal corporation can exercise only those powers granted in express words, or those necessarily or fairly implied in or incident to the powers expressly granted, or those essential to the declared objects and purposes of the corporation "not simply convenient, but indispensable." Also that any fair reasonable doubt concerning the existence of power is to be resolved by the courts against the corporation, and the power denied.

[4] The power to issue bonds to acquire a farm is not granted by express words contained in section 7401, supra, or elsewhere, nor can it be said that such power is necessarily or fairly implied in or incident to the powers expressly granted, or essential to the purposes of a school district. And any doubt should be resolved against such power.

[5, 6] Petitioners contend that the unauthorized purpose for which the bonds were voted was cured by the validating act of 1947 (Stats.1947, ch. 1335, p. 2889). But the purpose being unauthorized, the validating act cannot be said to have been intended to confer authority denied by the existing statute. In People v. Van Nuys Lighting District, 173 Cal. 792, 797, 162 P. 97, 99, Ann.Cas.1918D, 255, where a curative act was relied upon the court said: "A curative act or a conclusive evidence clause in a statute is effective to cure all defects resulting from a failure to comply with provisions which are merely directory of the mode of the exercise of the power. But defects and omissions which go to the jurisdiction of the board to act at all, and which make their action absolutely void, cannot be cured in this manner. Ramish v. Hartwell, 126 Cal. 443, 58 P. 920; Chase v. Trout, 146 Cal. 350, 359, 80 P. 81; Kelly v. Luning, 76 Cal. 309, 18 P. 335; People v. Lynch, 51 Cal. 15, 19, 21 Am.Rep. 677; Brady v. King, 53 Cal. 44; People v. Goldtree, 44 Cal. 323." Also see 23 Cal.Jur. 611, where it is said that a curative act is one designed to give effect to past acts which are ineffective because of failure to comply with some requirement of law, by correcting errors of mere mode, and supplying omissions the necessity of which might have been dispensed with by the prior statute. Also see City of Pacific Grove v. Irwin, 76 Cal.App.2d 46, 172 P.2d 357, and City of Venice v. Lawrence, 24 Cal.App. 350, 141 P. 406, illustrative of the rule that validating acts may cure errors or irregularities of procedure, where none of the steps omitted to be taken was jurisdictional. To a similar effect is the rule in Illinois as set forth in Reeves v. Bell, 309 Ill. 387, 141 N.E. 187, 188.

The validating act of 1947 specifically provides that it shall be limited to the correction of defects, irregularities, omissions and ministerial errors in complying with statutory requirements, and we are satisfied that it did not have the effect of rendering valid bonds issued for an unauthorized purpose which rendered the issue void.

As for the objections raised by respondent that there was error on the part of the board in establishing two voting places in one precinct, and in providing for different voting hours in the various precincts, since we are satisfied that the bond issue was invalid for the reasons previously stated, it becomes unnecessary to determine them.

It is ordered that the writ prayed for be denied.

PEEK and THOMPSON, JJ., concur.

84 Cal.App.2d 606

MERCANTILE COLLECTION BUREAU v. PINHEIRO.

Civ. 7428.

District Court of Appeal, Third District, California.

March 27, 1948.

1. Appeal and error ⚷957(1)

Appellate courts are favorably disposed toward such action on part of trial courts as will permit, rather than prevent, adjudication of legal controversies on their merits, but an order denying motion to set aside a default will not be disturbed on appeal in absence of clear showing that trial court has abused its discretion in so doing. Code Civ.Proc. § 473.

2. Judgment ⚷153(1)

In addition to necessity of making application to set aside default judgment within the six-month period prescribed in statute, it also must be made within a reasonable time, and what is reasonable must depend primarily on circumstances. Code Civ.Proc. § 473.

3. Judgment ⚷153(1)

Even if default judgment was entered against defendant through mistake, inadvertence, or excusable neglect, in that in ordinary course of office routine in office of defendant's attorney a copy of demurrer in the action was mailed to plaintiff's counsel at wrong address, refusal to set aside default judgment was not abuse of discretion, where letter inclosing copy of demurrer was returned to office of defendant's attorney on November 19, 1946, and no further action was taken until January 27, 1947, when motion to set aside default judgment was filed, and no excuse was shown for delay. Code Civ.Proc. § 473.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Mercantile Collection Bureau against L. A. Pinheiro. From order denying motion to set aside default judgment, the defendant appeals.

Affirmed.

Lopez & Gomes, of Fresno, for appellant.

C. Ray Robinson and R. A. McCormick, both of Merced, for respondent.

PEEK, Justice.

Plaintiff's complaint was filed in Merced county on October 15, 1946, and defendant was duly served in Fresno county on October 17, 1946. On November 18, 1946, more than thirty days after service, default judgment was entered against defendant, and on the following day satisfaction of judgment was entered.

The record discloses no further action of any kind until January 27, 1947, when counsel for defendant moved to set aside said default judgment under section 473 of the Code of Civil Procedure upon the ground that the same was taken against him through "mistake, inadvertence, surprise or excusable neglect," which motion was denied by the trial court, and it is from this order that defendant has appealed. The motion was accompanied by the proposed answer of defendant and the affidavits of F. Louis Gomes, one of his counsel, and Virginia Johnson, a legal stenographer in the office of said counsel. The Johnson affidavit, after reciting the fact of her employment, stated that on October 16, 1946, she had prepared a demurrer in said action and typed a letter addressed to the attorneys for plaintiff at 1812 L. Street, Merced, California; that she also prepared an affidavit of mailing of said demurrer but that through error the envelope enclosing a copy of said demurrer and affidavit was addressed and mailed to plaintiff's counsel at 1812 L. Street, *Fresno,* instead of *Merced.* The affidavit of attorney Gomes, after reiterating the error of the secretary in addressing the envelope, averred that according to the information given him by defendant he [defendant] was served with summons on or about October 18, 1946; that the letter enclosing the copy of the demurrer which was mailed on November 16, 1946, was returned to his office on the morning of November 19, 1946. He immediately called Mr. McCormick, one of plaintiff's counsel at the latter's office in Merced, and upon being informed that McCormick was out of town he conferred with

McCormick's secretary, informing her of what had happened. He knew nothing of the default judgment until informed by McCormick on November 20, that the same had been entered on November 18, 1946. Mr. Gomes further averred that solely by reason of the error in addressing the envelope the timely appearance by defendant was prevented. No attempt to explain or excuse the failure to file the demurrer with the clerk within the time required was made. Obviously the error in addressing the copy to the plaintiff's attorney had no effect on defendant's failure to timely appear. The proposed answer of defendant admitted the execution of the note and the demand for payment but alleged that the same had been obtained without consideration and by reason of the duress, threats and fraud of one of the partners of the plaintiff copartnership.

Counter-affidavits in opposition to defendant's motion were filed by attorney McCormick and his secretary Janell Flansburg, and by both members of the plaintiff partnership collection agency. The affidavit of the secretary merely refers to her conversation of November 19 with attorney Gomes, which she states was the only conversation she ever had with anyone concerning defendant's demurrer, and that at the time of said conversation she did not know defendant's default had been taken. The affidavit of attorney McCormick states that defendant was served in Fresno county on October 17, 1946; that on November 18, when affiant was informed by the County Clerk of Merced County that no appearance had been made by defendant he caused defendant's default to be entered; and that his first conversation with attorney Gomes was on November 20, two days after the entry of said default. The affidavits of the plaintiff partners were primarily directed at the merits of the proceedings.

[1] It is too well established to warrant citation that appellate courts always have been favorably disposed toward such action on the part of the trial courts as will permit, rather than prevent, the adjudication of legal controversies on their merits. Benjamin v. Dalmo Mfg. Co., 31 Cal.2d 523, 190 P.2d 593. But that is not to say that an order denying a motion to set aside a default will be disturbed on appeal in the absence of a clear showing that the trial court has abused its discretion in so doing. The Benjamin case contains an exhaustive discussion of the law on this point with numerous citations of authority. A reference to that case is sufficient here.

[2] In the cited case the court, in discussing a situation not wholly unlike the present, observed that while the acts which contributed to the failure of the defendant therein to appear within the statutory time might well entitle him to relief, nevertheless it did not follow that merely because a motion was made upon apparently valid grounds within the six months period provided for in section 473, that therefore such motion should be granted. For, in addition to the necessity of excusing the original default by a sufficient showing of "mistake, inadvertence, surprise or excusable neglect" it is also incumbent on the moving party to satisfactorily show that his application has been made *"within a reasonable time"* but in no event "exceeding six months." It is readily apparent the six months limitation is simply a limitation on the power of the court to grant any relief regardless of the merits of the application or its timeliness. Benjamin v. Dalmo Mfg. Co., supra; Smith v. Pelton Waterwheel Co., 151 Cal. 394, 90 P. 934. Stated otherwise, in addition to the necessity of making application *within the six months period* it also must be made within a reasonable time, and what is reasonable must depend primarily on the facts and circumstances of each individual case.

[3] Applying these rules to the present case and conceding for the purpose of discussion that mistake, inadvertence or excusable neglect has been shown sufficiently by virtue of an error occurring in the ordinary course of office routine (something not at all unique) yet nowhere in the record before us is there any showing whatever to excuse the failure of defendant to timely file his motion for relief, i. e., not only before the six months period had elapsed but also *within a reasonable time,* and the trial court's refusal to set aside the default is justified on that ground alone. Benjamin v. Dalmo, supra.

It necessarily follows that defendant has not sustained the burden cast upon him to show such an abuse of discretion as would warrant this court in disturbing the previous order of the trial court.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

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84 Cal.App.2d 702

SNIDOW et ux. v. HILL et al.

Civ. 16137.

District Court of Appeal, Second District, Division 1, California.

April 1, 1948.

1. Quieting title 🔑32

Court had jurisdiction to appoint receiver to culture and care for citrus grove, where complaint in action to quiet title alleged that plaintiffs contracted to sell realty, on which citrus grove was located, to defendants for $55,000, payable in semiannual installments of $3,000, that defendants were in default, that more than $30,000 was still due, and that value of realty had so depreciated that it was insufficient to discharge balance due, and that property was in danger of being materially injured by defendants' failure to care for a citrus grove properly. Code Civ.Proc. § 564.

2. Receivers 🔑38

A court has no power to appoint a receiver pendente lite unless the evidence shows that the property is in danger of being materially injured. Code Civ.Proc. § 564.

3. Appeal and error 🔑955
Receivers 🔑8

The appointment of a receiver rests largely in the trial court's discretion, and its action in appointing a receiver will not be disturbed in absence of a showing of abuse of discretion. Code Civ.Proc. § 564.

4. Appeal and error 🔑1032(1)

On appeals from orders appointing receivers, the appellant must show injury as well as error in order to obtain a reversal. Code Civ.Proc. § 564.

◆

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Suit by Houston A. Snidow and wife against Hayden Hill and others to quiet title to realty. From an order made ex parte appointing R. E. Allen receiver, and from an order continuing the receivership, the defendants appeal.

Orders affirmed.

Barry Sullivan, of Los Angeles, for appellants.

Allard, Brownsberger & Shelton and Leonard A. Shelton, all of Pomona, for respondents.

BARTLETT, Justice pro tem.

The defendants have appealed from an order made ex parte May 7, 1947, appointing R. E. Allen, Receiver, and an order made after a hearing on May 9, 1947, continuing the receivership. The complaint is one to quiet title to 17 acres in Glendora, California, on which is located a citrus grove and a private residence. Attached to the defendants' answer is a contract between Houston A. Snidow and the appellants which provides for a sale of the property to the appellants for $55,000 in installments, $3,000 to be paid on January 1 and on June 1 of each year with interest of 6% per annum on the unpaid balance. The title is to remain in the seller until paid in full. The contract also provides that the seller have the right to all the proceeds received from the sale of fruit and that if the seller advances money in connection with the care, operation or maintenance of the property, the seller is to be reimbursed out of the first money received in connection with the transaction. There is a provision recognizing the fact that there is a trust deed on the property in favor of one Anson Lisk.

At the time the contract was entered into, Snidow and the appellant Hill were in a partnership known as the L. A. Trailer Service.

The contract also provides that money withdrawn from that partnership by either party may be credited against the amount due as their interest may appear.

The affidavit of Houston A. Snidow, upon which the motion for a receiver was based, recites that the defendants are in default in their payments provided for in the contract; that a sum in excess of $30,000 is still due; that the value of the property has so depreciated since the contract was entered into that it is insufficient to discharge the balance due and that the property is in danger of being materially injured by failure to properly care for the grove, failure to irrigate at proper times, failure to disc the same, and failure to fertilize, although accepted agricultural practice requires these matters to be done.

It is further deposed that unless these matters are immediately attended to at the period then existing when the trees are blooming and setting fruit, irreparable damage would be caused to the soil, trees and crop.

The testimony taken at the hearing was sharply conflicting but the facts set forth in his affidavit were again testified to by Snidow and he was corroborated as to the lack of care of the grove and the depreciation in its value by another witness. Testimony was also given indicating a lack of financial ability on the part of appellants to properly care for the grove. The Lisk trust deed referred to in the contract required the property to be correctly cared for and protected.

The order of May 7, 1947, which was continued in effect on May 9, 1947, reads as follows:

"It is hereby ordered that R. E. Allen, 220 N. Broadway, Los Angeles, California, be and he is hereby appointed receiver herein for the purpose of irrigating, fertilizing, spraying, fumigating, smudging, cultivating, controlling pest, harvesting fruit, delivering fruit to the packing house, and otherwise culturing and caring for the citrus property situated on the following described real property: * * *."

The appellants claim that the order appointing a Receiver should be reversed upon three grounds. We quote from their brief:

"1. The court has no power to appoint a Receiver pendente lite unless the evidence shows that the property is in danger of being materially injured.

"2. The court has no jurisdiction to appoint a Receiver in this case.

"3. The pleading and proof is insufficient to support the order appointing a Receiver."

[1] The court had jurisdiction to make the orders attacked. So far as applicable here, section 564 of the Code of Civil Procedure authorizes the appointment of a Receiver on the application of the plaintiff or of any party whose right or interest in the property or funds is probable and where it is shown that the property or fund is in danger of being lost, removed or materially injured, and also in all cases where Receivers have heretofore been appointed by court of equity.

It makes no difference that the complaint is in the form of an action to quiet title. If we scan the provisions of the contract between the parties and examine the averments in the affidavit upon which the motion was based, we find a situation in which the plaintiffs' interest in the fund is probable and the property or fund is in danger of being lost or materially injured. There is no doubt as to its being the type of action in which courts of equity have exercised their inherent power in aid of their jurisdiction to appoint receivers. The order in the instant case in its enumeration of the duties of the Receiver is notable not for the powers it grants but for the extreme limitation based upon those powers. It does not confer the use and possession of the residence, that is left with the appellants. It does not grant the Receiver either possession or control of the proceeds of the crop. Indeed, all it does is make a necessary order authorizing the Receiver, for the protection of the grove, to properly culture and care for it. In Davies v. Ramsdell, 40 Cal.App. 432, 183 P. 702, the court says:

"This is an appeal from an order appointing a receiver pendente lite, in a suit in equity, more resembling the old suit to remove a cloud on title than the Code suit merely to quiet title. The appellant contends the order should not have been made, as such appointments are not usually made in suits to quiet title. In this case there were equitable considerations before the court in addition to those of the ordinary suit to quiet title. Equity has inherent power in aid of its jurisdiction to grant injunctions and to appoint receivers, and the exercise of the power rests very largely in the discretion of the chancellor. * * *"

We also quote the following from Takeba v. Superior Court, 43 Cal.App. 469, 474, 475, 476, 185 P. 406, 408:

"The sole and only question to be determined in this proceeding is, manifestly, whether the respondent court stepped beyond its jurisdiction in appointing a receiver in the case of Mier v. Mizushima, mentioned above, and in taking, through the receiver so appointed, possession of the fruit referred to in the petition for this writ.

"Numerous affidavits have been filed herein touching the merits of the controversy; that is, affidavits addressed to the question as to the ownership of the fruit. But we cannot decide that controversy in this proceeding. If it appears that the court was within its jurisdiction under the law in appointing the receiver, then the inquiry, so far as this proceeding is concerned, is at an end. * * *

"But we think the respondent court was authorized to act in this case, upon a proper showing, of course, upon the provisions of what was formerly subdivision 6 of the Code section, above named, but which is now, and has been since the above considered amendment of 1919, subdivision 7. It reads: 'In all other cases where receivers have heretofore been appointed by the usages of courts of equity.'

"Where the dispute in a litigation is as to the title to the property involved therein, and it is made satisfactorily to appear that the property is of such a character or is in such a situation as that it is likely to be lost or destroyed or greatly deteriorated in value in the hands of the party in possession before the merits of the controversy can be adjudicated, and a satisfactory showing is made that the plaintiff has some interest in the property, or that the plaintiff's right thereto or to some portion thereof is reasonably certain, the court may, in the exercise of its discretion, appoint a receiver to take custody of the property pending the litigation and the determination of the rights of the parties. This means, of course, that the court itself may take possession or custody of the property and hold or dispose of it, according as the nature of the property or the exigencies of the situation with respect to it may require."

The other type of case referred to in section 564 of the Code of Civil Procedure, applicable to such a case as we have here, is fully illustrated by Armbrust v. Armbrust, 75 Cal.App.2d 272, 171 P.2d 75, 77 wherein the court states:

"If it appears that the party seeking the appointment 'has at least a *probable* right or interest in the property' and that 'there is danger of its being lost or destroyed or misappropriated,' then if 'upon conflicting testimony, such right or interest and danger of the destruction or misappropriation of the property or fund are found to exist, a reviewing court is, as a general rule, in no position to say that a nisi prius court has abused its discretion in the appointment of a receiver.' Whitley v. Bradley, 13 Cal.App. 720, 725, 110 P. 596, 598. Here the verified pleadings showed the probable interest of the respondent and the danger of misappropriation of the property or its proceeds sufficiently for the judge to state his conclusion that 'the appointment of a receiver * * * may be a step in the right direction for the preservation of the assets that are involved in the controversy, * * * as set forth in the complaint itself. * * * It certainly would keep in status quo the property and assets of the litigants.'"

The showing made in the instant case is the same as that referred to in the quoted language. Concerning this case, in an attempt to avoid the effect of this decision, appellant says, "and the case of Armbrust v. Armbrust, 75 Cal.App.2d 272, 171 P.2d 75 * * * is a case in which plaintiff alleged that defendant had obtained a conveyance to the property by fraud." However, the order appointing the receiver was not made on the application of the plaintiff at all but on that of the defendant on her cross-complaint which raised no issue of fraud whatever.

Before us we have a case where a showing was made to the court that a plaintiff had a probable interest in the property and that there was danger of its loss or material injury. In fact the right of the plaintiff to the proceeds of the crops was an admitted fact.

In discussing the question of jurisdiction, the appellant says: "There is a recent case of Khatchadourian v. Davidian, 79 Cal.App.2d 539, 179 P.2d 853, decided on May 23, 1947, in which the court ruled that a receiver could not be appointed for the crops on the trees by the request of the vendor as against the vendee."

Contrary to this statement of appellants, the receiver in the case cited was not appointed at the request of the vendor but at the request of the vendee. Neither do the facts in any way parallel those confronting us here. The cited case held that the plaintiff had no right to the crop or the proceeds of it. There was no contract such as existed in the case before us governing the rights of the parties in that regard. The order in the Khatchadourian case, unlike the order in this case, required the receiver to take possession of the real property and to harvest and sell the crops. The prime issue of the case at bar, of the protection of the grove and its proper care, was not involved in that case.

The only other case to which plaintiff calls our attention on the question of jurisdiction is Bennallack v. Richards, 125 Cal. 427, 58 P. 65. In that case the matter before the court was stated by it as follows, on page 433 of 125 Cal., page 67 of 58 P.:

"In making this sale the executors exercised and exhausted their power to deal with the property, unless, upon reporting the sale to the court, confirmation of the sale was refused. It certainly cannot be true that executors acting under such a power may make a valid and unimpeachable contract of sale to appellant, refuse to report it to the court for confirmation, in violation of a duty imposed upon them by law, and, having put him in possession, and permitted him to make improvements to an amount nearly or quite equal to the value of the property at the time the contract of sale was made, invoke the powers of a court of equity to compel an accounting for the rents received, doubtless largely increased by the improvements made, and have a receiver appointed to collect and retain them, to be disposed of by some future order of the court. 'He who seeks the appointment of a receiver must himself come into court with clean hands.' High Rec., § 7."

The court then held that the executors were therefore in no position to invoke the aid of a court of equity. Nothing in that decision bears even remotely on the situation involved here.

[2, 3] We agree with appellant that the court has no power to appoint a receiver pendente lite unless the evidence shows that the property is in danger of being materially injured. The affidavit of Snidow, to which we have referred, and the evidence given at the hearing, were sufficient to justify the court in holding that the property was in danger of being lost or materially injured. "The rule is well established that the appointment of a receiver rests largely in the discretion of the trial court, and that its action in appointing a receiver will not be disturbed by an appellate court in the absence of a showing of abuse of discretion. Conklin v. Superior Court, 1 Cal.2d 601, 36 P.2d 386; Anderson v. Anderson, 124 Cal. 48, 56 P. 630, 57 P. 81, 71 Am.St.Rep. 17; Copper Hill Mining Co. v. Spencer, 25 Cal. 11; Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 77 P.2d 301; Sunset Farms, Inc., v. Superior Court, 9 Cal.App.2d 389, 50 P.2d 106; Lowe v. Copeland, 125 Cal.App. 315, 13 P.2d 522; Brush v. Apartment & Hotel F. Corp., 82 Cal.App. 723, 256 P. 285; Fox v. Flood, 44 Cal.App. 786, 187 P. 68." Goes v. Perry, 18 Cal.2d 373, 381, 115 P.2d 441, 445.

[4] The appellants in this case would not be benefited by a reversal of the order. The contract between the parties was such that they were not entitled to receive the proceeds of the sale of the fruit in any event and they could not be injured by the appointment of a receiver who could care for the culture of the grove and could assume payment for that care, fertilization and irrigation as needed. In appeals from orders appointing receivers, just as in other cases, the appellant must show injury as well as error, Davies v. Ramsdell, supra; Carroll v. Carroll, 16 Cal.2d 761, 771, 108 P.2d 420.

The orders appealed from are affirmed.

DORAN, Acting P. J., and WHITE, J., concur.

84 Cal.App.2d 687

PEOPLE v. HADLEY.

Cr. 2034.

District Court of Appeal, Third District, California.

March 31, 1948.

1. Criminal law 🔑1159(3)

If there is substantial conflict in evidence which cannot upon its face be said to be wholly improbable or unbelievable, verdict will not be disturbed on appeal.

2. Criminal law 🔑742(1), 745

Credibility of witnesses and right to draw inferences from evidence are questions for jury.

3. Criminal law 🔑1159(2)

Appellate court will give to evidence relied upon to sustain conviction an effect of no evidence only where it is physically impossible or so inherently improbable as to be impossible of belief.

4. Homicide 🔑254

Evidence supported conviction of murder in second degree based on defendant's shooting of his adult son.

5. Criminal law 🔑369(1)

The prosecution, in order to convict defendant, may not introduce evidence of other offenses or bring before jury facts concerning wrongful acts for purpose of showing that he is of bad character and more likely to have committed offense than if he had been of a better moral disposition.

6. Criminal law 🔑1037(1)

Fact that some of the remarks by district attorney in his argument to jury were not objected to at trial did not necessarily preclude defendant from urging their prejudicial effect for first time on appeal, if it can be said that they were sufficient to cause a possible miscarriage of justice. Const. art. 6, § 4½.

7. Criminal law 🔑1186(4)

In determining prejudicial effect of errors occurring in trial of criminal prosecution, appellate court must review entire case for purpose of determining whether a miscarriage of justice has resulted or ends of justice subserved. Const. art. 6, § 4½.

8. Criminal law 🔑1186(4)

In a close case where evidence is sharply conflicting, substantial and serious errors vital to defendant that may have resulted in a miscarriage of justice must be regarded as prejudicial and grounds of reversal. Const. art. 6, § 4½.

9. Criminal law 🔑1186(4)

Misconduct of district attorney in his argument to jury did not entitle defendant to a reversal, where defendant's own testimony was so strongly indicative of his belligerent attitude that it was doubtful that district attorney's action could have increased prejudice of minds of jurors which might have existed along that line, and especially where review of entire record did not indicate that case was so close that it could be said that errors of which defendant complained were of such degree as would have turned the scales against him. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Warren L. Hadley, Sr., was convicted of murder in the second degree, and he appeals.

Affirmed.

J. T. Fraser and J. Thomas Fraser, Jr., both of Eureka, for appellant.

Fred N. Howser and Benjamin B. Knight, both of San Francisco, for respondent.

PEEK, Justice.

The defendant was convicted of the crime of murder in the second degree, and has appealed from the judgment and the order of the trial court denying his motion for a new trial.

Inasmuch as one of the grounds for reversal urged by appellant is the alleged insufficiency of the evidence, we have reviewed in detail the facts of the case, as we must, in the light most favorable to the verdict of the jury.

At the time of the homicide defendant was approximately 79 years of age and was living on an undeveloped ranch owned by his son, the decedent, in Humboldt county. An old cabin on the ranch had been repaired by the son in order that the defendant might have a place to live, but the manner in which the repairs were made appeared to have greatly displeased the defendant and it was a continuing source of argument between them. Prior to moving to decedent's ranch defendant had made his home on a ranch jointly owned by a daughter, another son and their spouses, but had left there in August, 1946, because of a quarrel with his daughter, likewise resulting from his dissatisfaction with the arrangements there.

On December 28, 1946, the decedent, his son Herbert, Jr., aged nine and Mr. Rodoni, decedent's father-in-law, drove to the ranch from their home in San Francisco. After supper that evening the three men, defendant, decedent and Mr. Rodoni played pinochle, during the course of which defendant became dissatisfied with decedent's playing and later accused him of cheating. Nothing of importance appears in the record until the day of the homicide, January 2, 1947. On that morning appellant arose first and prepared his own breakfast. He appeared to be morose and unfriendly, refusing to reply to a "good morning" from Rodoni and the decedent as each arose. As a result of his attitude a further argument began between him and the decedent concerning which Rodoni testified in substance as follows:

That when the defendant refused to speak to his son, the decedent said he wanted to talk to him, and defendant in reply said, "What the hell you want to talk about now?"; that decedent said he wanted to know what was wrong, why was it that after he had been at the ranch for a day or two the defendant would talk to no one but would only grunt, whereupon the defendant called him a "damn liar."

Mr. Rodoni, believing it to be just a family quarrel, went outside, leaving them alone in the cabin. While outside he heard them argue over various matters including the pinochle game, the repairing of the cabin and a fight in Oregon in which decedent had been defeated, all of which was corroborated by the defendant himself, and partially by the nine year old son of decedent, who at the time was in bed in the cabin. Rodoni further stated he heard defendant threaten to kill the decedent. The boy also testified to a similar threat by the defendant.

Although Rodoni testified he saw no fighting, or marks upon the defendant, nor did he hear sounds of a fight, the young boy and defendant both described the scuffle which took place while Rodoni was outside the cabin and during which blows were struck by both men. The arresting officers further corroborated defendant's testimony concerning the condition of his face and clothes as an indication of a struggle.

After the scuffle or fight appellant went outside, washed his face, returned, and continued to argue with the decedent who insisted that appellant quit calling him a liar. The appellant, however, persisted in his verbal attack, and his vextious and defiant attitude is reflected in his own testimony at the trial: "And I never had any idea of quit calling him a liar as long as I know he was a liar." The appellant's state of mind is further illustrated by his statements to constable Drewert a few hours after the shooting, when in reply to the constable's question: "Did you shoot to kill" referring to the second and third shots, defendant replied, "you're God damned right I did." Likewise his statement that the last words he spoke to decedent were: "You are a damn dirty liar."

As the last statement was made the decedent was at the opposite end of the cabin, about twenty-four feet from appellant and had started toward him. Appellant, who was the only witness to testify to the entire shooting, took a loaded 30-30 caliber rifle from the wall behind him and, as he stated, for the purpose of stopping decedent, fired, hitting him in the left shoulder. After the first shot decedent either was knocked down or had moved about eight feet and "right side up" as appellant testified; decedent was crouched down, giving defendant the impression he was going to spring at him. Defendant then fired the second shot, the bullet ranging downward through the decedent's upper right leg causing him to fall on his face immediately in front of defendant. The third shot was fired into decedent's back as he lay on the floor. The reason stated by defendant for firing the third shot was that when decedent had dived as the second shot was fired he had grabbed defendant's left heel, and feeling that decedent would kill him if he could, the instant his heel was grabbed, the defendant shot. Immediately prior to the shooting Mr. Rodoni had returned inside the cabin and was busy getting the boy up, with his back toward defendant and decedent and did not see the first two shots fired. However, he and the decedent's son saw the final shot fired.

As one of the grounds urged for reversal of the judgment, appellant contends that "the verdict is contrary to the evidence," and characterizes the testimony of Mr. Rodoni and the decedent's son as incredible and unworthy of belief.

[1-3] The appellant recognizes the rule that if there is substantial conflict in the evidence which cannot upon its face be said to be wholly improbable or unbelievable, the verdict of the jury will not be disturbed on appeal (People v. Ogden, 41 Cal.App.2d 447, 107 P.2d 50), but attempts to circumvent the rule by the assertion, as stated, that the testimony of Mr. Rodoni and decedent's son is incredible, and therefore constitutes no evidence. However, it is equally well settled that the credibility of witnesses and the right to draw inferences from the evidence are questions peculiarly within the province of the jury. People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631; People v. Haydon, 18 Cal.App. 543, 123 P. 1102, 1114. It is only where the evidence relied upon to sustain the conviction is physically impossible or so inherently improbable as to be impossible of belief that an appellate court will give to it an effect of no evidence at all. People v. Headlee, 18 Cal.2d 266, 115 P.2d 427; People v. Braun, 14 Cal.2d 1, 92 P.2d 402; People v. Haydon, supra.

[4] The testimony of the two witnesses is in no way unbelievable but merely relates to facts surrounding the shooting which are entirely consistent with the fact of the homicide. The appellant's argument is that Rodoni's testimony that he heard no fighting or saw no evidence of blows on defendant's face is in direct conflict with that of decedent's young son and of the police officer who testified to the condition of defendant's face and clothes, and that a father, sane and in his right mind, would not kill his own "flesh and blood" deliberately and without sufficient provocation to invoke a belief in the necessity of self defense, and that any other view of the facts is inherently improbable. It is obvious that the first point argued presents merely a conflict in the evidence, and as regards the second point, the all too many cases involving just such a tragedy as here occurred, sufficiently bear witness to the frailty of human nature which makes such an unfortunate act possible.

As additional ground for reversal the appellant urges that certain misconduct on the part of the district attorney, which he charges was part of a deliberate plan, operated to the prejudice of the appellant by inducing the jury to return a verdict based on bias and prejudice.

The misconduct complained of consisted of references to an estrangement between defendant and his family and his desertion of them some twenty years prior to the homicide. Such domestic difficulties were first brought to the attention of the jury in the district attorney's opening statement and again referred to in his closing argument. The charge of desertion was hinted by a son of defendant, the witness Warren Hadley Jr., when in an unresponsive answer he stated: "I hadn't seen him to remember him since I was six years of age," and directly mentioned in the testimony of defendant's daughter who, also in an unresponsive answer, stated: "I think I was twelve years old when he deserted all of us." Counsel for defendant made no objection to this testimony except to move that the latter statement be stricken on the ground that it was incompetent, which motion was granted and the jury instructed to disregard it.

Appellant also charges error of a similar nature was committed by the admission of certain testimony by these same two witnesses in which they recite benevolences to their father, the defendant. Although no objection was made thereto at the trial it is now claimed that such testimony reflected upon the defendant as being an ungrateful father, and was improperly admitted.

Further error is alleged in the testimony by the wife of decedent regarding an argument between defendant and his daughter at which the witness and decedent were present in that after an objection to the examination of the witness concerning the facts of this argument had been sustained, the district attorney in disregard of the ruling continued: "Q. Did he (decedent) participate in any way in the argument? A. Not in the argument, but when the old man picked up a rock to hit his daughter, why, he went * * *." The court interrupted the witness at that point and again ruled the testimony to be inadmissible.

Finally, appellant cites as prejudicial misconduct the derogatory remark of the district attorney with reference to the defense counsel that "just because he (defendant's counsel) is in the habit of coaching witnesses and telling them what to say is no reason to presume what other people do."

There is no doubt that the introduction, deliberate or not, of such statements into the case was improper as were the remarks directed at defendant's counsel.

[5] The prosecution in order to convict the defendant may not introduce evidence of other offenses or bring before the jury facts concerning wrongful acts for the purpose of showing that he is of bad character and more likely to have committed the offense than if he had been of a better moral disposition. People v. Zamavasky, 20 Cal.2d 56, 123 P.2d 478; People v. Cook, 148 Cal. 334, 83 P. 43; People v. Mohr, 157 Cal. 732, 109 P. 476; People v. Glass, 158 Cal. 650, 112 P. 281.

[6] The fact that some of the remarks were not objected to at the trial does not necessarily preclude the appellant from urging their prejudicial effect for the first time on appeal, if it can be said they were sufficient to cause a possible miscarriage of justice. People v. Podwys, 6 Cal.App.2d 71, 75, 44 P.2d 377; People v. Lynch, 60 Cal.App.2d 133, 140 P.2d 418.

[7, 8] In determining the prejudicial effect of errors occurring in the trial of a case an appellate court, by the mandate of Article VI, section 4½ of the California Constitution, must review the entire case for the purpose of determining whether a miscarriage of justice has resulted or the ends of justice subserved. It is only "'in a close case where the evidence is sharply conflicting, substantial, and serious errors vital to defendant that may have resulted in a miscarriage of justice must be regarded as prejudicial and grounds for reversal.'" People v. Reese, 65 Cal.App.2d 329, 337, 150 P.2d 571, 576.

[9] In the instant case the testimony of the defendant himself is so strongly indicative of his cantankerous and belligerent attitude to the bitter end that the instances above referred to hardly can be viewed as having increased any prejudice in the minds of the jurors which may have existed along that line.

Moreover, a review of the entire record does not indicate the case to be so close it could be said the errors of which defendant complains were of such a degree as to have turned the scales against him, and therefore without such errors the jury would have been likely to have returned a verdict in his favor.

The judgment and order appealed from are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

84 Cal.App.2d 645

PEOPLE v. COSTON.

Cr. 2511.

District Court of Appeal, First District,
Division 1, California.

March 30, 1948.

Hearing Denied April 27, 1948.

1. Indictment and information 🔑110(17)

Information in usual form, charging that defendant willfully, unlawfully and feloniously, and with malice aforethought murdered named person, a human being, was sufficient to sustain conviction of murder in the first degree although it omitted element of deliberation and premeditation. Pen.Code, §§ 187, 952.

2. Homicide 🔑139, 282

The degree of murder is not required to be included in the charge in the information, but is an issue of fact for the jury under a plea of not guilty and is to be determined together with a penalty by the court on competent evidence before passing sentence on plea. Pen.Code, §§ 187, 1041, 1042, 1192.

3. Constitutional law 🔑265

A defendant who was convicted of first-degree murder was not denied due process of law because the information substantially following the language of the statute in charging murder omitted the element of deliberation and premeditation. Pen.Code, §§ 187, 952.

Appeal from Superior Court, City and County of San Francisco; Albert C. Wollenberg, Judge.

John J. Coston was convicted of first-degree murder. From an order denying his motion to vacate and set aside the judgment of conviction, defendant appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant was convicted of murder in the first degree, with recommendation of life imprisonment. This conviction was affirmed in People v. Coston, Cal.App., 185 P.2d 632. Thereafter, he moved the superior court to vacate and set aside the judgment of conviction, claiming that the information upon which the conviction was based charged second degree murder only. This contention is made on the ground that, although the information is in the usual form and charged that the defendant "did willfully, unlawfully, feloniously and with malice aforethought murder" one White, a human being, it is insufficient because the "elements of deliberation and premeditation were entirely omitted."

[1] We had supposed that if there is one thing well established in the law of California, it is that the form of information for the charge of murder followed in this case is completely sufficient. That the contention made here is utterly without merit is shown by the fact that in People v. Fowler, 178 Cal. 657, 174 P. 892, and again as late as 1945 in People v. Mendez, 27 Cal.2d 20, 161 P.2d 929, the Supreme Court flatly held against the identical contention made by defendant. In the Mendez case, the court said, at page 23 of 27 Cal.2d page 930 of 161 P.2d: "The defendant's second contention is that the charge as worded in the information foreclosed a finding of anything more then second degree murder. His theory is that the court could not convict him of first degree murder unless the information so specified, that is, that the language defining first degree murder—

willful, deliberate and premeditated—must appear as part of the charge of murder.

"Murder is defined by section 187 of the Penal Code as the 'unlawful killing of a human being, with malice aforethought.' The degrees of murder are defined by section 189. * * *

[2] "The charge, which was substantially in the language of section 187 defining murder, was sufficient. Pen.Code, § 952; People v. Witt, 170 Cal. 104, 148 P. 928. The degree of the murder was not required to be included in the charge. It is an issue of fact for the jury under the plea of 'not guilty.' Pen.Code, §§ 1041, 1042. It is a matter, together with the penalty to be imposed, which must be determined by the court on competent evidence before passing sentence under a plea of 'guilty.' Pen.Code, § 1192; People v. Bellon, 180 Cal. 706, 182 P. 420; People v. Gilbert, 22 Cal.2d 522, 140 P.2d 9; People v. Paraskevopolis, 42 Cal.App. 325, 183 P. 585. Under the charge as worded in the information either the jury or the court, exercising their respective functions, could find that the defendant was guilty of first degree murder if the evidence warranted that finding."

[3] It is true that in People v. Thomas, 25 Cal.2d 880, 156 P.2d 7, 18, the court said that the phrase "malice aforethought" is not synonymous with "'wilful, deliberate and premeditated' intent" and that "Implications to the contrary" in People v. Fowler, supra, "are disapproved." However, the court made this statement in holding a certain instruction erroneous, and was not considering the question of pleading at all. The Mendez case, supra, was decided subsequent to the Thomas case, and while it did not refer to the Thomas case, it again reiterated the rule in California as to the sufficiency of an information charging murder. It did not need to discuss the above statement in the Thomas case, as it is obvious that a statement concerning the requirements of instructions is no basis for the requirements of pleadings. It is interesting that in the case of Davis v. Utah Territory, 151 U.S. 262, 14 S.Ct. 328, 329, 38 L.Ed. 153, (decided in 1894), the court calls attention to the fact that the definition of murder in the statutes of Utah Territory as "the unlawful killing of a human being with malice aforethought" (the identical definition of murder under section 187 of our Penal Code) is substantially the definition of murder at common law and that an indictment at common law in the form of the definition was sufficient, as well as under the Utah law. Thus, we find that the form of charge of murder used in our case has the support of antiquity, as well as of the later California decisions. The Davis case points out, as does the Mendez case, that the crime is murder, with which the defendant must be charged. The statutes divide the crime into degrees for punishment purposes, and these degrees do not have to be charged. "* * * the pleader need not indicate the degree, but may restrict the averments to such facts as, in law, show a murder,—that is to say, an unlawful killing with malice aforethought, —leaving the ascertainment of the degree to the jury, or in case of confession, to the court." at page 267 of 151 U.S., page 329 of 14 S.Ct. Moreover, the holding by the United States Supreme Court in the Davis case, that an indictment in the form of the one at bar is sufficient to sustain a conviction of murder in the first degree, completely refutes the contention of defendant that he has been denied due process of law under the federal Constitution because of his claim of being convicted of a crime with which he claims he was not charged.

To overrule the decision in the Mendez case (had we as an intermediate court the power so to do) would be to set the administration of criminal justice back to the year 1858 when the court in People v. Wallace, 9 Cal. 30, held, in effect, that although the indictment alleged that the defendant did "kill and murder" the victim, it nowhere alleged that the victim was *dead.*

In view of the lack of merit in defendant's contention, we have deemed it unnecessary to consider the point raised by the Attorney General, namely, that the motion to vacate and the appeal therefrom may not be entertained, as the sufficiency of the information could have been attacked on the original appeal. People v. Montgomery, 51 Cal.App.2d 444, 125 P. 2d 108; People v. Wallington, 77 Cal.App. 366, 246 P. 815.

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

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84 Cal.App.2d 716

MITCHELL et al. v. SETZLER et al.
LAWSON v. ROBERTS et al.

Civ. 15983.

District Court of Appeal, Second District, Division 3, California.

April 5, 1948.

1. Execution 🔑193, 194(1)

In a proceeding after execution to determine title to business property claimed by purchasers as against a seller's judgment creditor, claimants have burden of establishing their title to the property, and court had authority to make a determination as to such title. Code Civ.Proc. § 689.

2. Execution 🔑201

In proceeding after execution to determine title to business property claimed by purchasers as against seller's judgment creditor, where claimants contended that sale had been recorded and published as required by statute to permit purchasers to take title free from claims of sellers' creditors, and evidence received was addressed to that question, order denying claim was construed only as a determination that purchasers did not establish a title deserving of protection against rights of sellers' creditors to levy upon their interests if any. Code Civ.Proc. § 689; Civ.Code, § 3440.

3. Fraudulent conveyances 🔑47

Under statute requiring sellers of business property to give notice of intended sale which must be recorded and published so that purchaser may take title free from claims of creditors of seller, a notice duly published in conformity with statutory requirements becomes a nullity when the sale is not consummated at the time and place specified in the notice. Civ.Code, § 3440.

4. Fraudulent conveyances 🔑47

Under statute requiring that notice of intended sale of business property must be recorded and published so that purchaser may take title free from claims of creditors of seller, sale must be made substantially as stated in the notice, and one made at another time or place and without a new notice is not in substantial compliance with statutory method and is not protected. Civ.Code § 3440.

5. Fraudulent conveyances 🔑47

Where sellers of business property recorded and published notice of sale as required by statute so that purchasers could take title free from claims of sellers' creditors, and judgment creditor of a seller levied on property before the sale, which was consummated not on the day stated in the notice, but some time thereafter, sale was void as to that judgment creditor insofar as it involved transfer of any interests of the seller who was the judgment debtor. Civ.Code, § 3440.

6. Execution 🔑201

In proceeding after execution to determine title to business property claimed by purchasers after sale that did not comply with statute as to notice, as against judgment creditor of one of three sellers, order denying purchasers' claim determined nothing as to interest of that seller who was a judgment debtor beyond fact that purchasers' proof failed to establish complete non-ownership by the seller at time of sale where there was no evidence to show that judgment debtor was, as purchaser claimed, a mere party of convenience to the sale. Code Civ.Proc. § 689; Civ. Code, § 3440.

7. Execution 🔑201

In proceeding after execution to determine title to business property claimed by purchasers as against judgment creditor of one of three sellers, where other sellers were not parties to the proceeding, did not appear and were not shown to have had notice, title as between those sellers and the judgment debtor or his judgment creditor could not be determined nor affected by an order denying claim of the purchasers. Code Civ.Proc. § 689.

8. Execution ⚷194(1)

In a proceeding after execution to determine title to business property claimed by purchasers, as against judgment creditor of one of three sellers, to establish protected title, purchasers were required to establish compliance of sellers with the statute requiring notice of intended sale of business to be recorded and published in absence of evidence showing a partnership sale, preventing creditors of individual partners from following the property. Civ.Code, § 3440.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Proceeding by A. D. Mitchell and others, against George D. Setzler and Edward Barrett to determine title to property levied upon under a writ of execution issued on behalf of William Lawson, and claimed by H. W. Roberts, D. E. Roberts and N. D. Spencer, doing business as Frozen Food Shop. From an order denying their claim, H. W. Roberts third party claimants, appeal.

Order affirmed.

Thomas W. Clarke, of N. Hollywood, for appellants.

Harry T. Young, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Appellants, H. W. Roberts, D. E. Roberts and N. D. Spencer, assert ownership of the equipment and business operated under the name of Frozen Food Shop, which they claim to have purchased from Norman D. Twitchell and Edward Barrett, Jr., for the sum of $10,000. The controversy is between them and respondent, William Lawson, who holds judgment against Edward Barrett, Sr., under which he has caused a writ of execution to be issued and levied on the Frozen Food Shop business. The appeal is from an order made after a hearing on a third party claim filed by appellants with the constable who levied the writ of execution. The order was that the third party claim was denied. The appeal brings into question the implied findings that should be read into this order, in view of the issues to be determined, and the propriety of the order as applied thereto.

[1-2] In the proceeding which was held under section 689, Code of Civil Procedure, and by the express terms of that section, appellants, as third party claimants, had the burden of establishing their title to the property, Kyne v. Kyne, 16 Cal.2d 436, 440, 106 P.2d 620; Grant v. Segawa, 44 Cal.App.2d Supp. 945, 949, 112 P.2d 784, and the court would have had authority to make a determination as to such title. We must ascertain from the record what issues were actually tried and adjudicated, and it will be seen that only a question of law was decided, namely, whether, in the sale that was made to appellants, the sellers complied with the requirement of section 3440 of the Civil Code that notice of an intended sale of a business must be recorded and published in order that the purchaser may take a title which is free from the claims of the creditors of the seller. Appellants contended that section 3440 had been complied with, whereas respondent contended that there had been no compliance. All the evidence that was received was addressed to this question alone. No issue was presented as to whether the judgment debtor Edward Barrett had any interest in the property at the time of the sale and no evidence was introduced by either party which had a direct bearing upon that question. Since the issue was thus limited, we construe the order only as a determination that the third party claimants did not establish a title deserving of protection against the rights of creditors to levy upon the interest of any of the sellers in the property which was the subject of the sale.

On August 10, 1946, Edward J. Barrett, Jr., Norman D. Twitchell and Edward Barrett, signed and caused to be recorded a notice as required by section 3440, Civil Code, of their intention to sell the said business to Herbert W. Roberts and De-

Forest E. Roberts, specifying 10 a. m., August 20, as the time, and the escrow department of a bank in North Hollywood as the place, for the transfer to be made and the consideration paid. A copy of the notice was duly published. The Messrs. Roberts signed, recorded and published a notice of their intention to give to the three proposed sellers their note and chattel mortgage on the property in part payment of the purchase price. Escrow instructions were signed by the proposed purchasers and by the three proposed sellers. They called for the payment of the purchase price and the delivery of title papers through the escrow and also for the delivery of the purchase money note and mortgage.

Under date of August 16, respondent sent to the escrow his claim upon the funds in the amount of $3,156.22, based upon the judgment, requesting that if Edward Barrett refused to accept the claim, respondent be notified in order that he might protect himself by means of execution. On August 21, a letter was received in the escrow from Edward Barrett, stating that although his name appeared in the escrow he claimed no interest therein, his name having been added only as a matter of convenience. He directed that all further instructions be received from Twitchell and Barrett, Jr., and that all sums be paid to them. A copy of this letter was sent to respondent by the escrow holder, advising that no funds were held in escrow to the credit of Edward Barrett. On August 24, the escrow was cancelled by instructions of Twitchell and Barrett, Jr., and the proposed buyers, and all papers theretofore deposited were returned. Respondent was notified by the escrow holder of the cancellation of the escrow. On or about August 27, at an undetermined place, Twitchell and Barrett, Jr., sold the property to Herbert W. Roberts and DeForest E. Roberts for a consideration of $12,500, of which $7,500 was paid in cash and the balance by the promissory note of Messrs. Roberts for $5,000, secured by a chattel mortgage on the property. Barrett, Twitchell and Barrett, Jr., as parties of the first part, entered into an agreement with the Messrs. Roberts, as parties of the second, reciting that on August 8 the parties of the first part had entered into an agreement to sell the property to the parties of the second part, that certain claims had been filed in the escrow against Edward Barrett, that the parties of the first part had represented that said Edward Barrett had owned no interest in or to the property, and that the parties of the first part would agree to indemnify the parties of the second part for any loss arising out of any and all claims based upon respondent's judgment and any judgment lien thereunder. We find in the clerk's transcript a copy of a third party claim dated December 16, signed "Frozen Food Shop, a copartnership, by H. W. Roberts" and verified by him. It states that an execution was levied on the property December 16, that the property belongs to a copartnership consisting of H. W. Roberts, D. E. Roberts and N. D. Spencer, that their interest is that of absolute owner and that they purchased the same on or about the 27th day of August from Norman D. Twitchell and Edward Barrett, Jr., for a consideration of $10,000, and that the reasonable value thereof is $12,500. A hearing was had upon this third party claim in which the parties were represented by counsel, and documentary evidence above referred to was introduced in evidence, together with the testimony of the escrow officer of the bank. This testimony consisted of identification of the escrow papers and an explanation of what had been done therewith. Included in the documentary evidence were an affidavit of publication of the notice of sale signed by Barrett, Twitchell and Barrett, Jr., on August 8, and also a notice signed by the Messrs. Roberts, dated August 8, stating their intention to mortgage to Barrett, Jr., Twitchell and Barrett, the business known as "Frozen Food Shop, or Polar Food Shop," and that the transaction would be concluded August 20 through the above named escrow. There was no evidence of the recording or publication of an intention to sell the property, other than the one heretofore mentioned signed by Barrett, Barrett, Jr., and Twitchell, nor was there proof of any notice of intention to mortgage other than the one signed by the Messrs. Roberts and dated August 8. There was placed in evidence a purchase agreement dated March 18, 1946 with the Polar Food Shops, Inc., by E. J. Barrett, as seller, and Norman D. Twitchell and Edward J. Barrett, Jr., as purchasers, by the terms of which the purchasers agreed to pay $2,870 for four frozen-food cabinets, $574 in cash and the balance in monthly installments of $108. Upon the reverse of the agreement appears an assignment to Refrigeration Discount Corporation. It was stated by one of counsel, and not disputed, that the $5,000 note was discounted and paid off and the mortgage cancelled upon the payment by Messrs. Roberts of the sum of $2,500. This constituted all the evidence introduced at the hearing on the third party claim. It would appear, therefore, that the sale as noticed was not made through the escrow but that a sale was made and a chattel mortgage executed later, without further notice of intention to sell or to mortgage.

[3-5] Appellants could have prevailed either by proving that they purchased the property prior to the levy of execution, and after the statutory notice had been given, or by proving that the sellers, Twitchell and Barrett, Jr. were the owners and that Barrett, Sr., had no interest in the property at the time of the sale. They undertook to prove that the sale was made after due notice but failed in this effort. The notice became a nullity when the sale was not consummated at the time and place specified. Appellants' contention appears to be that respondent, having had the statutory notice of the intention to sell, had an opportunity to levy execution and lost his right by failing to do so before the sale was made. The statute may not be so construed. In order that title may pass, free from claims of the creditors of the seller, the sale must be made substantially as stated in the notice. The creditor is thus afforded an opportunity to present his claim for payment and, if payment is not arranged, to levy upon the money, when it passes to the seller, instead of upon the property. A sale made at another time or place and without a new notice is not made in substantial compliance with the statutory method and is not protected. The construction of the statute urged by appellants would largely destroy its efficacy and defeat its purpose to afford a method of collection without the necessity of legal action. It would also point out an effective method by which unscrupulous debtors could make secret dispositions of their property in fraud of creditors who were relying upon the terms of the statutory notice. Appellants failed to prove compliance with the statute sufficient to establish a title protected against the claims of the creditors of the sellers. The sale was therefore void as to respondent, under section 3440, insofar as it involved the transfer of any interest of Barrett, Sr.

[6, 7] Appellants also failed to prove that Barrett, Sr. had no interest in the property. The only evidence upon that point was that he signed the notice of sale and that he had agreed to sell to Twitchell and Barrett, Jr. certain refrigeration equipment on a conditional sale contract in March, 1946. By his subsequent letter, however, he denied having an interest in the property, and it was shown that he had assigned his conditional sale contract to a finance company. Appellants, as we say, had the affirmative in any attempt to show that the judgment debtor had no interest in the property. Since there was no evidence whatever as to the extent of his possible interest at the time of the sale the order determined nothing on that point beyond the fact that appellants' proof failed to establish complete non-ownership by Barrett, Sr. If, therefore, Barrett, Sr., had an interest in the property at the time it was sold to appellants, the fact that the sale was made does not preclude respondent from having recourse to appropriate legal process for the collection of his judgment from such interest. Norman D. Twitchell and Edward Barrett, Jr. were not parties to the proceeding and did not appear or take any part therein, and were not shown to have had notice of the hearing. It is clear that the question of title as between them and Barrett, Sr., or his judgment creditor, could not have been determined in the proceeding. Their rights are not affected in any manner by the order.

[8] Appellants' principal argument is that where a partnership makes a sale, creditors of individual partners cannot take advantage of the failure to comply with

section 3440, and that therefore the sale to the Roberts was valid without compliance with the section, since respondent is only a creditor of Barrett, Sr. Respondent answers that there was no evidence of the existence of a partnership between Barrett, Sr., Twitchell and Barrett, Jr., and this answer appears to be sufficient. There was no such evidence.

The order is affirmed.

WOOD, J., and VALLEÉ, J. pro tem, concur.

LUIS et al. v. CAVIN et al. *

Civ. 7441.

Sac. 5876.

District Court of Appeal, Third District, California.

Mar. 29, 1948.

Rehearing Granted April 28, 1948.

1. Death ⇨31(6)

Wife was not entitled to recover for the death of her husband, where she had, by express terms of property settlement agreement with husband, waived all claims to alimony, maintenance, support, costs and inheritance from husband's estate, and agreement was adopted by terms of interlocutory divorce decree procured by the wife, and there was no evidence of an actual reconciliation of the spouses or of a rescission of the agreement. Civ.Code, §§ 159, 3281.

2. Appeal and error ⇨1064(1)
Death ⇨104(1)

Where wife waived all claims to alimony, maintenance, support, costs and inheritance from husband's estate by express terms of property settlement agreement which was adopted by terms of interlocutory divorce decree, instruction in wife's action for death of husband, that wife might be individually entitled to recover damages, and that a reconciliation at any time within 12 months from time of granting of interlocutory decree would have effect of notifying property agreement and divorce proceeding, was reversible error. Civ.Code, §§ 159, 3281,

3. Appeal and error ⇨1169(8)

Where wife brought action individually and as guardian ad litem for a minor child to recover for death of her husband and father of minor child, and judgment was returned in favor of wife individually and as guardian ad litem without any indication as to what portion was intended to compensate wife individually and as guardian, and any recovery by wife individually was improper because of execution of a property settlement agreement which had been adopted by an interlocutory divorce decree, reversal of judgment for uncertainty was necessary. Civ.Code, §§ 159, 3281.

4. Parties ⇨88(3)

In action by wife individually and as guardian ad litem for minor child for death of her husband, wherein complaint merely stated that wife was deceased's widow and failed to mention that before husband's death husband and wife had entered into a property settlement agreement waiving all rights to husband's estate and that such agreement had been incorporated in interlocutory divorce decree, defendants did not waive their right to object to a misjoinder of parties plaintiff by failing to demur to complaint on that ground. Civ. Code, §§ 159, 3281; Code Civ.Proc. § 377.

5. Husband and wife ⇨279(2)

Where spouses entered into property settlement agreement whereby wife waived all rights in husband's estate, and agreement was adopted by interlocutory divorce decree, and spouses were living apart at time of husband's death, wife could not rescind the oral agreement by evidence of an oral unexecuted agreement between the spouses for a future reconciliation. Civ. Code, § 159.

6. Husband and wife ⇨279(3)

To constitute a reconciliation of marital relations, after a postnuptial written agreement of separation of the spouses and absolute complete settlement of all present and future property interests, including a waiver of right of inheritance, and all obligations growing out of the marital relationship, agreement for reconciliation must be consummated and executed. Civ.Code, §§ 158, 159.

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* Subsequent opinion 198 P.2d 563.

7. Husband and wife ⚿279(2)

Written property settlement agreement between spouses could be rescinded by its destruction by consent of spouses with intent to extinguish the obligation, by a written agreement, or by an executed oral agreement. Civ.Code, §§ 158, 159, 1698–1700.

8. Husband and wife ⚿279(3)

An oral agreement for reconciliation of spouses, who are living apart, will have effect of abrogating their written settlement of property rights only when oral agreement has been executed by a resumption of their marital relations and legal obligations growing out of that relationship. Civ.Code, §§ 158, 159, 1698–1700.

9. Death ⚿31(6)
Descent and distribution ⚿63

When written property settlement and interlocutory divorce decree fail to determine that all property rights of spouses have been settled and such rights have not been waived, or there is adequate proof of actual reconciliation and a resumption of marital relations and obligations, spouse may retain such interest in estate of deceased as will entitle her to maintain an action as an heir for damages accruing on account of deceased spouse's wrongful death. Civ.Code, §§ 158, 159, 1698–1700; Code Civ.Proc. § 377.

10. Appeal and error ⚿1050(1)

In action against several defendants, admission of evidence of compromise and settlement of claim of one defendant by an insurance company was not prejudicial to the defendants.

11. Appeal and error ⚿1046(5)

In death action, wherein a prospective juror on his voir dire examination stated to trial judge that he did not think that it was customary to allow insurance agents to sit on such a jury, due to the nature of the agents' business, and that therefore it might be possible that he be dismissed, trial judge's reply that he suspected there was a possibility that juror might be dismissed, but that he was not in a position to do so, was not prejudicial to defendants.

◆

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by John Reginald Luis, a minor, by his guardian ad litem, Angelina E. Luis, and by Angelina E. Luis individually, against Orlo C. Cavin, the Lumber & Supply Company, Joseph Silva, Jr., and Jack R. McKenzie, to recover for the death of Frank George Luis, deceased, who was the father of the minor and divorced husband of Angelina E. Luis, as result of an automobile collision. From a joint judgment in favor of the plaintiffs, which was reduced to $25,000 on a motion for a new trial, the defendants appeal.

Judgment reversed.

Ray W. Hays, of Fresno, for appellants Lumber & Supply Co. and another.

Chester O. Hansen and John Said, both of Fresno, for other appellants.

C. Ray Robinson and Russell F. King, both of Merced, for respondent.

THOMPSON, Justice.

From a joint judgment in favor of plaintiffs, which was reduced to $25,000 upon a motion for new trial, after a verdict had been returned for a larger amount, two separate appeals have been perfected. A suit for damages for the death of Frank George Luis was commenced by his wife Angelina E. Luis, individually and as guardian ad litem of their infant son, John Reginald Luis, for the concurrent negligence of the drivers of three motor vehicles which were involved in a collision on the public highway at the point where it passes beneath a railroad bridge near Livingston in Merced County. The accident occurred about 7 o'clock P. M., October 24, 1945, at the underpass of a four-lane highway which was separated by an intervening seven-foot graveled strip. The machines were traveling along the highway extending northwesterly toward Turlock. The foremost truck was loaded with a harvesting machine to a height of 17 feet above the pavement, contrary to Section 697 of the Vehicle Code, which prevented it from clearing the overhead bridge. That truck was therefore forced to stop in the undercut. Two other machines, which were following the truck, were forced to stop, obstructing the entire easterly passageway. Mr. Luis, who was driving his Buick automobile, came upon the stalled cars without previous warning, and crashed into one of them, resulting in his death.

Prior to the accident the deceased and his wife were living separate and apart from each other. She procured an interlocutory decree of divorce on August 24, 1945. They had previously executed a written agreement, settling their property rights, which was approved, adopted and included in the interlocutory decree.

A demurrer to the complaint was overruled. But the demurrer did not raise the question of misjoinder of party plaintiffs. At the trial a motion for nonsuit was granted as to the defendant Joseph L. Vierra. The jury returned a verdict in favor of the defendant, Richard Arthur Morrow. A joint and several judgment was rendered against the other defendants, as previously stated. From that judgment the Lumber Company, which owned the foremost truck, and Silva, who was operating it, appealed. The defendants Cavin and McKenzie joined in a separate appeal from the judgment.

The appellants Lumber Company and Silva contend that the evidence fails to support the judgment against them; that their acts were not a proximate cause of the accident; that the deceased, Luis, was guilty of contributory negligence which precludes plaintiffs from recovery; that Mrs. Luis, in her individual capacity, was not a proper party plaintiff and was barred from recovering damages for the death of her husband by the terms of their previous written property settlement agreement, and that the court erred in giving to the jury and in refusing to give certain instructions.

The appellants Cavin and McKenzie do not contend their acts did not proximately contribute to the accident which caused the death of Mr. Luis, but they do assert that the court erred in admitting evidence, over their objection, that an insurance company compromised and paid to the codefendant, Morrow, his claim for damages growing out of the same collision; that the court erred in instructing the jury with respect to the right of plaintiff, Mrs. Luis, in her personal capacity to recover damages, in view of her previous settlement of property rights with her husband, and that the trial judge was guilty of prejudicial misconduct in his reply to a statement made by Harold Johnson, a prospective juror, on his voir dire examination, addressed to the trial judge, as follows: "I don't think it is customary for either the defense or the plaintiff to allow insurance agents to sit upon a panel of this type due to the nature of our business, and if that is true why it might possibly be that I could be dismissed." To that inquiry the judge replied, "I suspect that there is a possibility that you may be, but I am not in a position to do that." The juror was subsequently excused.

[1-3] We are convinced the judgment for damages in favor of Angelina E. Luis, individually, is not supported by the evidence. There is no evidence that she suffered compensable detriment as provided by Section 3281 of the Civil Code, on account of the death of her husband. She waived all her claims and rights to alimony, maintenance, support, costs and inheritance from her husband's estate, by the express terms of her property settlement agreement, which was in full force and effect at the time of his death. That agreement was quoted, adopted, ratified and directed to be enforced by the terms of the interlocutory decree. There is no evidence of an actual reconciliation of the spouses, or of a rescission of the property agreement. The court erroneously instructed the jury, in effect, that Mrs. Luis might be individually entitled to recover damages, and that a reconciliation at any time within twelve months from the granting of the interlocutory decree would have the effect of nullifying and invalidating the property agreement and the divorce proceeding. In neither the verdict nor the judgment are

the damages which were awarded to Mrs. Luis individually, and to the minor child, segregated. It is impossible to determine what proportion of the judgment was intended to compensate either of the plaintiffs. That joint judgment would be proper, provided both parties were entitled to recover some amount of damages. But Mrs. Luis, under the undisputed evidence, was not entitled to recover any sum whatever, and it therefore becomes necessary to reverse the judgment for uncertainty, and because of the erroneous instructions which were given to the jury.

The spouses executed a written settlement of their property rights under Section 159 of the Civil Code. They were living separate and apart from each other at the time of the death of Mr. Luis. That agreement was incorporated in, and directed to be fulfilled by, the terms of the interlocutory decree of divorce. The agreement provides that two $1,000 policies on the life of the husband shall be made payable to the minor child and that one $500 United States Government bond and a specified amount of money on deposit in a bank shall be conveyed to the child. The balance of their community property was specifically divided between the spouses. The agreement then provides that each party thereby waives all rights to any other property of the other party then owned or thereafter acquired, and to all rights which he or she might otherwise acquire in the estate of the other party, at death, by will, succession, inheritance, or otherwise. The agreement further waives all claims and rights of each party against the other for alimony, maintenance, support, homestead, family allowance, inheritance, costs and counsel fees "from the date of this agreement to the end of the world." It declares that, in the event of a subsequent suit for divorce, the agreement shall be presented to the divorce court with a request that it be adopted and made a part of the decree which may be rendered.

[4, 5] The respondents contend that the widow of the deceased husband was authorized, under Section 377 of the Code of Civil Procedure, as his "heir", to maintain the action, in her individual capacity, for damages sustained by her on account of his wrongful death caused by the negligence of the appellants, and that a joint judgment in favor of the widow individually and the minor child, in an unsevered lump sum, was the only proper one that could be rendered. Rickards v. Noonan, 40 Cal.App.2d 266, 271, 104 P.2d 839. They assert that the appellants waived their right to object to a misjoinder of parties plaintiff by failing to demur to the complaint on that ground and cite Fuentes v. Tucker, Cal.App., 175 P.2d 867. We do not question the application of that rule under proper circumstances. But the waiver of the widow's right of action by the terms of a previous property settlement agreement and a subsequent interlocutory decree of divorce in which the agreement is incorporated and directed to be enforced, was not involved in that case. A hearing was granted by the Supreme Court. Fuentes v. Tucker, 31 Cal.2d 1, 187 P.2d 752. In the present case the complaint failed to mention either the property settlement agreement or the divorce proceeding. It merely stated that Angelina E. Luis "is the widow of Frank George Luis, now deceased," and that plaintiffs are the heirs of the deceased. The separate answers deny that plaintiffs are the heirs of the deceased husband. A demurrer to the complaint on the ground of misjoinder of party plaintiffs would have been ineffectual. The foregoing rule of pleadings does not apply to the issue in this case as to whether there is evidence that Mrs. Luis suffered compensable detriment by the death of her husband. Civil Code, Sec. 3281. In support of the last mentioned issue the respondents assert that the evidence shows a subsequent reconciliation of the spouses which had the effect of abrogating the agreement. But the evidence fails to show a reconciliation of the spouses. It merely shows that the interlocutory decree of divorce was rendered two months before the husband's death; that it included the terms of the previous property settlement agreement, which were approved and directed to be enforced, and that the husband and wife discussed a possible reconciliation which he proposed. She was then asked, "And what was your

intention, were you going to *eventually grant that reconciliation?*" to which she replied, "Yes, I was." That is the entire evidence on the subject of reconciliation. That conversation did not constitute evidence of a reconciliation which restored the marital relations and rescinded the written property settlement agreement. The evidence is uncontradicted that the spouses were living separate and apart at the time of the death of the husband. A written property settlement agreement may not be rescinded by an oral agreement to a future reconciliation which is in no wise executed.

[6] To constitute a reconciliation of marital relations, after a postnuptial written agreement of separation of the spouses and an absolute complete settlement of all present and future property interests, including a waiver of the right of inheritance, and all obligations growing out of the marital relationship, it is necessary that an agreement for reconciliation shall be consummated and executed.

[7-9] The written property settlement agreement was a contract which the spouses were authorized by statute to make. Civil Code, secs. 158, 159; In re Davis' Estate, 106 Cal. 453, 455, 39 P. 756. That written contract could be rescinded by its destruction by the consent of the parties with intent to extinguish the obligation, by a written agreement, or by an executed oral agreement. Civil Code, secs. 1698–1700. An oral agreement for the reconciliation of the spouses, who are separated and living apart from each other, will have the effect of abrogating their written settlement of property rights only when the oral agreement has been executed by a resumption of their marital relations and legal obligations growing out of that relationship. In re Davis' Estate, supra; London Guarantee and Accident Co., Ltd. v. Industrial Accident Comm., 181 Cal. 460, 465, 184 P. 864; In re Estate of Hurley, 28 Cal.App.2d 584, 589, 83 P.2d 61; Peters v. Peters, 16 Cal.App.2d 383, 386, 60 P.2d 313; Jones v. Lamont, 118 Cal. 499, 50 P. 766, 62 Am.St.Rep. 251; In re Estate of Boeson, 201 Cal. 36, 42, 255 P. 800; Brown v. Brown, 170 Cal. 1, 7, 147 P. 1168; In re Estate of Martin, 166 Cal. 399, 402, 137 P. 2; Lazar v. Superior Court, 16 Cal.2d 617, 107 P.2d 249; Mundt v. Connecticut General Life Ins. Co., 35 Cal.App.2d 416, 418, 95 P.2d 966; In re Estate of Ruiz, 53 Cal.App.2d 363, 127 P.2d 945; Rickards v. Noonan, supra; 35 A.L.R. 1529, note. It is true that when the written property settlement agreement and the interlocutory decree of divorce fail to determine that all property rights have been settled and such rights have not been waived, or there is adequate proof of actual reconciliation and resumption of marital relations and obligations, the spouse may retain such interest in the estate of the deceased as will entitle her to maintain an action, as an heir, under Section 377 of the Code of Civil Procedure, for damages accruing on account of the death of the spouse caused "by the wrongful act or neglect of another." Rickards v. Noonan, supra. But, the converse is necessarily true that, when all such rights are determined and expressly waived by the surviving spouse, she would not suffer compensable detriment by his death of a loss of property, alimony, or maintenance, nor would she be deprived of his comfort, society or support, so as to entitle her to damages on that account.

In the Rickards case, supra, upon which the respondents rely, a judgment in favor of the surviving wife whose husband was killed in an automobile casualty, was affirmed. In that case there was no written property settlement agreement, as there was in the present action. The spouses had lived separate and apart, and the wife had procured an interlocutory decree of divorce before his death. There was satisfactory evidence of a complete reconciliation. There was evidence that "there was a reconciliation between us" [40 Cal.App.2d 266, 104 P.2d 840]; he associated with her, paid her money and a portion of her debts, and they engaged in sexual relations. The court specifically found that "at the time of his death," she was his wife. It is true that they had not "yet moved together" into their own home. But the delay in so doing was explained by evidence that he was living with his father who was partially dependent upon him, and to whom he was paying $12.50 per week; that the husband "had many bills to pay and he 'wanted to get on his feet first' so that their resumed married life would not again fail." Upon that evidence the court determined that a reconciliation of the spouses was actually consummated. No such evidence of reconciliation was adduced in the present suit. Mrs. Luis did not even testify that she and her husband had been reconciled. All that she said was that he had proposed a reconciliation, and that it was her intention to *"eventually* grant that reconciliation."

In the London Guarantee and Accident Company case, supra, an order of the Industrial Accident Commission, awarding the surviving wife compensation on account of the husband's death, was reversed on appeal. The spouses had been separated and an interlocutory decree of divorce was rendered in favor of the wife, but no order for alimony or maintenance was provided for. There was no property settlement agreement between the spouses in that case. The question of a reconciliation was not involved. The Supreme Court said [181 Cal. 460, 184 P. 867]: "An interlocutory judgment of divorce is therefore, so far as it determines the rights of the parties a contract between them. It is temporary and provisional in its nature, it is true, but it settles the rights of the parties for the time being, and until some action, proceeding, or motion is begun to change the status, and some order is made thereon which has that effect, or *until they become reconciled and resume marital relations,* in which event their mutual obligations are, for the time being at least, restored." (Italics added.)

The court held in that case that, because there was no reconciliation of the spouses, and the interlocutory decree of divorce had settled all rights and obligations of the spouses the surviving widow was not entitled to compensation on account of his death.

In Re Estate of Dargie, 162 Cal. 51, 121 P. 320, 321, an order for family allowance to the widow of the decedent was affirmed on appeal. The wife obtained an interlocutory decree of divorce prior to the death of her husband, but the final decree of divorce was not rendered. It was held that she was still his wife at the time of his death, and that she was therefore entitled to family allowance. But in that case there was a complete consummation of their reconciliation. The court said in that regard: "The parties afterward became reconciled *and lived together as husband and wife.*" There was no property settlement agreement in that case. Those facts distinguish that case from the present one.

Other cases cited and relied upon by respondents may be likewise distinguished.

It may be conceded, as the respondents contend, that Mrs. Luis was entitled to maintain the action for damages under Section 377 of the Code of Civil Procedure (Redfield v. Oakland Consolidated Street Railway Co., 110 Cal. 277, 289, 42 P. 822, 1063; Taylor v. Albion Lumber Co., 176 Cal. 347, 351, 168 P. 348, L.R.A.1918B, 185), and that she would ordinarily be deemed to be his "heir". Knott v. McGilvray, 124 Cal. 128, 56 P. 789; Dickey v. Walrond, 200 Cal. 335, 339, 253 P. 706. But that right to maintain the action for his death would not dispense with the necessity of her proving that she suffered some detriment thereby for which she was entitled to compensation. Civil Code, Sec. 3281.

Certainly Mrs. Luis suffered no loss of property, alimony, maintenance or support, on account of his death, for she waived all such rights. Nor did she thereby suffer a loss of advice, comfort or society of her husband, for they had been separated by mutual consent and written agreement for several months, and she had been granted an interlocutory decree of divorce on the ground of his extreme cruelty. We are unable to perceive what detriment she suffered on account of his death which would be legally compensable in this action.

It follows that the court erroneously instructed the jury, under the circumstances of this case, that Mrs. Luis might be awarded damages for "pecuniary loss" suffered by her, and for the reasonable value of "comfort, society and protection of the deceased" of which she had been deprived. The court also misled the jury by instructing it that a reconciliation of the spouses might occur at any time within twelve months after the rendering of the interlocutory decree, which would have the effect of nullifying and invalidating the divorce proceedings. The last mentioned instruction infers that since the deceased was killed before the lapse of twelve months from the rendering of the interlocutory decree, during which period it was possible the spouses might have become reconciled, in spite of the existing property settlement agreement, the jury could award her damages. It disregards the fact that no reconciliation existed at the time of his death, and that none could subsequently occur because he was dead.

At the request of plaintiffs the court instructed the jury, in part, as follows:

"If * * * you find that the plaintiffs, John Reginald Luis *and his mother,* Angelina E. Luis, are entitled to a verdict against any defendant or defendants for the death of Frank George Luis, you will reward *them* such sum as, under all the circumstances of the case, may be just compensation *for the pecuniary loss they have suffered by the reason of the death* of Frank George Luis.

"In determining that loss, you may consider the financial support, if any, that plaintiffs were reasonably certain to have received from the earnings and services of Frank George Luis. *You may also consider what pecuniary loss, if any, plaintiffs have suffered, and will suffer in the future* with reasonable certainty, *by being deprived of the comfort, society and protection of the deceased* Frank George Luis.

"In weighing these matters, *you may consider the age of* the deceased Frank George Luis and of *the plaintiffs, the state of health and physical condition* of deceased and *of plaintiffs* as it existed at the time of the death, * * *.

* * * * * *

"If you find that plaintiffs are entitled to a verdict, *you may consider as evidence in arriving at the amount of damages,* if any, that *the expectancy* * * * *of a woman 25 years old is 38.81 years.* * * *

"If you return a verdict for plaintiffs, it shall be for a single sum, representing the aggregate of the pecuniary loss suffered by the plaintiffs. * * *

"*I instruct you that* a divorce does not become final until twelve months after the interlocutory decree of divorce has been granted and that *a reconciliation within such twelve months will nullify and invalidate such divorce proceedings.*" (Italics added.)

It will be observed that the jury was clearly instructed that an award of damages might be made to Mrs. Luis, individually, for pecuniary loss, including alimony, maintenance and support, together with her loss of "comfort, society and protection of the deceased", all of which were specifically waived by the express terms of the property settlement agreement which was incorporated in the interlocutory decree and approved and directed to be enforced. Moreover, the last quoted instruction clearly infers that the jury might award Mrs. Luis such damages on the theory that a reconciliation might occur at any time before the final decree of divorce was rendered, which would have the effect of nullifying and invalidating the divorce proceedings, including the property settlement agreement. Since they were not reconciled, and on account of his death a reconciliation was impossible, the last mentioned instruction was erroneous and prejudicial. Because the verdict and judgment are joint, we are unable to determine what proportion was awarded to Mrs. Luis in compensation of her pecuniary loss and for her loss of comfort, society and protection of the deceased, which elements are not supported by the evidence.

In view of the foregoing it is unnecessary for us to determine whether the death of Mr. Luis occurred as the result of his contributory negligence, or as a proximate result of the concurrent negligence of the appellants.

[10, 11] We are, however, satisfied the court did not err in receiving evidence of the compromise and settlement of the claim of the codefendant Richard A. Morrow by an insurance company. Appellants were not prejudiced thereby. Nor was the trial judge guilty of prejudicial misconduct in his reply to the inquiry of a prospective juror on his voir dire as to whether the respective parties would "allow insurance agents to sit" as jurors at the trial. The

plaintiffs did not adduce that inquiry. The reply that "I suspect that there is a possibility that you may be" dismissed as a juror by one of the parties, on that account, is not a statement inferring that the appellants were carrying insurance. They were not thereby prejudiced.

For the foregoing reason, the judgment is reversed.

ADAMS, P. J., and PEEK, J., concur.

Rehearing granted; THOMPSON, J., dissenting.

JEPPI et al. v. BROCKMAN HOLDING CO., Inc., et al. *

Civ. 3594.

District Court of Appeal, Fourth District, California.

March 30, 1948.

Hearing Granted May 27, 1948.

1. Vendor and purchaser 🔑349

Complaint alleging that corporation agreed to sell realty for specified price, with specified time in which to consummate transaction, that plaintiffs deposited purchase price in escrow pursuant to agreement, that corporation wilfully refused to consummate transaction and repudiated transaction because of receipt by a third person of a higher offer, value of realty at time of repudiation of contract, and that president of corporation who had executed contract with plaintiffs was authorized by corporation, stated cause of action for damages for breach of contract in bad faith. Civ.Code, § 3306.

2. Corporations 🔑410

Generally the president of a corporation has no power merely by virtue of his office to sell the property of the corporation.

3. Corporations 🔑425(5)

Where president of corporation entered into agreement for sale of substantially all property of corporation and corporation and stockholders received and retained no benefits from placing of purchase money in escrow pursuant to agreement and a majority of directors holding stock repudiated the agreement after discovering its terms and conditions, corporation in action for damages for breach of contract in bad faith was not estopped to deny that the agreement was unauthorized. Civ.Code, §§ 343–345, 3306.

4. Corporations 🔑426(1)

Where president of corporation entered into agreement for sale of substantially all property of corporation and stockholders received and retained no benefits from placing of purchase money in escrow pursuant to agreement and a majority of directors holding shares of stock repudiated the agreement after discovering its conditions, there was no ratification of unauthorized agreement by corporation. Civil Code, §§ 343–345.

5. Corporations 🔑410

Where president of corporation entered into agreement for sale of substantially all property of the corporation, president could not bind majority of nonconsenting directors or stockholders by telling purchaser that president had obtained consent of majority. Civ.Code, § 343–345.

6. Corporations 🔑410, 442

Resolution of directors of corporation declaring a policy to sell substantially all property of corporation not indicating to whom, at what price, the terms, and who was to effectuate the sale, did not bind directors or stockholders to affirm agreement executed by president of corporation without further approval on part of directors where articles of incorporation did not grant power to effect sale upon president, and it had not been the custom or duty of president to effect sales of corporate property. Civ.Code, §§ 343–345.

7. Corporations 🔑432(12)

In action for breach of contract in bad faith for sale of substantially all of property of corporation, evidence was insufficient as a matter of law to show that a defendant who executed contract as president of corporation had apparent or implied authority to bind the corporation or stockholders to sell the property at price and on terms agreed upon. Civ.Code, §§ 343–345, 3306.

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* Subsequent opinion 206 P.2d 847.

8. Corporations ⟹306

One who as president of corporation executed agreement for sale of substantially all of corporate property, which agreement was invalid because unauthorized by directors or stockholders, would not be personally liable for failure of corporation to consummate transaction. Civ.Code, §§ 343–345.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Frank Jeppi and W. B. Camp, Sr., against Brockman Holding Company, Inc., also known as Brockman Holding Company, and Mary C. Spaulding for damages resulting from alleged wrongful refusal of defendants as vendors to complete an agreement to sell realty. From judgment of nonsuit in favor of defendants, plaintiffs appeal.

Judgment affirmed.

Calvin H. Conron, Jr., Mack & Bianco and D. Bianco, all of Bakersfield, for appellants.

Stead & Boileau and Chas. R. Stead, all of Pomona, for respondents.

GRIFFIN, Justice.

Plaintiffs and appellants Frank Jeppi and W. B. Camp, Sr., have perfected this appeal from a ruling of the trial court granting a nonsuit in favor of defendants and respondents Brockman Holding Company, Inc. (hereinafter referred to as the Holding Company) and Mary C. Spaulding, in an action for damages resulting from the alleged wrongful refusal of defendants, as vendors, to complete an agreement to sell real property consisting of a one-half interest in a half section of land in Kern County and a half interest in a lot in Los Angeles County.

The complaint alleges the corporate entity of defendant company; that on May 29, 1945, it agreed to sell to plaintiffs the property indicated for $27,500; that the agreement allowed 60 days for the parties to consummate it; that on June 7, 1945, plaintiffs deposited the purchase price with the escrow company; that the Holding Company, in bad faith, wilfully refused to consummate the transaction and repudiated it for the reason that it had secured a higher offer for the land; that the value of the estate at the time of the repudiation of the contract was $147,500; and that defendant Mary C. Spaulding represented to plaintiffs that she was authorized by defendant Holding Company to execute the contract.

The answer of the defendant Holding Company denies the execution of the contract; admits the sale of the land to a third person for $32,025; denies that the value of the land at the time of the sale or at any other time was in excess of that amount; and as a separate defense alleges that the contract was a sale of all of the assets of the defendant corporation and that that fact was known to plaintiffs; and alleges that there was no authorization by the corporation or its stockholders, by resolution or otherwise for such sale.

The answer of Mary C. Spaulding, in addition to the denials in the answer of the other defendant, denies that she represented to plaintiffs that she had authority to complete the transaction. She also alleges that her signature to the escrow did not purport to bind the corporation, but the escrow was subject to the approval of the board of directors of the Holding Company.

The evidence produced by plaintiffs shows that the Holding Company was organized on April 14, 1930, for the purpose of taking title to and handling real estate in the estate of I. W. Brockman, deceased. Its principal place of business was in Pomona, where the directors lived. Defendant Mary C. Spaulding, president of the corporation, lived in San Francisco. The by-laws of the corporation empowered the president to preside at stockholders' and directors' meetings and perform all the duties specially required of the president by the laws of the State and the by-laws of the Holding Company. They also provided that the board of directors may create an executive committee of such number as may be determined by it and from time to time entrust to it such powers as are exercisable by the board. At a formal meeting of the board of directors held on May 1st, 1944, the following resolution was adopted: "Motion was made by Bert Harvey, seconded by Spaulding, that the property of Brockman Holding Company be sold in order to close up the company as soon as possible. Motion carried." The corporation, by custom, held but one directors' meeting a year, and during the interim matters were handled informally by the directors. On May 7, 1945, there was a meeting of the directors held, following the meeting of the stockholders which elected directors for the year 1945. Mary C. Spaulding was elected president, Bert Harvey vice president, Ralph Harvey Secretary, J. Alonzo Brockman, Ralph Goodale and Bert T. Harvey directors. The record shows that the board of directors at all times in question, in addition to the individual stock they owned, had proxies representing 23,390 shares of stock. Altogether they controlled 29,000 shares of the 42,000 shares outstanding. There is evidence that on May 7, 1945, after the annual meeting of the stockholders and, apparently, after a meeting of the directors, a majority of the directors, informally, specifically discussed the sale of the property involved in this transaction, and apparently they again decided to sell the Kern County property. The minutes of the board of directors on that date reflect no entry in reference to this discussion or decision. At any rate, it appears from the testimony that as a result of this so-called informal discussion Mrs. Spaulding came to Kern County to endeavor to negotiate a sale of the property. She contacted a Mr. Tupman, her friend and adviser, in reference to securing a purchaser for the property. It appears that Mr. Tupman had communicated to the board of directors a previous offer for the property. There is a letter in evidence from a Mr. Young, dated 12/18/44, offering the corporation $25,000 for the property. Tupman, Mrs. Spaulding and plaintiff Jeppi viewed the Kern County property on May 28, 1945. Jeppi offered her $27,500 for the two parcels. Tupman recommended it as the best offer that he had received.

Jeppi testified that Mrs. Spaulding then said as to the offer: "It suits me all right, and I will get in touch with my people in Pomona by phone, and let you know"; that he said: "All right, if your directors decide to sell you call me up at my office and if I am not there you can tell my secretary. If it is a deal I will meet you at the abstract office at 9 o'clock the next morning before the crowd gets in there"; that she called the secretary and told Jeppi to meet her at the title company the following morning which he did do; that preliminary instructions were then taken according to the instructions of the parties; that a regular escrow agreement was signed by him and Mrs. Spaulding as president of the Brockman Holding Company; that he left his check for $27,500 in escrow; that at the time the escrow instructions were signed Tupman made most of the conversation and Mrs. Spaulding did very little talking; that she said nothing about there being no deal unless the directors passed a resolution; that he could not say whether she said anything about this being all of the property the company owned because that didn't mean anything to him; that he believed all the time that proof of the fact that she had the consent of the board of directors to sell for $27,500 was the fact that Mrs. Spaulding met him at the title company the next morning after telling him that all that was necessary to effect the sale was to get the consent of her "group".

The sellers' instructions provided: "I will hand you the deed called for with proper resolution attached, * * * and hold for account of the seller $27,500". In the buyers' instructions it was agreed between the parties that a royalty check under a certain oil and gas lease for the month of May, payable in June, should be paid to the buyers and be retained by them whether or not the transaction was consummated, and any additional payments for royalty during the pendency of the escrow should likewise be paid to the buyers. This was solely an agreement between the buyers and seller and was not a condition of the escrow.

The general provisions of the escrow provide that time is the essence of the instructions; that if the escrow is not in condition to be closed "by July 28, 1945, any party who then shall have fully complied with his instructions may, in writing, demand the return of his money and/or property; but if none have complied, no demand for return thereof shall be recognized until five days after the escrow holder shall have mailed copies of such demand to all other parties at their respective addresses shown in the escrow instructions. If no such demand is made, close this escrow as soon as possible." On that same day, May 29, 1945, the title company wrote to Mr. Harvey, secretary of the Holding Company, requesting deeds and a formal corporate resolution, as follows: "We are advised that the properties being sold under this escrow comprise all of the remaining property owned by the corporation, and it will, therefore, require an appropriate resolution of the corporation to be attached to the deeds. The deeds are drawn and will not be dated or executed until the resolution has been procured." No reply to this communication was received until June 7, 1945, which came in the form of a telegram, to wit: "Brockman Holding Company sale not approved by directors and better offer has been received. Directors meeting to consider all proposals will be held June 14th. Brockman Holding Company, By Ralph S. Harvey, Secretary."

Jeppi was then notified of the receipt of this telegram by the title company. Between the date when the escrow instructions were signed and the date of the telegram Mr. Harvey, the secretary of the Holding Company, received a letter from Mr. Young, containing an offer of $30,000 for the property. Mr. Jeppi, upon being advised by the title company of the telegram, retained counsel and notified Mr. Harvey that although Jeppi intended to stand upon his transaction, he offered him $30,100 for the property, and "that was as far as we were going to go." On June 14, plaintiffs' attorney received a telegram advising plaintiff Jeppi and his attorney that the transaction had been closed and the property sold to Mr. Young for $32,025. On June 15, Mr. Jeppi went to the title company, withdrew his deposit, and the word "cancelled" was noted on the instructions signed "Frank Jeppi". No deed was ever tendered to plaintiffs prior to July 29, 1945, or at all, in respect to the property.

Mrs. Spaulding, called under section 2055 of the Code of Civil Procedure, testified that the directors did discuss the sale of this property after the meeting held on May 27, 1945. However, in her deposition taken in connection with the matter, she testified: "Well, we discussed it but I couldn't tell you whether it was in a directors' meeting or not, now. We discussed it in May, 1945, but I don't know whether it was in a meeting or not. I don't think we were in session. It had been discussed informally among ourselves, yes"; that they had been offered $25,000 and refused it; that she was instructed at that informal meeting to come to Kern County and negotiate a sale of the property; that no formal directors' meeting or resolution was drawn up in that regard but the discussion of the matter was with the board as a group; that she was not authorized to sell for any certain amount; that they had theretofore had an offer of $32,000 and that would be satisfactory. As to the sale to Mr. Jeppi she testified that she told him that she was satisfied with his offer of $27,500; that she "would have to call the boys in Pomona and see what they said about it and if they answered favorably I would call him and let him know"; that "I was not authorized to make a trade myself, but I would have to see what they said about it"; that she called the secretary of the company but could not get him; that she then called Bert Harvey and then called Jeppi's office and told his secretary to tell him she would meet him the following morning at the title company office; that they met and she told him she could not get Mr. Harvey on the phone; that she particularly told him the company wanted to sell all of its holdings because it wanted to close out all of the property and that if he bought he would have to take it all; that these two parcels were all the real property the company had left. She then stated that she did not authorize the sending of the telegram to the title company disapproving the sale.

The secretary, Ralph Harvey, called under section 2055 of the Code of Civil Procedure, testified that ever since May 1, 1944, members of the board of directors made informal efforts to sell the properties of the company because they wanted to close it up; that it was the custom to have only one directors' meeting a year, and during the interval the affairs of the company were handled informally by the group of directors; that the company was getting monthly royalties from the property and it had four shares of valueless Edison stock on hand; that there was no meeting of the board of directors authorizing him to send the telegram to the title company but three of them met and authorized it to be sent because they didn't want to sell the property for less than $32,000. As to the claimed informal meeting on May 7, 1945, he testified that it was agreed among the group that Mrs. Spaulding was to see Mr. Tupman and see if the "$32,000" offer was still good and if so to go ahead "but it would have to be approved by the board before any deal could be put through".

Evidence was received that after the "schist" zone was discovered at Edison and a prolific producer was obtained in "Well 3 Brockman", the values of property in that zone increased considerably and the value of the property here in question was, as of July 29, 1945, in excess of $142,500.

Plaintiffs now argue that the granting of a nonsuit was error because the complaint stated a valid cause of action; that the escrow agreement contained necessary and essential elements of a contract to sell real property; that the record contains evidence that Mrs. Spaulding was authorized to sign the contract on behalf of the corporation not only expressly but by necessary implication; and also that there was a ratification of her acts.

Defendants argue that plaintiffs failed to meet the burden of proving that the contract of sale was authorized by the corporation; that it being a sale of substantially all of the assets of the corporation the added approval of all of the stockholders was required; that the authority of the claimed agent, Mrs. Spaulding, was not in writing and that plaintiffs had actual notice of her lack of authority; that there was no ratification of her claimed authority and no estoppel operated against the company to deny it; that there was no ratification of the alleged contract; that since plaintiff Jeppi, himself, later bid for the property and cancelled the escrow agreement and drew out his money before the expiration of the time defendants had to perform he is now barred from seeking the relief prayed for in this action.

[1] The complaint does state a cause of action. Sec. 3306, Civ.Code; 25 Cal.Jur. pp. 815-817, sec. 265; Shaw v. Union Escrow etc. Company, 53 Cal.App. 66, 200 P. 25; Morgan v. Stearns, 40 Cal. 434.

The escrow agreement followed the standard form set out in Tuso v. Green, 194 Cal. 574, 229 P. 327.

[2] As a general rule, the president of a corporation has no power, merely by virtue of his office, to sell the property of the corporation. Neuhart v. George K. Porter Co., 23 Cal.App. 526, 531, 138 P. 951; Leo G. McLaughlin Co. v. Phillips, 46 Cal.App. 637, 640, 189 P. 788; Mariposa Commercial etc. Company v. Peters, 215 Cal. 134, 8 P.2d 849.

In Black v. Harrison Home Company, 155 Cal. 121, at page 127, 99 P. 494, at page 497, it is said: "It is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it, and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director."

In Fudickar v. East Riverside Irr. District, 109 Cal. 29, 39, 41 P. 1024, it was held in a quiet title action, that for the plaintiff to prevail (where the corporate deed did not bear the corporate seal), (see sec. 374, Civ.Code) it was incumbent on the plaintiff to show affirmatively that the deed was executed by authority of a resolution of the board of directors, entered on the records of the corporation, or that it was ratified by such a resolution; that any deed purporting to convey any interest in real property not so authorized is void. It likewise held that the right to avoid such a deed must be exercised by the corporation itself or a stockholder acting for it. See also, Mariposa Commercial etc. Co. v. Peters, supra, at page 141 of 215 Cal., 8 P.2d 849.

Plaintiffs cite and rely upon McCartney et al. v. Clover Valley Land & Stock Co., 8 Cir., 232 F. 697, 701, where this is quoted: "In our judgment section 2309 of the California (Civil) Code, requiring an agent's authority to execute a contract in writing to be itself in writing, does not apply to the executive officers of a corporation."

In Corporation of America v. Harris, 5 Cal.App.2d 452, 458, 43 P.2d 307, 310, in discussing this quotation, the court said: "The court added, however, * * * it should be established that the making of such contract was within the scope of the officer's authority. On the other hand, it has repeatedly been held in California that the president of a corporation has no authority, by virtue of his office alone, to bind the corporation by contract * * * Nor may the business agent of a corporation, in violation of the statute of frauds, execute a note on behalf of his principal without appropriate resolutions of the board of directors authorizing him so to do. * * * The weight of authority, we believe, supports the view that the agent of a corporation, whether he be an executive officer or not, may not, merely because of his office, bind his principal upon a lease of real property for longer than a year, unless he has written authority from his principal so to do."

Incidentally, it was likewise there pointed out that ratification of the lease could have been made "only in the manner necessary to confer original authority for the act ratified." Citing Civ.Code sec. 2309.

In Butler v. Solano Land Co., 46 Cal. App. 171, at page 173, 188 P. 1019, at page 1020, it is stated: "As the plaintiff must recover, if at all, upon a written contract * * * the only question presented upon this appeal is whether or not the corporation is bound by the above-quoted writing. The record contains no proof of express authority of the president to make this contract; there is no seal affixed to the document to make it prima facie proof against the corporation. It was incumbent upon the plaintiff to prove either that the officer executing the instrument was expressly authorized to execute the same, or that it was an act fairly within the implied powers incidental to his office, or that the corporation is estopped to deny his authority by reason of having accepted the benefit of the contract, or otherwise."

[3, 4] Since defendant corporation and its stockholders received no benefits and retained none under the escrow agreement executed by the president of the corporation, and a majority of the directors holding shares of stock repudiated the agreement shortly after discovering its terms and conditions, it cannot be said that there was an estoppel or ratification of the unauthorized agreement. Corporation of America v. Harris, supra; International Magazine Co. v. National Radio Co., 67 Cal.App. 498, 502, 227 P. 918; Black v. Harrison Home Company, supra.

The only question remaining, which is a more serious one, is whether there was sufficient evidence to have supported a judgment based upon the claim that the president had the implied or apparent authority of the directors and stockholders to bind the corporation to alienate the remaining parcels of its real property, which property was "substantially all" of the remaining assets of the corporation. See secs. 343–345 Civ.Code.

All substantial evidence points to the conclusion that the Holding Company was endeavoring to dispose of its entire holdings in order that the company might be dissolved. The resolution of May 1, 1944, so states. There was no property owned by the company of any appreciable value outside of the Kern County property and the lot in Los Angeles County. Plaintiff did not desire to have that lot but defendant's president insisted that it be included in the deal as it was the last piece of realty owned by the company. The notes of the title company agent show that he was informed by one of the parties to the escrow agreement, in the presence of the other, that such a sale would constitute a sale of all, or substantially all of the company's assets. The title company, in its letter to the secretary of the Holding Company, asking for a certificate of such approval by the stockholders, clearly shows that there was such a conversation and such an approval was necessary before the title company would transfer the property. Plaintiffs do not deny that there was such a conversation but Jeppi said "it didn't mean anything to him". The escrow agreement itself provides that the seller will furnish a deed "with proper resolution attached".

[5] From the record it appears that Mrs. Spaulding did not, on the evening before going into escrow, obtain the consent of Ralph Harvey, the secretary, to the sale as proposed. According to the evidence, only one other director besides herself consented. Her failure to apprise plaintiff of this fact may have led him to believe she had obtained the consent of a majority. Even if she had told him she had, her statement of that fact would not have been binding against a majority of nonconsenting directors or stockholders. Harris v. San Diego Flume Co., 87 Cal. 526, 25 P. 758; 1 Cal.Jur. p. 741, sec. 41.

From that transaction it clearly appears that the president was signing the escrow instructions with plaintiff conditioned on the fact that the directors and stockholders would subsequently approve the sale as arranged by her and would furnish a certificate to that effect before the sale would be considered effectual. Smith v. Sleepy Hollow Investment Co., 65 Cal. App.2d 75, 149 P.2d 754.

The testimony of the directors as to the so-called "informal meeting" of May 7, 1945, whether made in or out of regular session, indicates that any arrangement she made as to a sale would be subject to their approval. Therefore, it cannot be said that plaintiff has established, by any substantial evidence, that the president had apparent or implied authority to bind the corporation or stockholders to sell the property at the price and on the terms suggested in the escrow instructions.

Section 343 of the Civil Code provides: "No corporation may sell * * * all or substantially all of its property * * * unless under authority of a resolution of its board of directors *and* with the approval of the *principal terms* of the *transaction* and the *nature* and *amount* of the *consideration* by vote or written consent of shareholders entitled to exercise a majority of the voting power." (Emphasis ours.)

[6] Even though the directors held the right to vote a majority of the stock of the corporation, the resolution of the directors on May 1, 1944, was merely a declaration of policy that the property of the company should be sold. To whom, at what price, the terms thereof, and who was to effect such sale was not indicated. There is no evidence that it had been or was the custom or duty of the president to effect such sales of real property. The articles of incorporation did not so provide. Therefore, it cannot be said that this resolution, in itself, bound the directors or stockholders to affirm whatever action was subsequently taken by the president of the corporation without further approval on their part.

The minutes of the meetings of the directors and the stockholders show no further approval was given by way of any resolution or official proceeding. Therefore, some further action by them, either by authorization or ratification of the president's act, was necessary in order that the corporation might be bound under the agreement.

It appears from some of the more recent cases that there has been a relaxation of some of the stricter interpretations requiring certain acts of agents and officers of corporations to be authorized by resolution where such acts are within the general powers of the agent or officer so acting for the corporation. Pixley v. W. P. R.R. Co., 33 Cal. 183, 91 Am.Dec. 623; Mannon v. Pesula, 59 Cal.App.2d 597, 603, 139 P.2d 336; Brainard v. De La Montanya, 18 Cal.2d 502, 116 P.2d 66; 6A Cal. Jur. 1148, sec. 653 (relied upon by plaintiffs).

In Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, 185 P. 388, which was an action on a contract for services as assistant manager of the corporation, the court, after stating the rule in reference to nonsuits, remarked that any contract pertaining to corporate affairs, executed by the president, *within his general powers,* will, in the absence of proof to the contrary, be presumed to have been done by the authority of the corporation.

International Magazine Co. v. National Radio Co., 67 Cal.App. 498, 499, 227 P. 918, after citing the Grummet case, held, in sustaining a judgment of nonsuit (quoting from the syllabus) that "if plaintiff had simply proved the making of the contract in question on behalf of the defendant (corporation) by its president a prima facie case of liability on the part of defendant would have been made out; but plaintiff's proof having included affirmative evidence that there was no provision in the by-laws of the defendant corporation giving the president power to make contracts and that there had been no special authorization by the board of directors, which facts were brought out by the plaintiff's witnesses, plaintiff's case must fall of its own weight."

[7] In the instant case plaintiffs' proof included affirmative evidence that there was no provision in the by-laws of the corporation giving the president power to make the contract, and that there had been no special authorization by the board of directors for her to so execute said contract, on the terms therein set forth, in behalf of the directors or with the consent of the stockholders. See, also, Salfield v. Sutter Co. L. I. & R. Co., 94 Cal. 546, 29 P. 1105; Bean v. Pioneer Mining Co., 66 Cal. 451, 6 P. 86, 56 Am.Rep. 106.

[8] Since Mrs. Spaulding would not be personally liable under the agreement, the judgment of nonsuit as to both was proper. Hall v. Crandall, 29 Cal. 567, 89 Am.Dec. 64; 6A Cal.Jur. pp. 1198, 1199, sec. 682; 19 Cal.Jur. p. 824, sec. 25.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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84 Cal.App.2d 469

KATZ v. KARLSSON.

Civ. 13502.

District Court of Appeal, First District, Division 1, California.

March 23, 1948.

1. Divorce ⚷165(1), 184(6)

Determination of a motion to set aside a final divorce decree and the attending issues involved are matters committed to trial court's discretion, and if there is substantial evidence or reasonable inferences to be drawn therefrom to support the order, reviewing courts will not interfere.

2. Divorce ⚷162, 165

The entry of a final divorce decree is a judicial act, and the determination of a motion to set aside a final decree is a judicial and not a ministerial act.

3. Divorce ⚷184(1)

If husband instituted proceeding to set aside a final decree of divorce with unclean hands, it was reviewing court's duty in interest of justice to determine the propriety of the order annulling the final divorce decree.

4. Divorce ⚷165(2)

When an interlocutory divorce decree is procured by collusion of the parties, equity will not interfere with the final divorce at the instance of either of the culpable parties.

5. Divorce ⚷165(2)

If wife, when she obtained final divorce decree without husband's knowledge, did not inform court of reconciliation subsequent to interlocutory decree obtained by husband, she committed a fraud on the court, but that fraud did not atone for alleged unclean hands of husband in obtaining interlocutory decree through alleged fraud, and did not entitle husband to have the final divorce decree set aside.

6. Equity ⚷65(1)

The "clean hands" rule is of ancient origin and is given broad application, and is the most important rule affecting the administration of justice.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

7. Equity ⚿65(1)

Equity denies affirmative relief for unclean hands, even though it thereby leaves undisturbed and in ostensible full legal effect acts or proceedings which would affirmatively be set aside but for such consideration.

8. Equity ⚿65(1)

The "clean hands" rule is based on conscience and good faith, and is not strictly or primarily a matter of defense, but is invoked on grounds of public policy and for the protection of the integrity of the court.

9. Equity ⚿65(2)

Where record was replete with instances of collusion and condonation on part of parties to divorce suit in the securing by husband of interlocutory decree of divorce, husband was not entitled to have final divorce decree, which had been obtained by wife without husband's knowledge, set aside after wife's death because of wife's fraud on court in obtaining final decree, since husband himself was guilty of unclean hands in obtaining the interlocutory decree.

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Suit for divorce by Louise Luellah Karlsson, deceased, against David Karlsson, wherein the defendant obtained an interlocutory decree of divorce on his cross-complaint, and wherein the plaintiff, without the defendant's knowledge, procured entry of a final decree of divorce. After the plaintiff's death the defendant applied for an order vacating, annulling, and setting aside the final decree of divorce. From an order vacating, annulling, and setting aside the decree, Phil C. Katz, as administrator of the estate of Louise Luellah Karlsson, deceased, appeals.

Order reversed.

Henry F. Boyen and Frank J. Fontes, both of San Francisco (Robert E. Hatch, of San Francisco, of counsel), for appellant.

Edward F. Sullivan, of San Francisco, for respondent.

WARD, Justice.

This is an appeal from an order vacating, annulling and setting aside a final decree of divorce. The motion to vacate was made upon an "affidavit of said defendant and cross-complainant, David Karlsson, * * * and upon all the pleadings, records, papers, files and judgments entered and filed in said action." In addition the testimony of defendant and his attorney was introduced.

Louise Luellah Karlsson and David Karlsson were married in November 1925. In January of 1931 the parties separated and the husband commenced an action (No. 224,936, Superior Court of the City and County of San Francisco) against his wife for divorce. He subsequently returned to the home and the parties resumed marital relations. The divorce action was thereafter dismissed. On June 3, 1936, the wife filed an action in the same county for divorce, alleging extreme cruelty. This action was numbered 266,468. The parties continued to live together at their Downey Street home until on or about May 17, 1939, at which time the husband filed an answer and cross-complaint praying for a divorce and alleging the existence of certain community property. This was followed by another "bed and board" reconciliation until approximately August 1940, when the parties separated. The following month the husband caused to be served upon his wife and filed a notice of motion to show cause why her default to answer his cross-complaint should not be granted. She failed to appear; default was entered and a hearing was had on September 18, 1940. An interlocutory decree of divorce in favor of the husband was ordered. At some unspecified date the wife withdrew $900 from a bank account. An automobile—community property of the parties—was eventually sold by the wife with the husband's approval. On September 30, 1940, the Downey Street property, standing in the names of the husband and wife as joint tenants, with right of survivorship, was granted by deed to the wife by the husband. The latter claims that there was no relationship between the signing of the grant deed and the divorce. His position is that he deeded the property to the wife because he was going out to sea. "Many men did the same thing when they went to sea during the war and they never knew what was going to happen." The deed was recorded about two months before the disaster at Pearl Harbor. The interlocutory decree on the cross-complaint in favor of defendant was entered October 2, 1940, two days after the husband transferred his interest in the joint tenancy property to his wife. On the present hearing the husband testified that "We didn't mention nothing about the house in Court." The evidence covering a reconciliation after the filing of the interlocutory decree consists in testimony by the defendant that he went to sea on several long voyages and that when he arrived at the port of San Francisco he generally made his headquarters at a seaman's hotel, but he visited his wife and on several occasions remained overnight. After a lengthy voyage the husband returned to San Francisco and the Downey Street home to find that the wife had died some six weeks previously. The evidence is practically a replica of the affidavit in support of the present motion. Relative to matters subsequent to the issuance of the final decree, the affidavit sets forth "That subsequent to the separation of the parties last aforesaid, and on the 30th day of June, 1942, the said plaintiff and cross-defendant, Louise Luellah Karlsson, at her own request, and without notice to this defendant and cross-complainant, and without his knowledge, procured the entry of the final decree of divorce in this action; that in support of her application therefor she filed the usual and necessary affidavit reciting that there had been no condonation or reconciliation between the said parties subsequent to the entry of said interlocutory decree of divorce." The same affidavit which is a part of the motion upon which the present order is based also sets forth "That subsequent to the entry of said interlocutory decree of divorce, and on or about the month of February, 1941, this defendant and cross-complainant condoned and remitted the offenses committed against him by said plaintiff and cross-defendant, and that he restored said plaintiff and cross-defendant to all marital rights and the said parties resumed marital relations, and lived together as husband and wife, as they formerly did, until on or about the early part of the year 1942, at which time said parties again separated." There is no allegation that upon the condonation and remission of the offenses subsequent to the interlocutory decree defendant and cross-complainant attempted to set aside that decree or that there was any change or transfer made or request therefor by defendant relative to the Downey Street property.

As already mentioned the wife died and the only purpose of the present proceeding is to obtain the whole or part of the community property, particularly the Downey Street house.

[1-3] The determination of a motion to set aside a final decree of divorce and the attending issues involved are matters committed to the discretion of the trial court. If there is substantial evidence or reasonable inferences to be drawn therefrom to support the order, reviewing courts will not interfere. The entry of a final decree is a judicial act. 9 Cal.Jur., p. 767, sec. 115. Following the same reasoning the determination of a motion to set aside a final decree is a judicial and not a ministerial act. In the present case defendant and cross-complainant husband sought to show that the plaintiff and cross-defendant wife had perpetrated a fraud upon the court in obtaining the final decree upon an affidavit stating that there had been no reconciliation since the issuance of the interlocutory decree. By his own affidavit the husband had practiced a fraud in obtaining the interlocutory decree without mentioning previous reconciliations and without reference to the community property and the disposition thereof which was an issue raised in the pleadings. The good faith of the husband, his entry and prosecution of the present motion with clean hands were necessarily questions to be weighed and determined by the trial court. If the *record shows upon its face* that the moving party has failed to act in good faith with the court, that is, has instituted a proceeding or motion with un-

clean hands, it is the duty of a reviewing court in the interest of justice to determine the propriety of the judgment, decree or order of the trial court.

Though legal form in procedure was adopted to obtain the interlocutory decree, defendant did not inform the court in the divorce hearing that any community property was involved, and prior to the interlocutory decree as entered in the record did not inform the court that he had deeded his joint tenancy interest in the Downey Street property to his wife.

[4] In this case the appellate tribunal does not consider or interfere with the weight of the evidence given in the trial court. It does not use a new scale of measurement to evaluate all of the evidence introduced. It does not determine the truthfulness of the affidavit of the wife averring that there had been no reconciliation, nor does it attempt to balance that affidavit against that of the husband setting forth that reconciliations had occurred before and subsequent to the final decree. The position of this court is that if the affidavit filed by the husband in support of the motion to vacate the final decree is false the husband may be guilty of an offense which by Penal Code, is made a felony. If the averments in the affidavit are true then defendant's actions throughout the divorce proceedings are unconscionable as demonstrated by the admitted fact that the trial judge who granted the interlocutory decree to the husband was not informed of the disposition of the community property except that some reference was made to the fact that the wife had withdrawn community funds from the bank. "When an interlocutory decree of divorce is procured by collusion of the parties to the action, equity will not interfere with the final divorce at the instance of either of the culpable parties. Hendricks v. Hendricks, supra, [216 Cal. 321, 14 P.2d 83]; Bancroft v. Bancroft, 178 Cal. 359, 173 P. 579, [L.R.A.1918F, 1029]; Bruno v. Guglielmo, 113 Cal.App. 148, 297 P. 967; 15 Cal.Jur. 63, sec. 148." Godfrey v. Godfrey, 30 Cal.App.2d 370, 379, 86 P.2d 357, 362, quoted with approval in Ettlinger v. Ettlinger, 46 Cal.App.2d 628, 632, 116 P.2d 482. It is further said, at pages 632, 633 of 46 Cal.App.2d pages 485 of 116 P.2d in the Ettlinger case: "Mr. Justice Shaw in his concurring opinion [Bancroft v. Bancroft, 178 Cal. 359, 365, 173 P. 579, L.R.A.1918F, 1029] * * * said: '* * * while it is to the interest of the state that divorces shall not be obtained by collusion between the parties, that interest does not extend so far as to prevent the operation of the doctrine that equity will not relieve a party from an improper judgment rendered upon his own invitation, upon full knowledge of the facts and without coercion, imposition, or fraud upon him.'"

[5] If the plaintiff wife when she obtained the final decree did not inform the court of the reconciliation subsequent to the interlocutory decree she likewise committed a fraud upon the court, but that does not atone for the legal sins of the husband.

[6, 7] The "clean hands" rule is of ancient origin and given broad application. It is the most important rule affecting the administration of justice. "Equity denies affirmative relief for such conduct even though it thereby leaves undisturbed and in ostensible full legal effect acts or proceedings which would affirmatively be set aside but for such consideration.

[8] "The maxim is based on conscience and good faith. It is not strictly or primarily a matter of defense, but is invoked on grounds of public policy and for the protection of the integrity of the court." 30 C.J.S., Equity, § 93. "His acts need not have been such as to constitute a crime, be punishable, be 'actually fraudulent,' or be the basis of a cause of action. Within the purview of the maxim, the hands of the litigant are rendered unclean by conduct which is 'condemned and pronounced wrongful by honest and fair-minded men.'" 19 Am.Jur., p. 330, sec. 476. It is said in De Garmo v. Goldman, 19 Cal.2d 755, 764, 765, 123 P.2d 1, 6: "Any unconscientious conduct upon his part which is connected with the controversy will repel him from the forum whose very foundation is good conscience. Johnston v. Murphy, 36 Cal.App. 469, 172 P. 616. Nor will equity aid him who is guilty of breach of contract connected with the transaction concerning which he asks for a decree in his favor.

Harrison v. Woodward, 11 Cal.App. 15, 103 P. 933.

"The rule in this regard is a fundamental one. Bennett v. Brown, 206 Cal. 424, 274 P. 532; Young v. Young Holdings Corp., Ltd., 27 Cal.App.2d 129, 80 P.2d 723; Baar v. Smith, 97 Cal.App. 398, 275 P. 861. It was succinctly explained in Allstead v. Laumeister, 16 Cal.App. 59, 64, 116 P. 296, 297, where the court, quoting from Pomeroy's Equity Jurisprudence, said that '"whenever a party, who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy."' See, also, Richman v. Bank of Perris, 102 Cal.App. 71, 282 P. 801.

"The action of equity courts in this interposition on behalf of suitors for any and every purpose and in their administration of any and every species of relief, is guided and regulated by this principle. It differs from the maxim, 'he who seeks equity must do equity' in that the latter assumes that different equitable rights have arisen from the same subject matter or transaction, some in favor of plaintiff and some in favor of the defendant so that the plaintiff is required to recognize and provide for defendant's rights and his relief is granted only upon a showing that defendant's rights are protected. Therefore, as the very foundation of an equity forum is good conscience, any really unconscious conduct connected with the controversy to which he is a party is sufficient justification for the court to close its doors to him, nor does the fact that a plaintiff may have no adequate remedy at law justify disregarding the maxim. Miller v. Kraus, Cal.App., 155 P. 834. The burden is on the one coming into a court of equity for relief to prove not only his legal rights but his clean hands, and he may not rely on any deficiencies that may be laid at the door of the defendants. Richman v. Bank of Perris, supra."

See, also, Belling v. Croter, 57 Cal.App.2d 296, 134 P.2d 532.

[9] In this case the record speaks for itself. It is replete with instances of collusion and condonation. It is an illustration of a well-prepared plan by the husband after the death of the wife, by having the trial court declare that there was never a divorce, to repossess property which had been deeded by the husband to the wife during her lifetime.

The husband's affidavit, particularly the paragraph referring to a reconciliation after the interlocutory decree shows a desire to obtain the use of his wife's body during her lifetime and her property after death. The affidavit also shows not only disrespect of good morals but contempt for the administration of justice. Public policy and the integrity of the court demand that acts showing such bad faith should not be approved and that the motion to vacate the final decree should be denied upon the sole ground that the defendant and cross-complainant husband, has, in legal parlance, proceeded with unclean hands. If the wife was equally at fault in filing the affidavit requesting the final decree, then the answer to the problem is that equity does not adjust differences between wrongdoers. Godfrey v. Godfrey, supra.

The order vacating, annulling and setting aside the final decree of divorce in Karlsson v. Karlsson, San Francisco No. 266, 468, is reversed.

PETERS, P. J., and BRAY J., concur.

AYRES v. CITY COUNCIL OF CITY OF LOS ANGELES. *

Civ. 15871.

District Court of Appeal, Second District, Division 2, California.

March 29, 1948.

Hearing Granted May 27, 1948.

1. Municipal corporations 🔑43

Zoning is a municipal matter, and, where the city of Los Angeles was acting under a freeholders' charter, whether the city council had power to impose certain conditions on a subdivider seeking acceptance of a map depended, not on the Planning Act of 1929, but on the Business and Professions Code. Gen.Laws, Act 5211b; Business and Professions Code, §§ 11510 et seq., 11525 et seq.

2. Statutes 🔑231

The two sections of the Business and Professions Code defining "designs" and "improvement", respectively, must be read together. Business and Professions Code, §§ 11510, 11511.

3. Municipal corporations 🔑43

As used in Business and Professions Code providing that control of the design and improvement of subdivisions is vested in the governing bodies of cities, etc., and stating that design refers to street alignment, grades, and width, "design" includes streets in a generic sense, and if a boulevard is a highway it is also a street and therefore also included within such term. Business and Professions Code, § 11510.

> See Words and Phrases, Permanent Edition, for all other definitions of "Design".

4. Highways 🔑18

The term "highway" includes streets within cities.

> See Words and Phrases, Permanent Edition, for all other definitions of "Highway".

5. Municipal corporations 🔑43

Under the Business and Professions Code providing that control of the design and improvement of subdivisions is vested in governing bodies of cities and stating that "design" refers to street alignment, grades, and widths, and that "improvement" refers to street work, etc., to be installed by subdivider on land dedicated for streets, highways, public ways, etc., "design" includes, not only streets, but highways and public ways. Business and Professions Code, §§ 11510, 11511.

6. Municipal corporations 🔑43

A boulevard, as shown on subdivider's map submitted to city council of city of Los Angeles for approval, was a "highway" within the Business and Professions Code vesting control of the design and improvement of subdivisions in governing bodies of cities. Business and Professions Code, §§ 11510, 11511.

7. Municipal corporations 🔑43

Under the Business and Professions Code which vests control of the design and improvement of subdivisions in the governing bodies of cities, both "highway" and "public way" include a state highway. Business and Professions Code, §§ 11510, 11511.

> See Words and Phrases, Permanent Edition, for all other definitions of "Public Way".

8. Statutes 🔑225¾

Where "public way" as used in the Subdivision Map Act had been held to include a state highway and the term was retained some three years later when such act was incorporated in the Business and Professions Code, the presumption is that the Legislature intended that "public way" should include a state highway. Business and Professions Code, §§ 11500 et seq., 11510, 11511.

9. Municipal corporations 🔑43

Under the Business and Professions Code vesting in city council control of the design and improvement of subdivisions and providing that improvement refers to only such street work and utilities to be installed by subdividers on land dedicated for streets, highways, etc., as are necessary for the general use of the lot owners in the subdivision and local traffic and drainage needs, as a condition precedent to approval of map, the city council may compel a subdivider to dedicate land to widen an existing street which abuts on the subdivision. Business and Professions Code, §§ 11510, 11511.

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* Subsequent opinion 207 P.2d 1.

10. Municipal corporations 🔑43

That widening strip and planting strip exacted of a subdivider as conditions precedent to approval of map benefit others than residents of the subdivision does not render such exactions invalid. Business and Professions Code, §§ 11510, 11511.

11. Constitutional law 🔑278(2)
Eminent domain 🔑2(6)
Municipal corporations 🔑43

The Business and Professions Code authorizes the city council of Los Angeles to condition its approval of a subdivider's map on the dedication of a 10-foot strip for the widening of an existing highway on which the subdivision abuts and on the dedication for street purposes of the southerly triangular point or tip of the subdivision, and the Code as so construed is not unconstitutional as depriving subdivider of his property without due process of law or as an exercise of the power of eminent domain without providing compensation therefor. Business and Professions Code, §§ 11510, 11511.

12. Municipal corporations 🔑43

Evidence sustained finding that dedication of a 10-foot strip for widening of an existing highway abutting on subdivision and the dedication of a triangular point for street purposes were reasonably required of a subdivider by the city council of the city of Los Angeles as a condition precedent to the approval of subdivider's map. Business and Professions Code, §§ 11510, 11511.

13. Municipal corporations 🔑43

Evidence sustained finding that city council of the city of Los Angeles reasonably required that subdivider dedicate a width of 80 rather than 60 feet for a street traversing the subdivision as a condition precedent to approval of subdivider's map. Business and Professions Code, §§ 11510, 11511.

14. Municipal corporations 🔑43

Other alleged improper enforcements of subdivision laws by city council of the city of Los Angeles were immaterial as respects the validity of particular conditions on which the council based its approval of subdivider's map. Business and Professions Code, §§ 11510, 11511.

15. Municipal corporations 🔑43

The city council of the city of Los Angeles was without power to require a subdivider to set aside an additional 10-foot strip adjacent to strip for the widening of an existing highway abutting on the subdivision and to restrict it to the planting of trees and shrubbery that would prevent access to and from such highway as a condition precedent to approval of a subdivider's map. Business and Professions Code, §§ 11510, 11511.

16. Appeal and error 🔑171(1)

An appellate court will not consider a theory of a case different from that urged in the trial court.

17. Appeal and error 🔑173(9)

Estoppel to allege invalidity of condition exacted for approval of subdivider's map could not be raised for the first time on appeal. Business and Professions Code, §§ 11510, 11511.

MOORE, P. J., and WILSON, J., separately dissenting from different parts of opinion.

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Donald B. Ayres against the City Council of the City of Los Angeles for a writ of mandate to compel the defendant to approve map of a subdivision. From a judgment for the defendant, the plaintiff appeals.

Judgment modified and as modified affirmed.

Howlett & Elson and Musick, Burrell & Ingebretsen, by Eugene M. Elson, all of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Lester L. Lev, Deputy City Atty., all of Los Angeles, for respondent.

McCOMB, Justice.

This case involves the interpretation of portions of the California Subdivision Map

Act (sections 11500 et seq., Business and Professions Code), the constitutionality of a portion thereof, and the validity of the methods employed by respondent city of Los Angeles in administering the subdivision laws of the state and city.

Appellant, a Los Angeles subdivider, pursuant to the Subdivision Map Act, submitted to the planning department of the city of Los Angeles a tentative subdivision map of a thirteen acre tract in what is generally referred to as the Westchester district. After investigation, the city council of respondent adopted the recommendation of its planning commission and imposed upon appellant a number of conditions or requirements as conditions precedent to approval of the map. Appellant in seeking a writ of mandate in the trial court to require respondent to approve its map, claimed that such writ should be issued without his complying with four of the conditions precedent to the approval of the map imposed by respondent.

These are the four questioned conditions:

1. That appellant dedicate a strip ten feet wide along the front of his tract for the widening of Sepulveda boulevard on which his subdivision abuts.

2. That appellant dedicate for street purposes the southerly point or tip of his subdivision which is triangular.

3. That as to 77th Street, which street traverses appellant's subdivision, he dedicate a width of 80 feet rather than 60 feet.

4. That appellant set aside adjacent to the ten-foot widening strip an additional ten-foot strip to be retained in his ownership but to be restricted to the planting of trees and shrubbery and which will prevent ingress and egress to and from Sepulveda Boulevard.

The trial court held that respondent validly imposed all of the four requirements as conditions precedent to the approval of appellant's map and in so doing made the following finding which is supported by substantial evidence:

"That petitioner's [appellant's] subdivision is located in and is a part of an area of the City of Los Angeles known as the Westchester District; that said district or area consists of 3023 acres, bisected by two principal traffic arteries, i. e., Sepulveda Boulevard, which runs in a northerly and southerly direction, and Manchester Boulevard, which runs in an easterly and westerly direction; that the Westchester area extends approximately one mile to the south of Manchester and approximately one and one-half miles to the north; it extends approximately one mile to the east and one mile to the west of Sepulveda Boulevard; that when said Westchester District was about to be first subdivided in 1941, the entire area was held in three separate ownerships, i. e., Los Angeles Extension Company, Security-First National Bank of Los Angeles and the Superior Oil Company; that the Superior Oil Company was, at that time and at all times since has been, represented by petitioner, Donald Ayres, as its subdivider and selling agent; that in 1941 said three owners, including petitioner as agent for Superior Oil Company, worked out a general plan of development of the Westchester area with city planning officials and agreed that the two boulevards above-named should become the principal traffic arteries of the area and that the business district should be located on Sepulveda Boulevard immediately south of Manchester Boulevard and that the development of said business district should be placed in the hands and under the control of petitioner. It was further agreed that the area should be subdivided by using the cellular type of subdivision, which type is designed to minimize traffic through the developed area and to keep most of the traffic on the principal through boulevards, and which type requires that all lots abutting the principal thoroughfares should have their rears upon said thoroughfares. Said type of subdivision also minimizes the amount of land necessary to be dedicated for street purposes and thus saves the owner considerable money by retaining more land to sell. That pursuant to such agreement, the area was developed in the manner aforesaid; that as each subdivision was presented to the city officials for approval, requirements insuring uniformity and conformance to said agreement was imposed and in each case complied with; that as a tentative map for each subdivision fronting upon Sepulveda Boulevard was presented to the city officials, conditions were imposed insuring conformance to said agreement and requiring the dedication of a 10-foot strip for the widening of Sepulveda Boulevard, except in the business area above-referred to wherein a dedication of a 13-foot strip on each side of Sepulveda Boulevard was required; that, excepting the business district, all such subdivisions were also required to set aside a planting strip varying in width from ten feet to twenty feet, excepting one instance where by error a planting strip of only five feet was required; that many subdivisions fronting on Sepulveda Boulevard have been approved and final maps relating thereto filed with said conditions imposed and all subdividers have complied with said requirements; that most of the Sepulveda Boulevard frontage has been subdivided and that in all cases said requirements were complied with; that several such subdivisions were owned by the Superior Oil Company and subdivided by petitioner as real estate agent; that petitioner has always complied with said conditions requiring the dedication of additional width for Sepulveda Boulevard and a planting strip along said boulevard; that not until petitioner filed his tentative map for the tract now before the court, which tract he owns in fee and is not selling as agent for another, has any person officially objected to the imposition of said conditions; that the uniform pattern for the subdivision has until this time been carried out and the development of Sepulveda Boulevard frontage has been uniformly made, including said dedicated strips for the widening of the boulevard and the setting aside of said planting strips."

Appellant's Contentions.

The contentions of appellant are as follows:

I. That conditions 1 and 2, which are set forth above, are invalidly imposed because none of them are authorized by any of the provisions of the subdivision map act;

II. That even if conditions 1 and 2 are authorized by the subdivision map act, said act, in so far as it authorizes said conditions, is unconstitutional in that it permits the taking of property without due process of law and, under guise of the police power, constitutes an exercise of the power of eminent domain without providing compensation therefor. Appellant claims that the imposition of said conditions is not reasonably related to the protection of public health, public safety, public morals, or the general welfare of the people;

III. That as to condition 3, appellant concedes that it is authorized by the subdivision map act but contends that the required width of the street is unreasonable and excessive.

IV. That the city of Los Angeles has for many years improperly enforced the subdivision laws and has administered them by whim or caprice and without there being a master plan or any plan of city development;

V. That condition 4 is invalid because not authorized by any provisions of the subdivision map act.

The first four of these contentions should be resolved in favor of respondents for the reasons hereinafter stated, many of which are set forth in respondent's brief and which we approve and adopt.

Discussion of Appellant's Contentions

I.

[1] Appellant's first contention is unsound. Respondent city was operating under a freeholder's charter, and since zoning is a municipal affair (Hurst v. City of Burlingame, 207 Cal. 134, 142, 277 P. 308), the Planning Act of 1929 (Vol. 2, Deering's Calif. Gen. Laws, Act 5211b, p. 1768) was not applicable to the facts of the present case. The applicable statutes are to be found in sections 11525 et seq., and 11510 et seq., of the Business and Professions Code, which pertinent sections, so far as applicable here, are as follows:

Section 11525 of the Business and Professions Code provides that:

"Control of the design and improvement of subdivisions is vested in the governing bodies of cities and of counties * * *."

Section 11510 reads:

"'Design' refers to street alignment, grades and widths, alignment and widths of easements and right of ways for drainage and sanitary sewers and minimum lot area and width."

Section 11511 reads:

"'Improvement' refers to only such street work and utilities to be installed, or agreed to be installed, by the subdivider on the land dedicated or to be dedicated for streets, highways, public ways, and easements, as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs, as a condition precedent to the approval and acceptance of the final map thereof."

[2-8] The last two sections just mentioned are to be read together. (In re Petraeus, 12 Cal.2d 579, 583, 86 P.2d 343.) Section 11510, defining "design" as referring to "street alignment, grades and widths," even if standing alone, obviously encompasses streets in a generic sense. It cannot therefore be said that if Sepulveda boulevard is a highway it is not a street. The term "highway" includes streets within cities (B & H. Transportation Co. v. Johnson, 122 Cal.App. 451, 453, 10 P.2d 506, and cases therein cited). However, Section 11511 provides that "improvement" refers to work and utilities to be installed on the land dedicated or to be dedicated not only for streets alone but also for highways and public ways. Reading the two sections together, it is clear that the term "design" includes not only streets but also highways and public ways. Sepulveda boulevard is surely a highway. Also to claim the term "highway" does not include a state highway is not sound in view of the case of City of Long Beach v. Payne, 3 Cal.2d 184, 44 P.2d 305, which held that the word even includes a canal; but whether or not "highway" includes a state highway is not of vital importance because the term "public way," which appears in section 11511, was in 1940 held to include a state highway. See Ritzman v. City of Los Angeles, 38 Cal.App.2d 470, 475, 476, 101 P.2d 541. The subdivision map act (Stats.1937, Ch. 670) was not placed in the Business and Professions Code until 1943, at which time the sections above referred to were amended in minor respects. These changes were made three years after the Ritzman case, and the Legislature retained the words "public way" in the sections. Therefore, because the Ritzman case construed "public way" to include a state highway, and the Legislature subsequently used that term by retaining it when sections 11510 and 11511 were amended, the presumption is that the Legislature used the term "public way" with the intent that it should include a state highway. (City of Long Beach v. Payne, 3 Cal.2d 184, 191, 44 P.2d 305.)

[9] Appellant contends that although a subdivider can be compelled to dedicate land from his subdivision for a street which traverses the subdivision, he cannot be compelled to dedicate land to widen a street which abuts it and which is already in existence. He contends that the local neighborhood traffic needs set forth in section 11511 refer only to traffic within the boundaries of the subdivision. Common sense dictates a different interpretation. If the Legislature intended to deal only with the traffic needs of the lot owners in the subdivision, it would have said so. But it went further and stated that improvements mean not only those which are necessary for the lot owners in the subdivision but also those necessary for local neighborhood traffic needs. No plainer language could have been employed. The neighborhood traffic needs are obviously those pertaining not only to the subdivision itself, but to the neighboring areas. It is quite apparent that the development and building up of a subdivision contributes its share of additional traffic to an abutting traffic artery, and that as various neighboring subdivisions are developed, they each contribute an additional traffic load to the highway or traffic artery which affects the traffic needs of all of the neighboring areas. The Legislature recognized this fact in wording sections 11510 and 11511. To read an exemption into the subdivision map act which would immunize subdividers against requirements that they dedicate land which is necessary to widen the abutting streets or highways would ignore the plain language of the law, violate its obvious purpose and permit a subdivider to increase the traffic load of those highways without taking any steps to alleviate the crowded conditions to which his subdivi-

sion contributes and makes the widening necessary.

[10] Appellant takes the position that if the widening strip as well as the planting strip benefits anyone other than the residents of the subdivision itself, the requirements are void. But the benefits flowing from compliance with the requirements need not be so limited. It would seem that if the immediate locality is benefited so would the entire city receive some indirect and possibly lesser benefit.

In Dwyer v. City Council, 200 Cal. 505, 253 P. 932, 935, an ordinance rezoning a residential area into a business district was held to be subject to referendum to be participated in by all of the voters of the city. Inasmuch as the ordinance directly affected an area which comprised only about 1/550 part of the city, it was contended that only those persons who were owners or residents of the affected area and, perhaps, those within the "area of protest," were involved and that a city-wide referendum was improper. In rejecting the contention, the court quoted from Zahn v. Board of Public Works, 195 Cal. 497, 513, 234 P. 388. In the opinion of Dwyer v. City Council, supra, appears this quotation:

"'The power of the city council to zone is not limited in our opinion to the protection of established districts. To so hold would be to defeat in a large measure the very purpose of zoning which is to control future development in the best interest of the city. Zoning in its best sense looks not only backward to protect districts already established but forward to aid in the development of new districts according to a comprehensive plan having as its basis *the welfare of the city as a whole.*' (Italics supplied.)"

II

[11] Appellant's second contention is likewise without merit. The act as above interpreted violates no constitutional provisions. This matter is not entirely new to the courts and the authority of planning officials to make requirements of the nature now being considered has been sustained in each case. The cases recognize the wide distinction between the taking of property without compensation from an owner who is asking nothing of the governmental authority, on the one hand, and the case of a subdivider who, upon his own initiative, asks the local authority for the privilege of having his tract recorded so that he can sell by lot and block description and thereby avoid the generally unsatisfactory plan of selling by metes and bounds. In brief, it is held that there is no taking of property but only a giving by the subdivider in return for having his tract recorded.

A case directly in point is Newton v. American Security Co. (1941), 201 Ark. 943, 148 S.W.2d 311, 313. It appeared that the petitioner therein sought to subdivide his property into 24 parcels and offered to dedicate for road purposes 30-foot service roads along the north and east sides of his property. The land adjoining his property on these sides was undeveloped and the roads would lie entirely on his property. The property was in the county but under the state law the nearby city of Little Rock was required to approve the plat before it could be recorded. The planning commission of Little Rock refused to approve the plat unless the existing roads on the south and west sides of the property which were already developed to 40-foot width should be widened by petitioner dedicating an additional ten feet from his side. The county planning board had previously adopted as its master plan for county roads the requirement that they should have a minimum width of 60 feet. The city planning commission found that the existing 40-foot roads served a thickly settled surrounding community and that "In order to have an orderly development of thickly populated rural areas that will meet future transportation problems, a minimum of 60 feet right of way is necessary." The petitioner therein refused to dedicate an additional ten feet for said roads. It also appeared that if he dedicated the required ten feet, the road in front of his property would be only 50 feet in width until such time as the property owner across the road dedicated an additional ten feet, and that said county roads in each direction from petitioner's property would remain 40 feet in width. The petitioner claimed that the requirement took property without compensation, but the court stated on page 314, of 148 S.W.2d:

"Of course one's property cannot be taken for public use without compensation, but the evidence in this case clearly shows that no one is attempting to take the property of appellee. The record shows that the appellee itself is seeking to take advantage of the County's and City's Planning Boards and undertaking to file a plat, and seeks by this proceeding to compel the clerk to record the plat, although when submitted to the Planning Boards both the County and City Planning Boards refused to approve appellee's plat. There was no law requiring petitioner to file a plat, and if the appellee or the Planning Boards or any one else sought to take or damage appellee's property without just compensation therefor, such persons would be prohibited from doing so. But there is nothing in the record in this case that indicates that anyone is seeking to take the property of appellee; no effort is made to take it."

The court, in discussing the constitutionality of the requirements, quoted from Euclid, Ohio, v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 118, 71 L.Ed. 303, 54 A.L.R. 1016, as follows:

"Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half century ago, probably would have been rejected as arbitrary and oppressive."

A similar situation appeared in Ridgefield Land Co. v. City of Detroit (1928), 241 Mich. 468, 217 N.W. 58. A general plan had been adopted by the Common Council of the city of Detroit and provided that section line roads be 120 feet in width and that quarter-section line roads be 86 feet in width. The petitioner filed a plat of a proposed subdivision which was bounded on the north by a quarter-section line road already in existence and on the east by a section line road already in existence. The plat did not propose to dedicate enough additional width to make those existing streets conform to the master plan requirements. The petitioner claimed that the city had no power to make such requirements in that it was compelling the dedication of private property for public use without compensation therefor, and further, that for other plats along those streets the additional widening strips had not been given. The court stated on page 59 of 217 N.W.:

"There is no merit to this contention. The other plats referred to were approved and recorded before the present general street plan was adopted; so it cannot be said that it was not made applicable alike to all persons.

"The streets in the city of Detroit, as elsewhere, were originally laid out for the horse and buggy age. They are too narrow for the present traffic conditions. It has become necessary for the general convenience and the public safety to widen them and to prevent others of the same kind from being established. Because of this necessity, there is nothing unreasonable in the demand of the city that the streets designated in the plaintiff's plat should be of such a width as to conform to the general street plan. It has been determined that streets of a certain width are necessary to accommodate the traffic. They are necessary for the public safety, and therefore the right to provide for them is within the police power of the city."

In answer to the contention made in that case that the city was attempting to exercise its power of eminent domain without paying for it, the court continued:

"Its argument would have merit, and the authorities cited would have application, if this were a case where the plat had been recorded and the city were undertaking to widen the streets or to establish a building line. But this is not such a case. Here the city is not trying to compel a dedication. It cannot compel the plaintiff to subdivide its property or to dedicate any part of it for streets. It can, however, impose any reasonable condition which must be complied with before the subdivision is accepted for record. In theory at least, the owner of a subdivision voluntarily dedicates sufficient land for streets in return for the advantage and privilege of having his plat recorded. Unless he does so, the law gives him no right to have it recorded."

In Mansfield & Swett v. Town of West Orange, 1938, 120 N.J.L. 145, 198 A. 225, the proposed subdivision was disapproved for various reasons. In discussing municipal planning generally, the court observed that planning embraces zoning but that zoning does not embrace planning, although zoning does not entirely exclude planning and that the latter term is one of broader significance and is as old as government itself. The court pointed out on page 229, of 198 A.:

"To particularize, the public health, safety, order and prosperity are dependent upon the proper regulation of municipal life. The free flow of traffic with a minimum of hazard, of necessity depends upon the number, location and *width of streets,* and their relation to one another, and the location of building lines * * *. And it is essential to adequate planning that there be provision for future community needs reasonably to be anticipated. We are surrounded with the problems of planless growth. The baneful consequences of haphazard development are everywhere apparent. There are evils affecting the health, safety and prosperity of our citizens that are well-nigh insurmountable because of the prohibitive corrective cost. To challenge the power to give proper direction to community growth and development in the particulars mentioned is to deny the vitality of a principle that has brought men together in organized society for their mutual advantage. A sound economy to advance the collective interest in local affairs is the primary aim of municipal government." (Our italics.)

In discussing the police power and the fact that private property is subject to reasonable limitations in the use and enjoyment thereof, the court pointed out that ordinarily a course of action may be deemed to be in the public interest when it fairly tends to promote the good of the community at large. But what is public necessity? The court answered the question on page 230 of page 198A.:

"If it be required to promote the common good in a recognized sphere of activity, it is 'necessary' within the intendment of this element of sovereignty so reserved to the states. If it be reasonably demanded by the general welfare, it is embraced within this power. The sweep of the police power is coextensive with the public need as thus defined. * * *

"And this sovereign power is not limited to measures needful to subserve the public health, morals and safety; it may also be invoked to serve the public convenience and general prosperity and well-being."

As to the contention that compensation should be paid for the taking of subdivision property, the court, referring to the police power, stated that:

"Compensation has never been a condition of its exercise, even when attended by inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare."

[12] There are ample facts supporting the finding that the widening strip requirement was reasonably imposed. It is apparent that the widening of Sepulveda boulevard is necessitated by the creation and development of the Westchester community and of each individual subdivision which is a part of that community. It appears that the district was unimproved land in 1940 (the tentative map for the first unit fronting on Sepulveda boulevard was filed February 28, 1940), but that approximately 15,000 people lived there at the time of trial and that when fully developed, the community would include approximately 40,000 to 45,000 persons. All of these people, of course, do and will contribute to the increasingly heavy flow of traffic which the two main arteries, Manchester boulevard and Sepulveda boulevard, must bear. Then too, the business district on Sepulveda boulevard, lying immediately south of Manchester boulevard, is intended to draw trade not only from the Westchester district itself, but from the population in the surrounding areas. Accordingly, the Westchester business district contributes and shall continue to contribute an ever-increasing amount of traffic to the load already carried by Sepulveda boulevard

It should be borne in mind that the subdividers have not been required to improve the strip dedicated for widening, but only to dedicate it. The city will have to bear the cost of the improvement either from funds available for such purpose or by means of special assessment.

Condition 2, requiring appellant to dedicate the triangular tip of the tract for street purposes, is authorized by the subdivision map act and is otherwise validly imposed. This was supported by testimony which was very persuasive that the dedication of the tip is absolutely necessary to reduce the traffic hazard.

The court found that the creation and laying out of the subdivision in question will create traffic conditions and hazards requiring the dedication of the tip for the proper control of traffic which will be necessary for and will benefit the lot owners in the subdivision, and that the imposition of said condition is reasonably related to the protection of the public health, safety, etc., of the people of this city.

In the first place, the condition involves the widening of either Sepulveda boulevard or Arizona Street, or both. It also involves the alignment of one of the streets, or both. It is therefore a requirement which comes within the scope of the term "design" as the same is defined in section 11510 of the Business and Professions Code and as more fully discussed above.

The evidence clearly sustains the finding. Mr. Dorsey, the traffic engineer, testified that the elimination of the point was necessary to reduce the traffic hazards at that intersection. He stated that the two fundamentals of traffic engineering involved were the reduction of the points of conflict where the flow of traffic on one street intersects that on the other street, and getting the traffic movements as close to a right angle as possible. He also testified that the dedication of the tip is "the most practical and safest way for traffic originating or destined to this area to enter and leave Sepulveda Boulevard." He again stated under cross-examination that the fundamental purpose is to minimize the points of contact and make the traffic movement as close to a right angle as possible. It seems clear that the person who will live in or otherwise use the subdivision now in question will gain the benefit of the safer entry into Arizona street and into Sepulveda boulevard. The fact that other persons in the Westchester area will likewise be benefited would not detract from the reasonableness of the condition.

III

[13] Appellant's third contention is devoid of merit. Appellant concedes that the subdivision map act permits the imposition of the requirement, but contends that it is unreasonable to require that the street be 80 feet in width.

He concedes that the finding of the court, "that said subdivision map act was not improperly or unreasonably construed or enforced in the imposition of any of the conditions set forth in paragraph III of the first cause of action of said amended petition" constitutes a finding that this condition was reasonably imposed. That there is ample evidence to support the finding cannot be questioned.

A witness testified that most of the streets in the Westchester area are only 54 or 56 feet wide, whereas they would have been 60 feet if the old standard pattern had been used, and that the Westchester community has narrower streets than are usual.

Only a few of its streets come into the main highways. It stands to reason that where most of the interior streets are comparatively narrow, the few streets which open into the surrounding traffic arteries will carry all or most of the traffic, and accordingly should be wide enough to accommodate the increased burden. Mr. Ayres himself testified that 77th Street is the most northerly street in the Westchester community coming into Sepulveda boulevard from the west and that it draws or will draw traffic from a residential area extending one-half mile north along Sepulveda boulevard, and to a lesser distance north as 77th street gets further west from Sepulveda, and one-quarter of a mile south to 79th street. In other words, it is the only outlet to Sepulveda boulevard for a distance of about three-quarters of a mile from 79th street to the northerly end of Westchester. Seventy-seventh street therefore is a bottleneck, being the only ingress and egress to Sepulveda boulevard for a substantial residential area. The undisputed testimony also shows that the land abutting 77th street on the north in the subdivision now in question is to be used only for drive-in businesses, and the land immediately to the south is to be occupied by a church. A witness testified that most of those people who enter the business area from Sepulveda boulevard will leave it on 77th street, and that the church immediately to the south of 77th street will subsequently increase the traffic load further, that there will be parking along the street because of the nature of the enterprises abutting it, which will narrow the roadway for moving traffic.

IV

[14] Appellant's fourth contention is immaterial in view of the fact (a) that we hold that respondent was not bound by the provisions of the state planning act of 1929; and (b) that it is entirely immaterial, so far as the present proceeding is concerned, whether in other instances not now before the court respondent properly or improperly enforced the subdivision laws. Our sole concern here is whether or not respondent has acted properly in the present case.

V

[15] Appellant's fifth contention is meritorious. There in nothing in the subdivision map act authorizing respondent to require a subdivider to retain ownership of a strip of land adjacent to a highway, and restrict it to the planting of trees and shrubbery which will prevent ingress and egress to and from such highway. The most that respondent can say in support of this requirement is that if planting was done on such a strip it would tend to screen out traffic noise and fumes from homes in the vicinity; that it has been required by the Federal Housing Administration and the city thought it to be a good idea and practice. The record is devoid of any evidence that if a planting strip were shown or dedicated it would be planted; respondent claims that it does not have the funds to plant the strip; the lot owners cannot be compelled to plant it; and there is an utter lack of evidence to show that this requirement is in any way related to the public health, safety, morals or general welfare.

Hence respondent improperly required the fourth condition mentioned, supra, to wit, that appellant set aside, adjacent to the 10-foot widening strip, an additional 10 feet to be retained in his ownership but to be restricted to the planting of trees and shrubbery which would prevent ingress and egress to and from Sepulveda boulevard.

[16] Respondent's contention that appellant is estopped to urge the invalidity of the fourth condition is not well taken for the reason that the law is settled that an appellate court will not consider a theory of a case different from that urged in the trial court and which is presented for the first time on appeal. (Title Ins. & Trust Co. v. Graham, 44 Cal.App.2d 660, 662, 112 P.2d 935, and cases therein cited.)

[17] Applying this rule to the facts in the present case the record discloses that the question of estoppel was not pleaded during the trial; there was no finding by the court or any conclusion of law concerning the alleged estoppel. From the foregoing it is apparent that the theory of estoppel which appellant urges is being here presented for the first time and therefore will not be considered by this court.

Since each of the other conditions imposed by respondent were valid, it is ordered:

First: That finding (b), paragraph II of the second cause of action be stricken, and that in lieu thereof there be inserted this finding: "That with respect to the condition that a planting strip be shown adjoining Sepulveda boulevard, the court finds that it is true that such condition is arbitrary, capricious and invalidly imposed, and that such condition is not authorized by any of the provisions of the subdivision map act of the state of California;"

Second: That (2) of paragraph II of the Conclusions of Law be stricken, and that (3) and (4) be renumbered (2) and (3) respectively;

Third: That (2) in paragraph (a) of the judgment be stricken and that (3) and (4) be renumbered (2) and (3) respectively.

As thus modified the judgment is affirmed.

MOORE, Presiding Justice.

[1-14] I concur in the opinion and judgment of Mr. Justice McComb in so far as it affirms the judgment of the trial court but dissent from that portion which directs its modification. The conditions attached to appellant's map are reasonable requirements to be made of the promoter of a new subdivision for sale in parcels. In considering them it will be borne in mind that the decision derived by respondent was its answer to appellant's request for approval of his map of his subdivision in order that it might be recorded among the public deed records as an aid to appellant in the sales of his land in city lot parcels. That respondent was not arbitrary is established (1) by finding (c), quoted in Mr. Justice McCOMB'S opinion and (2) the evidence adopted by the court as the basis for such finding.

A charter city has plenary power to administer municipal affairs without legislative interference. Constitution, Art. XI, secs. 6 and 8. Such has long been the practice of Los Angeles. Department of Water and Power of City of Los Angeles v. Inyo Chemical Company, 16 Cal.2d 744, 753, 108 P.2d 410. The city's charter provisions are paramount to general laws in relation to municipal affairs and unless its power with regard to municipal affairs be limited by the charter, it is unhampered, except by constitutional inhibitions. City of Oakland v. Williams, 15 Cal.2d 542, 549, 103 P.2d 168; West Coast Advertising Company v. City and County of San Francisco, 14 Cal.2d 516, 521, 95 P.2d 138. It follows that if a charter is silent upon a subject dealt with by statute the city is at liberty to enforce such statute in the absence of a charter provision inconsistent with the statute. City of Oakland v. Williams, supra, 15 Cal.2d page 549, 103 P.2d page 171. These doctrines lead to the conclusion that the city may exercise the police power granted by the constitution (Art. XI, sec. 11) the purpose of which power was to make municipalities free from legislative interference in matters of their internal concerns. Butterworth v. Boyd, 12 Cal. 2d 140, 147, 82 P.2d 434, 126 A.L.R. 838.

Zoning and planning are municipal affairs. Hurst v. Burlingame, 207 Cal. 134, 142, 277 P. 308; Civic Center Ass'n of Los Angeles v. Railroad Commission, 175 Cal. 441, 445, 166 P. 351. So also are the opening, vacating, widening and improvement of streets. Sunset Telephone & Telegraph Co. v. City of Pasadena, 161 Cal. 265, 282, 118 P. 796; Blake v. City of Eureka, 201 Cal. 643, 657, 258 P. 945. Since the Subdivision Map Act is specifically mentioned in section 95[g] of the Los Angeles Charter which prescribes designated duties for the city planners and the subdivision ordinance refers to the Subdivision Map Act it is inescapable that such ordinance was adopted to enforce the Act. The only charter requirement imposing duties with reference to city planning is section 96½ which requires that the council shall consider any master plan presented by the planning department. Not only are the conditions of the triangular tip, the 80-foot width of 77th street and the ten-foot strip on Sepulveda proper and reasonable but the requirement of the planting strip is also justified by the circumstances and the overall plan for the Westchester community. This strip was designed as stated by appellant "to restrict the lots for the use of planting and to prohibit ingress and egress of the adjoining property owners over the strip." When planted to shrubs and trees it will protect the residents of the tract from the annoyance of fast and heavy traffic and from the influence of the monoxide fumes of motor cars. The strip is not condemned; nor is appellant's alienation restrained. While the strip could be taken as a part of the general design (Bus. & Prof. Code, sec. 11510) its use is merely restricted to a specified purpose. Hence, the condition is nothing more than a zoning of the area which is a power of a charter city. Miller v. Board of Public Works, 195 Cal. 477, 486, 234 P. 381, 38 A.L.R. 1479. Even appellant testified that "a planning commission and the subdivider should do everything possible to develop a city that we would be proud of." Also, he discussed with the Planning commission the matter of putting in "a divided street with a parkway in the center for planting." But he disdains the idea of the city's imposing restrictions upon his own lands, and objects to the condition of the planting strip as a "benefit of the city as a whole" notwithstanding its development will enhance the beauty of the community and increase the value of his own tract. He knew that all the subdividers would lay out planting strips, a practice to which he conformed during the early growth of the Westchester community. Appellant's contention that no plan has been adopted for the care and maintenance of such strips indicates an impatience. No one knows better than he that the perfection of plans for the beautification and improvement of a city or of any subdivision thereof requires time. Especially was this true when the cost of everything was excessive and the public thought was centered upon the winning of a war.

The plan for the development of the Westchester community has been approved by respondent as each subdivision was offered for sale as city lots. Both the tentative and final maps were approved pursuant to sections 11525, 11552 and 11611 of the Business and Professions Code and to the subdivision ordinance, sections 6 and 7. The master plan of traffic arteries, adopted in 1934, provided that Sepulveda should be a major artery. In adopting that plan and in approving the maps and plans for all subdivisions respondent did not delegate its authority to any city department. The planning department does the designing upon which the Planning Commission makes recommendations to respondent. Whether they are adopted by the council rests solely in its discretion. It may receive advice from any department of the city or state or from any citizen but at last its orders are of its own making. This is the procedure followed in the entire history of the development of the district here in question. Therefore there has been no abuse of power or disregard of statutes or ordinances. On the contrary the Planning department before adopting any plans has always consulted with public and private agencies to the end that its judgments might be seasoned with the thoughts and experiences of many.

The judgment should be affirmed in its entirety.

WILSON, Justice.

I dissent from those portions of the opinion of Mr. Justice McCOMB and from those portions of the judgment that sustain the judgment of the lower court with reference to (1) the dedication of land for the opening of 77th Street across appellant's subdivision to the width of 80 feet; (2) the dedication of a 10-foot strip for the widening of Sepulveda Boulevard.

[1-11 and part of 12; 14-17] I concur (1) in that portion of the judgment amending the findings and judgment of the lower court with reference to showing on appellant's subdivision map an undedicated planting strip along Sepulveda Boulevard and declaring that respondent was and is without power to require such strip to be left as a condition for the approval of the map; (2) in that portion of the judgment sustaining the trial court in approving the condition with reference to the dedication of the southerly triangular point of appellant's proposed subdivision; (3) in that portion of the opinion holding that respondent cannot urge the defense of estoppel on this appeal.

The Planning Act of 1929 as amended (Stats.1937, ch. 665, p. 1817; 2 Deering's General Laws, 1944 Ed., Act 5211b, p. 1768) provides in section 1 that every city shall adopt and establish a master plan and official plans based thereon, and that "Such plans are hereby declared to be established to conserve and promote the public health, safety and general welfare." Section 4 declares it to be the function and duty of the planning commission "to prepare and adopt a comprehensive, long-term, general plan for the physical development of the city, * * *" and that "Such plan shall be known as the master plan and shall be so prepared that all or portions thereof may be adopted by the legislative body" as a basis for the development of the city; that the master plan, with the accompanying maps, diagrams and charts, shall show, among other things, "the general locations and widths of a comprehensive system of major traffic thoroughfares and other traffic ways and of streets and the recommended treatment thereof."

Section 6 provides for the adoption by the legislative body of the city of the master plan or of such parts thereof as may practicably be applied to the development of the city for a reasonable period of time next ensuing.

Respondent urges that the city of Los Angeles is not subject to or bound by the State Planning Act but that city planning is a municipal affair and, since sections 6 and 8 of Article XI of the Constitution grant plenary power to charter cities over municipal affairs, respondent may manage and administer such affairs uncontrolled by the general law. Appellant contends that "city planning, in so far as the adoption and elements of a master plan is concerned, is not of local concern but statewide." A decision upon this phase of the controversy is rendered unnecessary by the fact that the supremacy of the general law has been expressly recognized and adopted by the City Charter of Los Angeles, section 94 of which provides that the Department of City Planning "shall have and exercise all the powers and duties which are now or may hereafter be granted to or imposed upon City Planning Commissions or Departments by State law," together with such powers as are provided by ordinance, subject to the provisions of Article VIII of the charter. Article VIII includes sections 94 to 99½, both inclusive.

Conformable with section 1 of the State Planning Act above mentioned section 95(e) of the charter provides that the director of planning "shall prepare a master plan for the physical development of the City, as such term is defined by State law, in so far as such definition is applicable to the City, * * *." Section 95(g) requires the director of planning to make "investigations and report on the design and improvement of all proposed subdivisions of land and shall have such powers and perform such duties as are required by the Subdivision Map Act of the State of California." Section 96½ provides that upon the adoption of the master plan or any part thereof by the planning commission, it shall be presented to the City Council, which may adopt the same, or any part thereof. The same section requires the planning commission to make such reports and recommendations to the City Council and to other governmental officers or agencies as may be necessary "to secure adherence to and systematic execution of the master plan * * *." For charter provisions, see Stats.1941, pp. 3487, 3495 et seq.

Since section 94 of the charter grants to the City Planning Commission all the powers and imposes on it all the duties charged upon such commissions by state law, the latter, as well as the charter provisions, must be examined for the purpose of determining the questions raised by this appeal, whether planning be a municipal affair or one of general concern. The powers and duties of the commission are the same in either event. The charter provision does not restrict such powers and duties to any particular statute but embraces all those granted or imposed "by State law." Being all-inclusive it comprehends the requirements of the State Planning Act, the Subdivision Map Act and all other applicable statutes. Furthermore, there is so little difference between the charter provisions and those of the State Planning Act that the distinguishing or correlation of their respective requirements is unnecessary.

Respondent and its officials have failed to follow the provisions of the general law or those of the city charter in the preparation and adoption of a master plan, and the finding that they have done so and that a master plan exists and has existed during the times material to this action is not sustained by the evidence. Maps and documents were introduced in evidence with reference to (1) a comprehensive zoning plan, designating portions of the city in which buildings of certain kinds may be erected or businesses of certain descriptions may be maintained, which have been amended on numerous occasions; (2) master plans for the civic center, covering a few blocks in the business area in which public buildings are to be erected; (3) parkway plan for highways, ingress to and egress from which is not permitted to abutting owners; (4) shoreline or beach master plan for the development of the beaches; (5) yard zone plan, determining the width of front yards, side yards and set backs; (6) master plan of main and secondary traffic arteries; (7) plans for the new airport. It is contended that the foregoing constitute the master plan required by statute and by the city charter. Some of the so-called plans were approved by ordinance but many of them have nothing more than the approval of the Planning Commission. Taken together, without regard to the manner of their adoption or approval, they have nothing whatsoever to do with the laying out of subdivisions or with the widths or locations of streets to be installed therein.

Respondent states in its brief that "the city of Los Angeles is voluntarily creating a master plan, and a number of the elements thereof have been completed," but the fact that it is in process of creating such plan does not comply with the statutory requirement that a plan be created so that subdividers may know what they must do in order to have their maps approved. Respondent's statement in another portion of its brief that it has created a master plan is not sustained by a reference to the record indicating that anything has been done by the planning commission or by the director of planning toward the adoption of such plan other than as hereinbefore enumerated, or that such plan has been adopted by the City Council by ordinance or otherwise. Civic center plans, zoning ordinances, yard zones and plans for limited access freeways are no guide for subdividers in laying out streets and have not prevented planning authorities from making and enforcing unreasonable conditions for subdivisions or from changing conditions without uniformity.

It is not contended by appellant that a master plan for the entire city must be created by one map, one resolution, or one ordinance. Obviously in a city covering as large an area as that of Los Angeles the various localities must be separately considered in view of the necessities of the several neighborhoods and the uses which will be made of the property. We are not referred to any plan relating to the widths of streets required to be dedicated in or near the proposed subdivision which is the subject of this action, or to any such plan covering the large acreage adjacent thereto known as the Westchester District.

That there has been no master plan for the city or for any extensive portion thereof, or if one exists it has not been adhered to, is demonstrated by the evidence. In some residential localities streets have been required to be dedicated with various widths of 56, 60, 80 and 100 feet, in many instances without regard for the necessities of the property subdivided or of the surrounding territory. One of respondent's witnesses testified that the usual paved portion of a street is 36 feet when the dedication is 60 feet, and 56 feet and 74 feet for dedications of 80 and 100 feet respectively. It is in evidence that in many instances where streets have been dedicated to the width of 80 and 100 feet only 36 feet have been paved. In such cases the dedicated lands not used for street and sidewalk purposes are occupied by lawns and gardens of the owners of adjoining property. The latter have the benefit of such lands without having paid for them, and the person who was required to dedicate the land has not received and never will receive any compensation therefor.

The widths of streets required to be dedicated have been determined in a haphazard, crazy quilt method according to the whims and temporary ideas of the planning commission or of its director or of some one of its employees. In some instances a street through one subdivision has been required to be dedicated to a width of 100 feet and within a few months a dedication of only 80 feet has been exacted for the extension of the same street through a new adjacent subdivision. In one instance it was demanded that a street be dedicated to a width of 100 feet, that a planting strip ten feet wide be left on each side of the street and that houses be constructed facing on the adjoining street, while the extension of the same street through the contiguous tract was permitted to be only 72 feet wide, no planting strips were required, and the houses were allowed to front on the street, because, said the witness, "their plans had been changed." No compensation was offered to the first subdivider for the 28 feet dedicated for street purposes but not needed or used, or for the 20 feet left for planting strips. A plan at one time in a subdivision for a through highway was not projected through adjoining land because the planning commission had determined that the through street should be in another location. In several cases the subdivider was compelled to require purchasers of lots to build their houses with their rears toward the street and by reason of a change of the plans dwellings in the adjoining block would be permitted to front on the same street.

While I concur with Mr. Justice McCOMB in holding that the city is without power to require a subdivider to reserve a "planting strip" along a street, it is illuminating to observe the method previously followed by the planning authorities with reference to such strips as aptly illustrating the absence of any plan whatsoever. In some instances a planting strip of 20 feet has been required in one block, five feet in the next, ten in the next, followed by a block in which no planting strip at all was required.

In one instance the dedication of a 100-foot street was demanded because the plan at that time was to extend a through highway westerly to the beaches. The plan was changed and the subdivider of the adjacent property was not required to dedicate an extension. Airport Boulevard was dedicated to a width of 214 feet as a grand entrance to the municipal airport. Later it was determined that the entrance was to be at another location and the dedicated land was lost to its owner. No compensation was offered to him for it.

In 1939 or 1940 the city engineer requested the dedication of 80 feet for Kenebec Street east of Sepulveda Boulevard as an alternate route paralleling Manchester Avenue in order to relieve the heavy traffic that was expected on the latter. Subdividers were required to face their houses away from Kenebec Street and to provide a planting strip along the street. At the time of the trial of this action the street was not improved in any manner—not even graded. The houses on Kenebec Street west of Sepulveda Boulevard were permitted to face the street and no planting strip was demanded.

The evidence shows that plans have been made and dedications have been exacted for wide streets on which the planners expected to compel traffic to flow, but when the streets were opened it has been found that drivers of vehicles have chosen to travel on other streets which they considered better suited to their needs.

When the tentative map involved in this case was presented to the planning commission the dedication of the southerly triangular tip was required for the reason then given that 79th Street was to be extended across it. That street has been since located further south and will not touch appellant's subdivision. Another sufficient reason now exists for the dedication of the triangle which causes my concurrence in the judgment to that extent and this is mentioned only as another event showing the absence of definiteness in planning.

The foregoing are only a few illustrations of the irregular and hodgepodge method of the city officials in dealing with subdividers of residential property. Land required to be dedicated for highway purposes which, by reason of changed plans, is not so used, is for all practical purposes donated to the purchasers of adjoining property and the subdivider is thereby deprived of his property without compensation. This process does not rise even to the level of taking property for public use without compensation. It is in fact the forcible taking of the property from its owner without due process of law and presenting it to another private person without the payment of consideration therefor by the latter.

The record is devoid of evidence that any plans for subdivisions and for streets therein have been adopted or approved by the City Council as required by section 6 of the Planning Act and by section 96½ of the City Charter, to both of which reference has been made.

The finding of the trial court, to the effect that a proper construction of the Subdivision Map Act authorizes the conditions imposed by the planning commission, is a conclusion of law which does not bind this court as would be the case if it were a finding of fact upon conflicting evidence. Therefore this court may and should determine as a matter of law whether any of the conditions are authorized by statute or justified by the facts.

The finding that the changes in the so-called plans were made in accord with the Constitution, statutes and City Charter is a conclusion of law and is not based upon any facts in the record to which the attention of the court has been called. It is apparent from the evidence of several witnesses that general plans for a locality have been changed when a tentative map has been presented for approval, and it does not appear that such changes have been presented to or adopted by the City Council. Mr. Bennett, the planning director, in describing the method of changing plans after they had been adopted by the council, made no pretense that such proposed changes had been submitted to that body. He stated "if it were a highway plan approved by the Planning Commission and they felt a change was necessary in it, they would by motion approve such change and instruct the staff to so change the map on which was shown the comprehensive overall plan." The adoption of plans is a legislative act to be exercised by ordinance. Planning Act, sec. 6.6; City Charter, secs. 96½, 21. If a plan has not been thus adopted there is no plan. When a plan has been adopted in the manner required by the statute and by the charter only the council may change it. The legislative body is without power to delegate its functions to an executive or administrative board or officer and it has not attempted to do so. The method of adopting and changing plans as described by Mr. Bennett which, according to the evidence, has been followed by him and by the commission for several years is an unauthorized and unlawful assumption of power and has no foundation in law.

I see no justification for the requirement that a planting strip be reserved. Neither statute nor charter requires or authorizes it. It is reserved by order of the city's officials and restricted to the planting of trees and shrubs. Respondent's witnesses testified that the city will not do the planting since it has no funds for that purpose. It is admitted that neither the subdivider nor the owners of adjoining property can be compelled to plant or otherwise improve the strip. Hence the intended means of screening adjacent residences from gases and fumes from the highway will be nonexistent. No zoning ordinance has set aside the land for planting. The purchasers of the abutting lots cannot be expected to purchase the strip in view of the limited purpose for which it is reserved. The title remains in the subdivider but he cannot use it or obtain revenue from it. It will not be assumed that taxes levied on it will be paid, thus resulting in the loss of tax revenue on the entire area covered by planting strips. The possible sale of the strips for nonpayment of taxes or of street improvement assessments poses a question that need not be considered in this case but no doubt at some time will confront the city and its officials. Since a tax title is paramount to other interests in real property would the purchaser at the tax sale obtain a title free of the planting reservation? If so how will his occupancy of the strip affect the intended protection of adjacent dwellers from the noise, fumes and gases of passing automobiles? If it is necessary to prevent entry of traffic into a street from abutting property such result can be readily accomplished by another but lawful method without the loss to the subdivider that is occasioned by the reservation of planting strips.

I have referred to the fact that section 94 of the City Charter requires the planning commission to act in accord with the state law and that this provision includes all state laws having reference to matters covered by Article VIII of the charter. Section 95(g) expressly vests in the director of planning the powers and duties prescribed by the Subdivision Map Act. That statute is found in sections 11500 et seq. of the Business and Professions Code. The provisions applicable to this decision are as follows (emphasis added): Section

11510: "*'Design'* refers to street *alignment,* grades and *widths* * * *." Section 11511: "*'Improvement'* refers to only such *street work* and utilities, *to be installed,* * * * *by the subdivider* on the land dedicated * * * for streets, highways * * * as are necessary for the general *use of the lot owners in the subdivision* and *local neighborhood traffic and drainage needs,* as a condition precedent to the approval and acceptance of the final map thereof." Section 11525: "Control of the *design* and *improvement* of subdivisions *is vested in the governing bodies of cities* * * * but, in all matters concerning such design and improvement, any decision by a governing body is subject to review as to its reasonableness by the superior court * * *."

Since no master plan or other definite plan relating to subdivisions has been adopted by the governing body, the city council, the planning authorities have not complied and cannot comply with the Subdivision Map Act. There is no "design" from which the widths of streets has been or can be determined. The "improvement of subdivisions" has been made by the planning commission to include street work which was not to be installed by a subdivider on land dedicated for streets and which he did not agree to install, contrary to section 11511 of the Business and Professions Code. Although one of the conditions imposed on appellant in reference to the subdivision in question in this action is the dedication of a ten-foot strip for widening Sepulveda Boulevard, no street work is contemplated or expected to be installed by him. It is in evidence that the boulevard is a state highway and any street work thereon must necessarily be installed by the State Highway Department. With reference to Sepulveda Boulevard, the city officials testified that they had no idea as to when it would be widened—would not "hazard a guess" as to the time.

Respondent contends that all the conditions imposed on appellant are within the police power. Wherever the police power is invoked in defense of an act of a municipality it must be exercised reasonably and not capriciously or arbitrarily. That the planning commission and its director have not exercised their powers in a reasonable manner with reference to the location and widths of streets is demonstrated by the illustrations hereinbefore given.

Respondent attempts to escape the force of the provision in section 1 of the State Planning Act that every city shall adopt a master plan by contending that the word "shall" is not mandatory but is merely directory or permissive. "Shall" is sometimes, by reason of the context or subject matter, construed as "may." No such construction is possible in the Planning Act for the obvious reason that a duty is imposed on cities and their planning officials to provide a master plan as a necessary guide for property owners so that they may proceed in an orderly manner to subdivide and improve their property. Not only is the word "shall" found in the Planning Act but section 94 of the City Charter provides that the Department of City Planning "shall" exercise the powers and duties imposed on such commissions by state law. Section 95(e) requires that the director of planning "shall" prepare a master plan. Section 95(g) provides that the director "shall" perform the duties required by the Subdivision Map Act. It is inconceivable that the word "shall" would be repeated so many times in the statute and in the charter and that the framers of those instruments would not intend thereby to impose a mandatory duty on the planning officials.

Respondent advances the theory, and it has been adopted in the opinion of Mr. Justice McCOMB, that the recording of a subdivision map is a privilege and that when a subdivider is required to meet the conditions prescribed by the planning commission he is merely giving something in return for the privilege of having his map recorded. When did the sale of property, either in one parcel or in several parcels, become a mere privilege that may be granted or withheld by a planning commission, and if granted may be exercised only on such terms as the commission may prescribe? It is a constitutional right to own and hold property and to dispose of it. The owner may make conveyances of his property at any time in parcels as long as he does not do so in an unlawful manner.

He may refrain from recording a map and may convey the smaller parcels by metes and bounds, or he may prepare a map showing his property subdivided into lots. It is a matter of right and not of privilege to record such map upon compliance with reasonable and constitutional conditions.

It is contended by respondent and so declared in Mr. Justice McCOMB'S opinion that the sale of property by reference to lots platted on a map is more convenient to the subdivider than conveyances by metes and bounds, and that therefore he may be compelled to pay the price exacted by the commission, by way of complying with its demands, as a consideration for the "privilege" of recording his map. No reason is advanced to sustain this contention and there is no evidence in the record to fortify it. The fact is that a map is much more for the convenience of public officials than of the subdivider. If the latter should convey a parcel by metes and bounds the preparation and execution of the deed terminates his relation to and interest in the property and any benefit to him is thereby extinguished, but the expense to the public and the inconvenience to public officials has just begun and it never ends. Each year the county assessor must write into his assessment records, both in the tax statement and in the assessment roll, the mete and bound description, and the tax collector must copy the same description in the tax bills. If taxes are not paid it is again copied in the delinquent roll. This procedure must be repeated each year. If the property should be assessed for street improvement purposes the same description must be carried into the assessments and into bonds if any should be issued. The convenience of a map to a subdivider is minimal and ends with his conveyance, while the time and expense caused to the public by reason of the repetition of metes and bounds instead of a simple description by lot number is great and continues indefinitely. The contention that the condition imposed upon appellant by respondent may be enforced in exchange or as a consideration for the approval of the map, without which approval it may not be recorded, has no support in law or in equity.

The point is made that appellant and other subdividers have, as to prior subdivisions, consented to requirements similar to those imposed in this case and that the objection made by appellant in this action came too late. Respondent's contention in reference to estoppel is covered in the opinion of Mr. Justice McCOMB, with that portion of which I concur. Moreover, appellant's answer to this contention is simple, reasonable and understandable. The subdivisions previously made were placed on the market at a time when low-cost housing was imperative for persons who were engaged in the production of war materials. There was a vast acreage to be sold in a locality near the plants where such materials were being produced and convenient and suitable for homes of such persons. Conditions and not permit of a delay until the questions herein dispute could be litigated, hence appellant and his associates submitted to demands that they considered unreasonable, just as any person will yield to a force majeure.

Manifestly situations arise whereby an owner of real property cannot be permitted to subdivide it according to his own ideas. The public welfare and convenience is recognized as a primary factor in the supervision over the location and width of streets. The statutes provide a method for the orderly control of those features. Such control must be exercised in a reasonable manner and all subdivisions in the same locality should receive the same treatment. The record in this case shows such repeated discriminatory and bureaucratic administration of the laws that the orders of the planning authorities cannot be justified. Rules cannot be altered with every change of administration or according to the whims or caprices of the individual into whose hands a proposed subdivision map may chance to fall. The desired and intended result can be obtained only by strict obedience to statutory requirements. The adoption and enforcement of a comprehensive master plan is the only method by which the rights of property owners can be protected from arbitrary orders and conditions that occur to the minds of the planning authorities as each subdivision comes before them for approval.

84 Cal.App.2d 445

PENAAT v. GUASCO.

Civ. 13588.

District Court of Appeal, First District,
Division 2, California.

March 20, 1948.

1. Appeal and error 🔑931(4)

Where trial court, upon first trial, ruled that tax sale purchaser's title was defective, but Supreme Court reversed that ruling, and judgment upon second trial was in favor of purchaser, and taxpayer, upon appeal to Court of Appeals, claimed that trial court neglected to find that no notice of sale was given to taxpayer as provided by statute, it would be assumed by Court of Appeal that if trial court had found on the particular matter, the finding would be in compliance with evidence sustaining the judgment and in accordance with law of the case.

2. Taxation 🔑811

Findings that tax sale was conducted in accordance with provisions of the revenue and taxation code constituted findings that sale was conducted according to law and were sufficient in that respect though corresponding provisions of political code rather than revenue and taxation code, which did not become effective until later were applicable on date of sale. Pol.Code, §§ 3766, 3767, 3771a.

3. Quieting title 🔑35(2)

In ordinary quiet title suit, plaintiff need not allege his chain of title.

4. Taxation 🔑794

In suit by tax sale purchaser to quiet title, former owner may establish by proof that sufficient facts have not been alleged or proved. Revenue and Taxation Code, §§ 3351-3972.

5. Appeal and error 🔑193(9)
Pleading 🔑408

The point that complaint does not state cause of action may be raised at any time, even on appeal, because question is jurisdictional. Code Civ.Proc. § 434.

6. Pleading 🔑201

Jurisdictional demurrer should call trial court's attention to the jurisdictional defect.

7. Taxation 🔑809(2)

In suit by tax sale purchaser to quiet title, complaint claiming title by virtue of attached tax deed, alleging payment of taxes and setting forth correct legal description of property involved was sufficient. Revenue and Taxation Code, §§ 3480, 3481.

◆

Appeal from Superior Court, San Mateo County; Edmund Scott, Judge.

Action by Naomi J. Penaat against Clara B. Terwilliger to quiet title to property purchased at tax sale. Mildred B. Guasco, administratrix of the estate of Clara B. Terwilliger, deceased, was later substituted as party defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

Edmund J. Holl, of San Francisco, for appellant.

William H. Penaat, of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment given on the retrial of an action after reversal of a former judgment. Penaat v. Terwilliger, 23 Cal.2d 865, 147 P.2d 552. In the first trial a ruling was made that plaintiff's title was defective in that the required publication in a newspaper of a delinquent tax list appeared in a *supplement* to the newspaper. (Political Code, secs. 3766, 3767, 3771a.) The Supreme Court reversed the ruling and held that Political Code sec. 3766 as amended in 1921 merely requires publication, and that a list in the folded section of a paper circulated with news and advertising matter complied with the statutory requirement. That appeal was from the whole of the judgment, but the brief filed by plaintiff, appellant in the first appeal, stressed the question of the Political Code sections dealing with the subject of tax sales. The judgment was reversed without specific directions and all parties appear to have assumed that a retrial was required.

The second trial proceeded upon the original pleadings and there is no claim that the evidence on all issues was substantially different. In appellant's reply brief it is stated: "Three questions are involved upon this appeal, to-wit, the insufficiency of the complaint, the insufficiency of the findings, and the insufficiency of the evidence." Appellant urges but does not discuss the insufficiency of the evidence introduced to support the findings made in favor of plaintiff, but suggests that the trial judge failed to find upon certain material issues presented by the pleadings. It is not claimed that defendant offered findings covering the designated material issues.

[1] It is claimed that the court neglected to find that no notice of sale was given to defendant as provided by statute. It must be assumed that if the court found on this particular item the finding would be in compliance with evidence sustaining the judgment and in accordance with the law of the case. Penaat v. Terwilliger, supra. Counsel for appellant admitted with respect to the notice given, that while not conforming to his personal views "the issue is res judicata."

[2] There may be one technical but trivial error in the findings. It is set forth that the sale was conducted in accordance with the provisions of the Revenue and Taxation Code. The sale was held on July 20, 1940. The provisions of the Revenue and Taxation Code did not become effective until February 1, 1941. (Stats.1939, Ch. 154; Revenue and Taxation Code, sec. 27.) The corresponding sections in the Political Code were applicable on the date of sale. So far as the findings are concerned, the sale was conducted according to law. Perhaps it should be noted that the answer to the complaint in the "separate and distinct defense" refers to certain similar sections of the Revenue and Taxation Code instead of the Political Code. Appellant called the court's attention to this matter in the closing brief but refers to Revenue and Taxation sections in his opening brief and the answer to the complaint on file. In view of this circumstance the sections of the Revenue and Taxation Code will be cited except when the corresponding Political Code sections illustrate to better advantage. Otherwise the findings only are attacked because they followed the allegations of the complaint, which is claimed to be "obviously insufficient basis for a judgment based upon such complaint." This leaves for consideration the sufficiency of the complaint.

[3] The complaint alleges "That the plaintiff claims title to the following described lands and premises in the County of San Mateo, State of California: Nly 70′ of Lots 7-8, Block 33, Amend Map Town of San Carlos; under and by virtue of a certain tax deed made, executed and delivered to plaintiff pursuant to law on the 20th day of July, 1940, by A. McSweeney, Tax Collector of the said County of San Mateo, State of California, a copy of which deed is attached hereto * * * said deed being recorded in the office of the County Recorder of San Mateo County on the 27th day of July, 1940, in volume 918 of Official Records, at page 1 thereof. * * * That the plaintiff has paid in taxes on said premises, the following: June 28, 1940, To A. McSweeney, Tax Collector for deed: $100.00. July 20, 1940, to A. H. Sagehorn, County Treasurer, delinquent taxes for 1934, 1935, 1936, 1937, 1938 and 1939, $39.09." Thereupon a correct legal description of the property is set forth. The correct legal description of the property as set forth in the complaint and in the findings is not attacked in the answer to the complaint.

Defendant demurred generally and specifically to the complaint but it was "overruled for want of prosecution." At the end of the present trial, as a conclusion of law the court determined that the plaintiff was the owner in fee simple and entitled to possession. Judgment accordingly was entered.

Defendant recognizes that in the ordinary quiet title suit it is not necessary for the plaintiff to allege his chain of title, but urges that where a tax title is set forth in a complaint compliance with all statutory provisions must be alleged. The following statement from 24 Cal.Jur., pp. 395, 396, sec. 366, is quoted in support of this contention: "One who sets up a title derived from a sale for delinquent taxes is required to show by appropriate allegations that all the proceedings necessary to the regularity of such sale were had. And this is true despite the fact that the legislature has declared that a deed, duly acknowledged or proved, is primary evidence of certain matters affecting its validity."

The judgment sustaining a demurrer on the general ground that there are not facts sufficient, etc., was affirmed in Dye v. Dye, 1858, 11 Cal. 163, where the complaint in an action for the division of community property under Stats.1850 failed to aver that the property was acquired by the defendant subsequent to the passage of said act. In this connection the court said at page 169 of 11 Cal.: "* * * as the plaintiff has chosen to rest her case upon the statute, those facts which the statute required as the foundation of the right must be stated in the complaint."

Keane v. Cannovan, 1863, 21 Cal. 291, 82 Am.Dec. 738, was an action for the possession of real property. Plaintiff traced his title to one Mondolet. Defendants relied upon two tax deeds, but the deeds, proof of the payment of taxes, and Mondolet's abandonment were rejected by the trial court. In affirming the trial court's judgment for plaintiff, the court stated (page 299 of 21 Cal.): "The tax deed of the County Treasurer, executed in March, 1851, was inadmissible without preliminary proof that all the requirements of the law authorizing its execution had been complied with." As this case is concerned with rulings on evidence rather than on correctness of pleadings, it does not have great weight in determining the matter at hand.

In Russell v. Mann, 1863, 22 Cal. 131, may be found language supporting appellant's contention. As a defense to an action to recover a quartz mill, defendant set up title under a tax deed, alleging that by virtue of an act passed April 29, 1857, a tax was imposed upon "'one quartz mill situated on Rancheiro Creek * * *' * * * and that on the third Monday of October, A.D. 1859, the tax being unpaid, W. J. Pough * * * Sheriff and Tax Collector * * * did enter upon the tax list or assessment roll a statement that he had made a levy upon all the property assessed on said roll upon which the taxes had not been paid, in which description was included the above described property." Plaintiff's demurrer to this answer on the ground that it did not state facts sufficient to constitute a defense, and particularly that it did not show that any valid assessment of the property had been made, as required by the revenue law, was sustained.

As the basis for appellant's argument is upon certain language found in Russell v. Mann, supra, or on other early cases in which Russell v. Mann is used as a guide, it may be well to quote further (pages 133, 134 of 22 Cal.): "All the provisions of the statute for the assessment of taxes and for the sale of property for their nonpayment must, in their substance, be strictly pursued in order that a title acquired at such a sale should be valid. Whenever a tax title is specially set forth in a pleading it is necessary that every fact should be averred which is requisite to show that each of the statutory provisions has been complied with. Owing doubtless to the number of acts required to be done in the assessing and levying of taxes, and in the proceedings to sell property for their non-payment, and the embarrassments attending the proof of many of them, especially after the lapse of any considerable time, the Legislature has provided that the deed executed upon such a sale shall state certain of these essential facts, and shall be proof of the matters by it set forth, subject to certain exceptions. But this provision as to the effect of the deed as evidence does not dispense with the necessity of averring every essential fact in a pleading in which a tax title is specially set forth."

Another case worthy of note is People v. Jackson, 1864, 24 Cal. 630. There the action was brought to set aside a patent issued by California to the defendant for certain lands under the provisions of the Act of April 16, 1859, entitled "An Act to provide for the issuance of patents to lands located with State school land warrants, and for lands purchased under the Act of * * * 1858." A demurrer specifying that the complaint failed to state facts sufficient to constitute a cause of action was sustained. In affirming, the court said at page 632 of 24 Cal.: "Having alleged title derived from the State under and by virtue of certain statutes, it is necessary for the plaintiff [the People on the relation of S.C. Hastings] to allege specially a performance by him or his grantor of all the acts required by the provisions of those statutes. * * * The facts showing such performance must be pleaded. *The sixtieth section of the Practice Act excuses the statement of the facts showing the performance of conditions precedent in cases of contract,* and makes a general averment of performance sufficient. [Emphasis added.] But this rule cannot be extended beyond the cases mentioned in the section. Expressio unius, exclusio alterius est. In all cases except contracts, the performance of conditions precedent must be specially pleaded."

In the present case the complaint contains the allegation that the tax deed was "made, executed and delivered to plaintiff pursuant to law." Section 60 of the Practice Act (1851) provides that "In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts, showing such performance." The same provision substantially is now found in Code of Civil Procedure sec. 457 of Ch. 7, entitled "General Rules of Pleading."

There are later cases that do not state such a strict rule as that found in Russell v. Mann, supra, but the case still seems to be held as an authority. If the language of Russell v. Mann must be followed, do the pleadings show every essential fact relating to plaintiff's tax title. There are over six hundred sections appearing in Part 6 of the Revenue and Taxation Code (secs. 3351-3972). Over eighty sections contain provisions relative to notices of sales of property. Appellant contends that if any of these essential steps is omitted the sale is void. Note that the language in the Russell case is that the provision for the sale of property for non-payment of taxes is that they must appear in *"substance."* (Emphasis added.) It may be assumed that in the days of the Russell case many land owners bought property, moved away from the neighborhood, neglected to pay on a delinquent date or found it impossible to transmit the tax due by reason of lack of communication. Under such circumstances courts would be inclined to construe statutes strictly to protect the owner. In these days the method of communication is different. The government needs the tax on delinquent property. The so-called strict rule in Russell v. Mann would hardly receive the considered approval in 1948 that was given in 1863.

The specified insufficiency of the pleading in the Russell case was the failure to state for what year the tax was imposed on which the sale was made and the failure to indicate by whom the assessment was made. As stated, this complaint sets forth: "That the plaintiff has paid in taxes on said premises, the following: June 28, 1940, To A. McSweeney, Tax Collector for deed: $100.00; July 20, 1940, to A. H. Sagehorn, County Treasurer, delinquent taxes for 1934, 1935, 1936, 1937, 1938 and 1939, $39.09." The deed was attached to and made a part of the complaint.

Revenue and Taxation Code section 3480 provides: "In addition to the usual provisions of a deed conveying real property, the deed shall specify: (a) The year the property was assessed for taxation and the name of the assessee for that year. (b) That the property was duly assessed for taxation and the tax legally levied. (c) The name of the purchaser at this tax sale and the fact and date that the property was sold to him for nonpayment of delinquent taxes which were a lien on the property. (d) The amount for which the property was sold to the purchaser. (e) That the property has been redeemed. (f) That the property is therefore conveyed to the purchaser according to law." The language used in the deed is "in pursuance of the statute in such case made" and shows that the taxes have been paid. The deed states "in substance" the "requisite" facts. Russell v. Mann, supra. The deed is made prima facie evidence of "the same facts as a deed to the State for taxes and conveys the same title as a deed to the State" when duly acknowledged. Revenue and Taxation Code section 3481, formerly Political Code section 3785b. The present deed was duly acknowledged and is in harmony with the requirements of Revenue and Taxation Code section 3480 and of its predecessor in the Political Code, section 3785 and the accompanying subdivision. Exhibit "A", the deed, reads in full as follows: "This Indenture made the 20th day of July, 1940, between A. McSweeney, Tax Collector of the County of San Mateo, State of California, first party, and Naomi J. Penaat, second party, witnesseth: That Whereas, the real property hereinafter described was duly assessed for taxation in the year 1934 to Everett H. and Pearl B. Davis, and was thereafter on the 28th day of June, 1940, duly sold to Naomi J. Penaat by A. McSweeney, Tax Collector of said County of San Mateo, for non-payment of delinquent taxes which had been legally levied in said year 1934, and were a lien on said property, the total amount for which the same was sold being One Hundred and no/100 Dollars, And Whereas, all taxes levied and assessed against said property prior to the year 1940 have been paid and discharged; Now, therefore, the said first party, in consideration of the premises, and in pursuance of the statute in such case made and provided, does hereby grant to the said second party that certain real property in the County of San Mateo, State of California, more particularly described as follows, to-wit:-Nly 70′ of Lots 7-8, Block 33, Amend Map Town of San Carlos. In Witness Whereof, said first party has hereunto set his hand the day and year first above written. (Signed) A. McSweeney, Tax Collector of the County of San Mateo." The description of the property is not questioned.

[4] The former owner may establish by proof that sufficient facts have not been alleged or proved. Rollins v. Wright, 93 Cal. 395, 29 P. 58. In Stuart v. Chapman, 87 Cal.App. 552, 555, 262 P. 348, 349, it is stated: "It is next claimed that the tax deed was void because the tax collector did not file in the office of the county clerk a copy of the publication of the delinquent list. Pol.Code, § 3769. The statute does not say the effect of such omission invalidates the deed. On the other hand, the statute provides that plaintiff's deed is conclusive evidence that a copy of the publication was filed. Pol.Code, § 3787. That such is the meaning of that section was held in Haaren v. High, 97 Cal. 445, 447 32 P. 518."

Appellant next argues that the complaint fails to state a cause of action because it was neither pleaded nor proven that the property was sold at public auction. In support of this contention appellant cites Grimm v. O'Connell, 54 Cal. 522, 524: "Plaintiff must recover, if at all, on his *tax deed,* supported by evidence of the regularity of the prior proceedings, if the same are attacked." The cited case does not base its ruling on the insufficiency of a pleading but rather on the insufficiency of the deed which was offered in evidence.

The last point is that it was not proven or pleaded that the property was sold to the highest bidder for cash. It might be added that some of the sections in relation to the sale of delinquent tax property use the language "in lawful money of the United States of America." The Political Code sections applicable at the time of this sale provided two methods of selling real property for delinquent taxes. Jacoby v. Wolff, 198 Cal. 667, 247 P. 195; Scott v. Beck, 204 Cal. 78, 266 P. 951. If a sale is made to a purchaser under the provisions of Political Code secs. 3771 and 3771a, there is no provision for a deed to the state but the tax collector is directed to convey the property to the purchaser under Political Code sec. 3785b. That section sets forth "in substance" the form of the conveyance similar to the language used in the present deed. De Flon v. Van Lue, 83 Cal.App.2d 288, 188 P.2d 301, called to our attention by appellant after the submission of the case, dealing with Revenue and Taxation Code sec. 3711 is not pertinent to the code sections in effect at the time of this transaction.

In a recent delinquent tax case it was held that there being no evidence to the contrary it will be presumed that official duty has been regularly and legally performed. Tannhauser v. Adams, 31 Cal.2d 169, 187 P.2d 716, citing Code of Civil Procedure sec. 1963, subd. 15; Jacoby v. Wolff, supra.

[5-7] When the facts and legal points on this appeal are reduced to the real issue—jurisdiction of the trial court—it appears that appellant failed to prosecute her general and special demurrer but claims to have raised the herein enumerated points on a motion for a new trial. If a complaint does not state a cause of action the point

may be raised at any time, even on appeal (Code Civ.Proc., sec. 434; Norager v. Mountain States Life Ins. Co., 10 Cal.App. 2d 188, 51 P.2d 443; Emery v. Pacific Employers Ins. Co., 8 Cal.2d 663, 67 P.2d 1046) because the question is jurisdictional. This court has previously stated: "The trial of a law suit is not a game where the spoils of victory go to the clever and technical regardless of the merits, but a method devised by a civilized society to settle peaceably and justly disputes between litigants." Simon v. City & County of San Francisco, 79 Cal. App.2d 590, 600, 180 P.2d 393, 399. The practice of filing a jurisdictional demurrer but failing to call the trial court's attention to the jurisdictional defect results in unnecessary costs to litigants and delay in the administration of justice. As such practice has been declared by the courts permissible it may not be condemned but it can not be commended.

The judgment appealed from is hereby affirmed.

PETERS, P. J., and BRAY, J., concur.

84 Cal.App.2d 665

McCORMACK et al. v. HOUSTON et al.

Civ. 7413.

District Court of Appeal, Third District, California.

March 31, 1948.

Rehearing Denied April 30, 1948.

Hearing Denied May 27, 1948.

1. Waters and water courses 🔑222

The rights of reclamation district bondholders are measured by statute or other law by virtue of which the bonds were issued.

2. Waters and water courses 🔑222

Law in force under which reclamation district bonds were issued enters into and becomes a part of the contract between district and bondholders.

3. Waters and water courses 🔑222

Where refunding bonds issued by reclamation district expressed no right to have reserve funds set up, but such reserves were thereafter set up in order to secure loan represented by the bonds from Reconstruction Finance Corporation pursuant to a subsequent statute authorizing their establishment, reserve funds as to persons who thereafter acquired the refunding bonds from corporation were a gratuity, and they could not complain that withdrawal of funds from such reserves by district constituted impairment of obligation of the bond contract. Pol.Code, § 3480a, 3480e, 3480f.

4. Contracts 🔑170(1)

Generally, where contract is ambiguous in its terms the conduct of the parties under it is persuasive in arriving at understanding of its meaning, but such rule presupposes existence of a contract and an ambiguity in its language.

5. Constitutional law 🔑193

A "curative act" is one designed to give effect to past acts and transactions, which are ineffective because of failure to comply with some requirement of law, by correcting errors of mere mode and form, or supplying omissions the necessity of which might have been dispensed with by prior statute.

See Words and Phrases, Permanent Edition, for all other definitions of "Curative Act".

6. Waters and water courses 🔑222

Where bond contract under which refunding bonds were issued by reclamation district to Reconstruction Finance Corporation contained no provision for having reserve funds set up, though reserves were thereafter set up in order to secure the loan pursuant to a subsequent statute authorizing their establishment, subsequent curative acts could not have effect of adding to bond contract the requirement of setting up reserves. Pol.Code, §§ 3480, 3480a, 3480e, 3480f; Gen. Laws Act 8920, § 7.

7. Waters and water courses 🔑222

Where statutory provision under which holders of refunding bonds issued by reclamation district relied upon to establish their right to require district to create reserve funds contained no provision as to any specific amount which district was required to retain in reserve funds, even if statute required creation of reserve funds, a proposed transfer of approximately $15,000 from reserve funds to regular bond funds, leaving in the reserve fund approximately $53,000, would not infringe rights of bondholders. Pol.Code, §§ 3480, 3480e.

◆

Proceeding in the matter of the controversy between Thomas McCormack and others, as and constituting the Board of Trustees of Reclamation District No. 1000, on the one part, and Ray G. Houston, as and constituting the County Treasurer of Sacramento County, State of California, on the other part. Petition was filed by Thomas McCormack and others, as and constituting the Board of Trustees of Reclamation District No. 1000, for a writ of mandate to compel Ray G. Houston, as and constituting County Treasurer of Sacramento County, State of California, and ex officio Trustee of Reclamation District No. 1000, to transfer a portion of the monies now in two certain designated reserve funds to the bond interest and bond principal fund of the district.

Writ issued.

C. F. Metteer and Stephen W. Downey, of Downey, Brand, Seymour & Rohwer, all of Sacramento, for petitioners.

John Quincy Brown, Dist. Atty., and William A. Green, Asst. Dist. Atty., both of Sacramento, and Orrick, Dahlquist, Neff, Brown & Harrington, of San Francisco, for respondent.

ADAMS, Presiding Justice.

Thomas McCormack and two others, constituting the Board of Trustees of Reclamation District No. 1000 (a public corporation), instituted this proceeding in behalf of the District, seeking a writ of mandate to compel Ray G. Houston, as County Treasurer and Ex-officio Trustee of the district, to transfer a portion of the moneys now in two certain designated Reserve Funds to the Bond Interest and Bond Principal Fund of said district.

The petition is submitted on a statement of the case agreed to by counsel for the respective parties, and therefrom the following facts appear. From time to time, beginning in January, 1913, the district had issued bonds, the aggregate amount of which, outstanding as of July 19, 1934, together with unpaid interest, was $2,364,204.73. In January, 1934, for the purpose of refinancing this outstanding indebtedness, the trustees applied to the United States Reconstruction Finance Corporation, hereinafter referred to as R. F. C., for a loan, pursuant to the provisions of section 36, part 4, of the Emergency Farm Mortgage Act of 1933, 48 Stat. 49 as amended. On May 7, 1934, the R. F. C. agreed to grant a loan in the amount of $1,609,000, which represented approximately 70¢ on the dollar of the then existing bonded indebtedness of the district, and agreed to take new refunding bonds in that amount in lieu of the old bonds. However, the resolution of the directors of R. F. C. granting the loan, which resolution was dated May 7, 1934, provided, as a condition of the making of the loan, that "so long as any of the New Bonds or any of the Old Securities pledged with or acquired by this corporation remain outstanding" the district shall "provide for building up such suitable reserves *as may be required by this Corporation* for payment of principal and interest in bad years." (Italics added.) It also provided that "All resolutions and agreements by the District shall provide that any consents that may be given by and any rights thereby conferred upon this Corporation may be exercised by any successor to this Corporation designated by Act of Congress or by any Department of the United States Government or any corporation wholly owned by it, or by any person holding responsible office under the United States Government that may at any time be designated for that purpose by this Corporation."

On May 26, 1934, the board of trustees of the district adopted a resolution accepting the loan from the R. F. C., agreeing and assenting to all of the terms and conditions of the resolution of the directors of R. F. C., and agreeing to do and perform all things on its part to be done thereunder.

On July 19, 1934, the district held a bond election and authorized the issuance of bonds in the amount of $1,609,000, which bonds were designated as "refunding bonds of 1934." On July 27, 1934, the board adopted a resolution which provided that the authorized bonds should be issued in two divisions, designated as "First Division" and "Second Division," and provided the form of such bonds which was that the district promised to pay to the holder the sum specified, with interest at 4%, and that they were to be secured by an assessment levied on the lands in the district. They were thus issued, and dated July 1, 1934.

On or about August 7, 1934, the R.F.C. advised the district by telegram that it would be necessary to set up reserves for this district on the same plan as adopted by the Pescadero Reclamation District, which plan did not involve setting up reserve funds but provided for the execution of a trust agreement escrowing certain of the outstanding bonds.

In 1937, before the actual conclusion of the negotiations with R.F.C., the district, being in doubt as to whether or not it was empowered under existing law to set up reserves as required by R.F.C., took steps to secure the enactment of legislation granting that power; and in 1937 section 3480e of the Political Code was enacted. That section, which took effect June 22, 1937, provides, among other things, that whenever (a) an agreement shall have been entered into between any reclamation district and the United States of America or any department or agency thereof, for the refunding of bonds of such district and for the creation of a reserve fund for the purpose of paying installments of principal or interest of such refunding bonds whenever, by reason of delinquencies in the payment of calls or otherwise, the amount in the bond fund is insufficient to pay such installments, and (b) the unpaid principal amount of the assessment or assessments securing the outstanding bonds to be refunded is, or upon the carrying out of the plan will be, in excess of the principal amount of the bonds secured by such assessment or assessments and then outstanding, the board of trustees *may,* by resolution, declare that such excess (or part thereof) of the assessment or assessments shall be called from time to time for the purpose of creating a reserve fund; that the moneys in such reserve fund shall be used for the purpose of paying installments of principal and interest, or either thereof, of any outstanding bonds secured by such assessment or assessments, whenever by reason of delinquencies in the payment of calls *or otherwise* the amount in the bond fund shall be insufficient to meet such installments of principal and interest, or either thereof, on any January 1st or July 1st as the case may be; that if there shall be on hand in the bond fund a sum derived from an assessment or assessments upon which said bonds so to be refunded have been issued, which sum is in excess of the amount required for the payment of all installments of principal and interest due or to become due within six months upon all bonds secured by such assessment or assessments and then outstanding, the board of trustees *may* by resolution direct that such excess of the bond fund, or such part thereof as they shall deem advisable, be set apart for the creating of a reserve fund for the purposes above stated. The section also provides that whenever the reserve fund shall be depleted in whole or in part by reason of payments made therefrom, the county treasurer shall call such part of the principal of such assessment or assessments (not exceeding, however, the amount by which the unpaid principal amount of such assessment or assessments should be in excess of the principal amount of bonds secured thereby), as may be necessary in order to restore such depletion.

From time to time the R.F.C. had extended the time for completion of the closing of its loan to the district, and in the meantime it had proceeded to purchase the outstanding bonds of the district by payment to the holders thereof of 70% of the principal amount thereof; and by June 28, 1937, it had acquired practically all of such outstanding bonds in the amount of $2,262,044.40. It then proposed to close the loan by exchanging the bonds which it had acquired for the refunding bonds of the district in the sum of $1,583,500. This was done on June 28, 1937. On July 8, 1937, the trustees adopted a resolution which recited that pursuant to authority conferred by sections 3480e and 3480f of the Political Code there was created in the office of the county treasurer of the county of Sacramento, two reserve funds to be known as "First Division Reserve Fund" and "Second Division Reserve Fund"; and the county treasurer was "authorized, empowered and directed to maintain in said respective reserve funds at all times, so long as any of said 'Refunding Bonds of 1934' shall remain outstanding and unpaid, an amount in cash, or in principal amount of bonds of the United States or of the State of California, the aggregate principal amount of which shall be a sum not less than the amount of the next ensuing maturities of principal and interest payable pursuant to the terms of said 'Refunding Bonds of 1934—First Division,' and 'Refunding Bonds of 1934—Second Division,' respectively, and if, at any time, said reserve funds, or either thereof, shall become depleted in whole or in part, and other funds are not available in District's respective bond funds with which to replenish such reserve funds, as hereinafter provided, then the said County Treasurer shall call such part of the principal of such assessment or assessments, or of any interest accrued thereon, (not exceeding, however, the amount by which the unpaid principal amount of such assessment or assessments shall be in excess of the principal amount of the bonds secured thereby) as may be necessary in order to restore such depletion." This resolution was amended on August 2, 1938, but the provisions above set forth were not changed in any respect material here.

On April 3, 1945, the R.F.C. sold the refunding bonds then in its possession, which by that time had been reduced to the principal amount of $1,357,000, to certain underwriters. It is recited in the agreed statement before us that in the course of their negotiations with the R.F.C. for the purchase of said bonds the underwriters consulted with the secretary of the district and were advised by him that the reserve funds created by resolutions of the board of trustees had been established; and that in addition to monies held in the reserve funds in the office of the county treasurer, $50,000 was held in the Federal Reserve Bank of San Francisco belonging to such reserve funds. Also the agreement sets forth a letter written by C. F. Metteer, secretary of the district, on April 13, 1945, after the sale of the bonds by R. F.C., to the attorneys for the underwriters, which contains a memorandum reciting the history of the transactions with R.F.C., the status of the reserve funds, the previous resolutions of the trustees of the district, etc., and which contains a statement that "The Trustees and the Treasurer will, of course, pursuant to the Statute, maintain at all times, the proper reserve in the office of the County Treasurer." Also the statement recites that the county treasurer exhibited to the underwriters the books in his office as showing $73,611.13 then in the two reserve funds.

In due time after the sale of said bonds by the R.F.C., its relationship with the district was terminated.

On September 6, 1946, the trustees of the district passed a resolution providing that approximately $15,000 of the reserve funds, then aggregating in excess of $86,000, should be transferred to the bond funds to be applied to the payment of the interest on the refunding bonds to become due January 1, 1947, in order to bring the amount in the bond funds up to the necessary amount, and the county treasurer was directed to transfer said sum from the respective reserve funds to the respective bond funds, thus obviating the necessity for making assessment calls for said purposes.

Respondent county treasurer refused to make such transfer, and proceeded to make a call upon the assessments for the payment of interest to become due January 1, 1947. His reasons for so refusing, as set forth in the statement before us, are (1) that the reserve funds were established for the benefit of the holders of the refunding bonds "so long as the same should be outstanding and unpaid," and that they cannot be dissolved without the consent of the owners and holders of all outstanding bonds "without impairing the obligation of the contract expressed in the proceedings for the issuance of said bonds"; (2) that the county treasurer is trustee of the bond funds of the district, that the reserve funds must be held in trust by him "so long as any of the Refunding Bonds of 1934 are issued and outstanding," and that a transfer of *any* moneys from the reserve funds for payment of principal or interest in lieu of calls upon the assessments would constitute a breach of trust and subject him to liability; and (3) that the owners and holders of such outstanding bonds have threatened such liability upon respondent.

The position of petitioners is that the reserve funds were set up for the benefit of, and pursuant to their contract with R. F.C., which required the setting up of a reserve before the loan could or would be made by the R.F.C.; that their contract with the R.F.C. was not assignable to private parties, and, furthermore, was not assigned, and that the present bondholders cannot take advantage of its provisions. They argue that prior to the enactment of section 3480e of the Political Code a reclamation district had no power to set up reserve funds, and that said section was enacted for and intended only for the benefit of the United States or some department or agency thereof.

Respondent argues that the reserve funds are not limited to the benefit of the original holders—the R.F.C.—merely because section 3480e describes certain conditions upon the establishment of such reserve funds; that the district by its own proceedings established the reserve funds for the benefit of its refunding bonds as long as they remained outstanding and unpaid; that the obligation of what he designates as the "bond contract" (as distinguished from the contract between the district and the R.F.C.) continues so long as the refunding bonds are outstanding and that the district so intended at the time the refunding bonds were issued; that the said bonds are negotiable and carry with them "all the rights and security inherent in the bonds at the time of their issuance"; that the said bonds on their face refer to and incorporate the reserve funds as part of the obligation of the bond contract, and a practical construction of that contract by the district demonstrates that the reserve funds were established for the benefit of the holders throughout the life of such bonds; that the legislature has validated the bonds in favor of the holders thereof; and that the resolution of the district purporting "to dissolve" the reserve funds impairs the obligation of the "bond contract."

Respondent does not contend that the present bondholders succeeded to any of the rights of R. F. C. under the contract between R. F. C. and the district. He distinguishes between that contract and what he refers to as the "bond contract" and relies solely upon the latter. This necessitates a consideration of what the bond contract really is. Respondent is somewhat vague about this.

[1] It is stated in 21 Cal.Jur. 1044, sec. 18, that the rights of bondholders "are measured by the statute or other law by virtue of which the bonds were issued." This principle is enunciated in such cases as Kendall v. Porter, 120 Cal. 106, 45 P. 333, 52 P. 143; Boskowitz v. Thompson, 144 Cal. 724, 730, 78 P. 290; Bates v. Gerber, 82 Cal. 550, 552, 22 P. 1115.

[2] In Hershey v. Cole, 130 Cal.App. 683, at page 688, 20 P.2d 972, at page 975, the court quoted from Rorick v. Board of Commissioners, D. C., 57 F.2d 1048, to the effect that "Legislation by authority of which bonds are issued, and their payment provided for becomes a constituent part of the contract with the bondholders." In the Hershey case it was also said, at page 695 of 130 Cal.App., page 978 of 20 P.2d: "It also appears to be well settled that the law in force under which bonds are issued, enters into and becomes a part of the contract." And the court there gave approval to the contention of petitioners that "The land owner's part of the agreement is that by virtue of the issuance of bonds he obligates himself to pay the assessment in ten equal annual payments, with such additional percentage as may be necessary to cover delinquencies; that his part of the obligation is thereby fixed, and that it can neither be limited nor increased during the life-

time of the bonds for the issuance of which he has voted. On the other hand, that the purchaser of the bonds, based upon the assessment, accepts the bond based upon the premises which we have stated, and his right is to have collected from each landowner the annual percentage of the assessment as specified in the bond—no more and no less."

Also see River Farms Co. v. Gibson, 4 Cal.App.2d 731, 749, 42 P.2d 95; Islais Co., Ltd., v. Matheson, 3 Cal.2d 657, 662, 666, 45 P.2d 326; Chapman v. Jocelyn, 182 Cal. 294, 297, 187 P. 962.

The obligation of the district as recited in the bonds themselves is to pay the amounts specified at the time and place specified, with interest at 4%. They also recite that they were issued pursuant to section 3480a of the Political Code, and that they are "secured by an assessment levied upon the lands of the district." Section 3480a, under which the bonds were authorized and issued, and which under the foregoing authorities became a part of the contract between the landowners and the bondholders, contained no provision for a reserve fund; and even though, as contended by respondent but which we need not decide, it did not exclude the setting up of such reserves, it did not require, nor give to the bondholders any right to demand that such reserves be established. Therefore it cannot be said that the bonds *on their face* refer to the reserve funds; nor can it be said that the law in effect at the time of their issue had the effect of attaching to the bonds as a part of the contract thereof, any right to have reserve funds which right did not exist at the time of their issuance. It would seem to follow, then, that if the bonds now carry with them, or if the present bondholders have, a right to have the reserve funds continued intact, that right must have attached to the bonds subsequent to their issuance, or the present bondholders must have acquired such rights subsequent thereto, either by virtue of the subsequent enactment of sections 3480e and 3480f and the passage of the subsequent resolutions or from the contract between the R. F. C. and the district. But, as formerly stated, respondent does not contend that any of the rights which R.F.C. acquired under their contract were assigned to them. In the course of the oral argument before this court counsel for respondent said: "We are not resting our case upon any rights granted to the R.F.C. as such. We are resting our case upon our rights as bondholders *expressed* in the obligations of the bond. * * * We claim impairment of the contract by the district in attempting to dissolve the reserve fund set up for the benefit of the bondholders and equally for the landowners." (Italics added.) Also in his brief respondent states: "* * * Respondent claims no rights under the R. F. C. loan agreement as such. Respondent's rights and duties are predicated upon the obligation of the *bond contract which came into existence when the Refunding Bonds of the District were issued.*" (Italics added.)

[3] But if the bonds when issued neither expressed nor carried with them any right to have reserve funds set up, then, though such reserves were thereafter set up in order to satisfy the demands of and to secure the loan from the R. F. C., and if respondent does not claim that the present bondholders succeeded to the contract rights of the R. F. C., what the district did in setting up the reserve funds after the issuance of the bonds appears to be, as far as present bondholders are concerned, a mere gratuity which the district is at liberty to discontinue if the rights inherent in the bonds at the time of their issuance are not thereby impaired.

In Kentfield v. Reclamation Board, 137 Cal.App. 675, 681, 31 P.2d 431, 434, the court said:

"The law is well settled that warrants, bonds, and contracts of reclamation districts have written into them the law existing at the date of the issuance of such warrants, bonds, or contracts. This court had occasion to consider this question, and went into the subject quite extensively in the case of Hershey v. Cole, 130 Cal.App. 683, 20 P.2d 972, and need only call attention to the cases there cited.

"It necessarily follows that the repeal of the act of 1927 directing the issuance of installment calls in the sum of 3½ per cent did not in anywise affect the rights of warrant holders. When the Legislature directed the reclamation board to make calls in the amounts stated, it gave an additional remedy to the warrant holders, which constituted no part of their contract, and not being a part of the contract, the direction to the reclamation board of the state might be withdrawn at any time."

In McLaughlin v. Department of W. & P., 18 Cal.App.2d 41, 44, 62 P.2d 1402, 1403, bonds issued under the Muncipal Improvement District Act of 1915 provided that the principal and interest of such bonds were payable out of taxes levied upon the taxable property in the particular district. After bonds were issued by Municipal Improvement District No. 35, located in the city of Los Angeles, the city adopted an amendment of its charter, section 223, which provided that the board of water and power commissioners should apportion from the revenue funds in the city treasury an amount sufficient to pay sums due on said bonds. Thereafter the charter was further amended to make it discretionary with the board to allocate revenue funds for the payment of bonds. Petitioner, who was the owner of some of the bonds, thereafter sought to compel the board to apportion out of the revenue funds of the city amounts sufficient to pay sums which had become due on the bonds held by him. The court said:

"Plaintiff contends that section 223 gave him 'additional security' for the payment of the bonds and argues that the provisions of the section 'became an integral part of the contract of the bonds.' We cannot take this view. The bonds established the contract between the taxpayers in the improvement district and the holders of the bonds, a contract which embraced as one of its component parts the existing laws providing for the issuance of the bonds and for the manner of their enforcement. Hershey v. Cole, 130 Cal.App. 683, 20 P.2d 972; Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962. If the argument advanced by plaintiff is to be sustained, it must be held that the giving of the 'additional security' to the bondholders was a gratuitous act on the part of the city, which did not become a part of the contract. No vested rights were given plaintiff by section 223 of the charter. If the people had the right to thus provide additional security for the bondholders, they had the right to remove such additional security. If in fact such security was given, it was effectively removed by the charter amendment of 1927, by which discretion in the matter of the apportionment of funds was reposed in the board of water and power commissioners."

As hereinbefore stated, the said bonds on their faces make no reference to reserve funds and they were authorized by the electors of the district in July, 1934, issued that same month, and dated July 1st of that year. It is therefore apparent that they were voted and issued under the statute then in effect, to wit, section 3480a, supra, and long prior to the enactment of sections 3480e and 3480f of the Political Code in 1937, and prior to the adoption of the resolution of the trustees establishing the reserve funds, on July 8, 1937. Respondent argues that the bonds were negotiable; that their transfer carried the security with them as an incident thereto; that the purpose of the reserve funds was to enhance the marketability of the bonds; that contractual rights are transferable. But a recitation of these legal precepts does not establish that the bonds were actually secured by the reserve funds which were set up after their issuance, and even after their delivery to R. F. C., so as to constitute them a part of the bond contract between the present bondholders and the landowners; and the law in existence at the time of issuance, even though it might have permitted a district to set up reserve funds (which petitioners deny) and though, as respondent's counsel argue, section 3480e does not limit the benefit of reserve funds to the benefit of the original holder, it still has not been pointed out by respondent how the events subsequent to the issuance of the bonds, that is, the enactment of sections 3480e and 3480f, and the establishment of the reserve funds in order to effect the consummation of the contract between R. F. C. and the district, can be said to have become a part of the contract of the bond itself. The statute did not compel the setting up of reserves, but merely empowered the district to establish them.

[4] Respondent argues that the district by its own proceedings established the re-

serve funds for the benefit of the refunding bonds so long as they remain outstanding and unpaid. He also argues that the district intended at the time the bonds were issued that the reserve funds were to inure to the benefit of such bonds as long as they were outstanding, and that such intention was evidenced by the fact that calls were made in 1945 and in April, 1946, while there were moneys in the reserve funds more than sufficient to pay all of the principal and interest requirements to become due thus evidencing their own construction of the "bond contract," and that that "conclusively establishes that the Reserve Funds run throughout the life of the Refunding Bonds for the benefit of their owners and holders." And while it is true as a general rule that where a contract is ambiguous in its terms the conduct of the parties under it is persuasive in arriving at an understanding of its meaning, such rule presupposes the existence of a contract and an ambiguity in its language; and respondent has not yet shown any contract between the landowners and the present bondholders to establish and maintain reserve funds for their benefit or any ambiguity in the language in the bonds. The only contract shown is that appearing upon the face of the bonds themselves, and, of course, provided by the law under which they were issued which became a part thereof.

Respondent does not argue that the district or its trustees are estopped by their conduct from discontinuing the reserve funds, or that the present holders bought the bonds in reliance upon anything done by the district, though some of the elements of an estoppel are squinted at in his brief. He rests his case upon the proposition that there is a contract between the present bondholders and the district which binds the latter to continue the maintenance of the reserve fund, and this though the bonds do not so specify, and the law in existence when the bonds were authorized and issued did not so require, and though it is not even claimed that if the reserve funds are applied to the purpose for which the district now intends to apply them, the security of the bonds will be threatened or that the surplus assessment will not be sufficient to take care of principal and interest as they mature. Petitioners point out that there exists a surplus assessment of $684,844.40 over and above the outstanding bonds, which exists by reason of the fact that the old bonds amounted on their face to $2,268,344.40, while the refunding bonds were issued in the amount of $1,583,500, and had been reduced when the present bondholders acquired them, which constitutes ample security far and above the amount of the refunding bonds outstanding. Furthermore, it is stated by petitioners in their closing brief that it is not purposed to use the reserve funds for other than the purposes for which they are held, to wit, the payment of principal and interest on the refunding bonds, and petitioners agree that any writ of mandate issued by this court may so provide.

Respondent also argues that in 1939, and thereafter, at least four validating acts were passed by the legislature and that such acts validated the proceedings establishing the reserve funds in favor of the holders of the refunding bonds; and he quotes from said acts the provisions that "All acts and proceedings heretofore taken by any public body under any law, or under color of any law, for the issuance, sale, or exchange of bonds of any such public body for any public purpose are hereby confirmed, validated, and declared legally effective. * * * All such bonds heretofore issued, or heretofore authorized to be issued when hereafter issued in substantially the form contemplated in such authorization, shall be, in the form and manner in which issued and delivered, the legal, valid and binding obligations of the public body." But he fails to point out that such acts also provide that they "shall be limited to the correction of defects, irregularities, and ministerial errors which the Legislature originally could have omitted from the statutory requirements of the law under which such acts or proceedings were taken." See, for instance, section 7 of the Validating Act of 1939, Stats. 1939, ch. 593, 3 Deering's Gen. Laws, Act 8920.

[5] It is said in 23 Cal.Jur. 611 that a curative act is one designed to give effect to past acts and transactions, which are ineffective because of failure to comply with some requirement of law, by correcting er-

rors of mere mode and form, or supplying omissions the necessity of which might have been dispensed with by the prior statute; and that "curing the failure to comply with statutory requirements in the proceedings of municipal bodies, are familiar examples of curative statutes."

[6] We fail to see the applicability of such curative statutes to the situation before us. It is not contended by respondent that any past acts or transactions involved herein were ineffective, or that there were errors or omissions needing correction. Certainly such curative acts could not have the effect of adding to the bond contract something not inherent therein, nor add to the rights of the present bondholders any rights not conferred by the contract as stated in the bonds and/or conferred by the statutes in effect at the time of their issuance.

[7] It appears from the agreed statement before us, that by its resolution of September 26, 1946, which is attached as an exhibit to the statement, all that respondent was instructed to do was to transfer from the reserve funds to the regular bond funds the sum of approximately $15,000, so there would then be in such bond funds sufficient money to pay the obligations accruing on the outstanding bonds on January 1, 1947, which would obviate the necessity of making calls for such purposes, and still leave in the reserve funds approximately $53,000. We do not read the statutes applicable to the making of calls for the purpose of meeting obligations to become due on a given date to require that calls be made if there is already in the bond fund sufficient to meet such payments. See Pol. Code, sec. 3480, at page 242. Nor have we been cited to any provision of section 3480e requiring that any specific amounts must be retained in the reserve funds. Therefore, even if it were conceded that the bondholders have a right to have reserve funds maintained, it would not follow that their rights would be infringed by the transfer proposed to be made by the trustees.

The moneys in the reserve funds are moneys which have been paid in by the landowners; they are earning no interest. It is therefore plainly to the interest of the landowners that such funds be used to pay accruing obligations on the bonds and that they be relieved of the obligation to meet calls for that purpose, especially since there appears to be ample security for the bonds which are constantly decreasing in number while the security represented by the surplus assessment remains constant.

It is therefore ordered that a writ of mandate issue directing respondent to transfer from the respective reserve funds of the district, to the respective bond funds thereof, the amounts set forth in the resolution of the board dated September 26, 1946, such moneys so transferred to be used solely for the purpose of paying principal and interest on the refunding bonds.

THOMPSON and PEEK, JJ., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

31 Cal.2d 669

In re READE'S ESTATE.

QUEIROLO v. RUHLAND.

S. F. 17403.

Supreme Court of California.

April 13, 1948.

1. Insurance ⚿773

Where beneficial certificate designated a named person "as executrix of my will" and a resolution for payment and receipt contained like phrases, the quoted phrase meant "in the character of executrix", that is, in a representative capacity, and was not merely descriptive of the individual.

See Words and Phrases, Permanent Edition, for all other definitions of "As Executrix of My Will".

2. Insurance ⚿795

Evidence sustained finding that proceeds of beneficial certificate belonged to the estate of insured and not to executrix as an individual. Probate Code, § 927.

3. Attorney and client ⚿133

Compensation for the services of an attorney must be paid by the person employing him in the absence of a special agreement, special statutory provision, or exceptional circumstances.

4. Courts ⚿200¼

The probate court has no general equity jurisdiction and its jurisdiction is generally confined, to the settlement of the estates of deceased persons, but the court does have power to apply equitable principles in aid of its functions as a probate court.

5. Executors and administrators ⚿511(4)

Where one objecting to allowance of executrix' account produced the additional sum of $2,654 for distribution, allowance of $500 attorney's fee to objector was proper.

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Proceeding in the matter of the estate of James E. Reade, deceased, on objections by Dorothy Queirolo to the account of Olive Helen Ruhland, as administratrix of the estate of James E. Reade, deceased. From an order surcharging the account and allowing an attorney's fee, Olive Helen Ruhland, individually, etc., appeals.

Order affirmed.

Prior opinion 185 P.2d 620.

Lawrence A. Cowen, of San Rafall, and Herbert Chamberlin, of San Francisco, for appellant.

J. E. Hood, of Oakland, for respondent.

SHENK, Justice.

Appeals from an order surcharging an account and allowing an attorney's fee.

James E. Reade died intestate in 1945, leaving as heirs four daughters, two sons and two children of a deceased daughter. Olive Helen Ruhland, a daughter, was appointed administratrix of his estate. Thereafter she collected a death benefit of $2654 from the Widows' and Orphans' Aid Association of the San Francisco Police Department but did not list this sum as an asset of the estate either in the inventory or in her first and final account. Her sister Mrs. Queirolo filed objections to the first and final account, asserting that the insurance fund was an asset of the estate. See section 927, Probate Code. Following a hearing on the objections the court found that this sum had been paid to and received by Mrs. Ruhland as representative of the estate and that her individual claim thereto was without right. The court surcharged her account with the sum of $2654 and ordered that it be included for distribution. The court also found that $500 was a reasonable fee to be awarded Mrs. Queirolo's attorney for prosecuting the contest on behalf of the estate, the heirs and distributees, and ordered the administratrix to pay that sum from the surcharged fund. Mrs. Ruhland has appealed in her individual capacity contending that the evidence was insufficient to support the finding that the fund belonged to the estate, and as administratrix contending that the order allowing an attorney's fee was beyond the power of the court to make.

The evidence disclosed the following:

James E. Reade had been a member of the Widows' and Orphans' Aid Association of the San Francisco Police Department for many years and carried a $3,000 death benefit certificate in the association. In May, 1942, two officers in the association called on Reade at his home in Kentfield for the purpose of having him execute a document designating the beneficiary of his death benefit. Prior to their arrival he had filled in the form, making "Olive Helen Ruhland, as Executrix of my will * * *" the beneficiary. When the officers in the association told him that it was not necessary to say "as executrix of my will" in view of his declarations that day that the money was to go to Mrs. Ruhland, Reade refused to strike the phrase and signed the document on May 23rd, stating that he was making a will and naming Mrs. Ruhland as executrix. There was no evidence of the subsequent valid will. Reade attempted to make a will on September 30, 1943, but it was denied probate because it was typewritten and not witnessed. Mrs. Ruhland was therein appointed executrix to dispose of decedent's property to the children in equal shares, save one to whom only $100 was bequeathed. The designation of the beneficiary, Mrs. Ruhland "as executrix of my will" remained unchanged. The association authorized payment of $2654 (the face amount less funeral expenses paid by the association) to "Mrs. Olive Helen Ruhland, as Executrix * * * daughter and beneficiary of James E. Reade, deceased." When Mrs. Ruhland collected the sum she signed the receipt "Olive Helen Ruhland, as daughter and Executrix of the will of her father * * *," and attached a certified copy of her letters of administration thereto. There was testimony at the hearing on her petition for letters of administration that Mrs. Ruhland had expressly waived any personal right to the fund, but later she contended that she was entitled to it without accounting to the estate.

[1, 2] The designation of beneficiary, the resolution for payment, and the receipt all contain the phrase "as executrix of my will" following the name of Mrs. Ruhland. The quoted expression obviously means "in the character of executrix," that is, in a representative capacity (4 Words and Phrases, Perm.Ed., page 289), and is not merely descriptive of the individual. Cf. Jenkins v. Jenkins, 112 Cal.App. 402, 297 P. 56. While there was some evidence to the contrary the foregoing sufficiently supports the trial court's finding and conclusion that Mrs. Ruhland received the fund in a representative capacity.

[3] Compensation for the services of an attorney must be paid by the person employing him, in the absence of a special agreement, special statutory provision, or exceptional circumstances. The latter exist in certain actions in equity. For example, a plaintiff who has succeeded in protecting, preserving or increasing a fund for the benefit of himself and others may be awarded compensation from the fund for the services of his attorney. This is to compel those for whose benefit the action or proceeding was taken to bear their share of the expenses of the litigation; and this rule is equitable and just. Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 153 P.2d 714; In re Estate of Marre, 18 Cal.2d 191, 114 P.2d 591; Farmers' & Merchants' National Bank v. Peterson, 5 Cal.2d 601, 607, 55 P.2d 867; Miller v. Kehoe, 107 Cal. 340, 40 P. 485; 14 Am. Jur. 47; see, also, notes 49 A.L.R.. 1149, 107 A.L.R. 749.

[4, 5] While the probate court has no general equity jurisdiction and its jurisdiction generally is confined to the settlement of the estates of deceased persons, it does have the power to apply equitable principles in aid of its functions as a probate court. See Security-First National Bank v. Superior Court, 1 Cal.2d 749, 757, 37 P.2d 69, and cases cited. Here the successful contest by Mrs. Queirolo resulted in charging the administratrix in her first and final account with the additional sum of $2654 which then became available for distribution. A fund was thus created or preserved for the benefit of all the heirs. Mrs. Queirolo has only a one-seventh interest in the estate. The application of equitable principles would seem to require that the other heirs bear their proportionate share of the expense of the litigation. We therefore conclude that the allowance of a fee for the legal services which thus redounded to the benefit of the estate and all persons interested therein was

within the lawful exercise of power by the trial court (see 79 A.L.R. 523, 533), and that the order appealed from should stand. The reasonableness of the fee, if allowable, is conceded.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

31 Cal.2d 573

In re KNUTZEN'S ESTATE.

Sac. 5688.

Supreme Court of California, in Bank.
March 31, 1948.

1. Aliens 🔑13
Treaties 🔑8

The rights secured to German nationals by 1925 treaty between United States and Germany to sell their deceased ancestors' realty in United States and withdraw proceeds without discriminatory taxation extend to German heirs of any deceased person holding realty in United States, regardless of his citizenship. Treaty between United States and Germany, Oct. 14, 1925, 44 Stat. 2132.

2. Aliens 🔑13
Treaties 🔑6

The provisions of 1925 treaty between United States and Germany as to rights of German heirs of decedents holding realty in United States to sell it and withdraw proceeds without discriminatory taxation were not suspended or abrogated by outbreak of war between such countries or any action of President or Congress. Treaty between United States and Germany, Oct. 14, 1925, 44 Stat. 2132.

3. Aliens 🔑13
Treaties 🔑11

The national policy expressed in Trading with the Enemy Act is not incompatible with right of inheritance granted German heirs of decedents holding realty in United States by 1925 treaty between United States and Germany. Trading with the Enemy Act, 50 U.S.C.A.Appendix, § 1 et seq.; Treaty between United States and Germany, Oct. 14, 1925, 44 Stat. 2132.

4. War 🔑12

The power, granted President of the United States by Trading with the Enemy Act, to vest alien owned property in Alien Property Custodian, is discretionary, not mandatory. Trading with the Enemy Act, 50 U.S.C.A.Appendix, § 1 et seq.

5. War 🔑12

An enemy alien's loss of inheritance by vesting of his deceased ancestor's property in Alien Property Custodian under Trading with the Enemy Act is not inevitable, and does not necessarily deprive alien of all benefits of inheritance. Trading with the Enemy Act, 50 U.S.C.A.Appendix, § 1 et seq.

6. Aliens 🔑13
Treaties 🔑11

Disposition of realty in state on death intestate of resident owner survived by residents and nationals of Germany, is governed by 1925 treaty between United States and Germany, and provisions, thereof prevail over conflicting provisions of state law. Probate Code, § 259 et seq.; Treaty between United States and Germany, Oct. 14, 1925, 44 Stat. 2132.

7. Aliens 🔑14

The provision of 1925 treaty between United States and Germany that nationals of either party may dispose of their personal property in other party's territories refers only to right of any national of one country to dispose of property in the other country and does not cover personalty in United States which American citizen undertakes to leave to German nationals. Treaty between United States and Germany, Oct. 14, 1925, 44 Stat. 2132.

8. States 🔑4

The state statute declaring non-resident aliens' rights to take property in state by succession or testamentary disposition dependent on reciprocal right of United States citizens to take property in such aliens' countries on same terms and conditions as residents and citizens thereof, is not unconstitutional as extending state power into field of foreign affairs, exclusively reserved to federal government, and invading forbidden domain of negotiating with foreign countries or making compacts therewith. Probate Code, §§ 259–259.2; U.S.C.A.Const. art. 1, § 10.

9. Aliens ⚿13

A probate court decree, ordering distribution of entire estate of state resident, dying intestate, to his only resident heir to exclusion of heirs who were residents and nationals of Germany, was erroneous, as such heirs were entitled, under 1925 treaty between United States and Germany, to sell intestate's realty and withdraw proceeds or to share in proceeds of sale thereof by administrator for payment of debts and expenses, and Alien Property Custodian, filing order vesting in himself all of such enemy alien heirs' rights in estate, was entitled to claim their shares. Probate Code, § 259 et seq.; Treaty between United States and Germany, Oct. 14, 1925, 44 Stat. 2132.

10. War ⚿12

The statute, declaring non-resident aliens' rights to take property in state by succession or testamentary disposition dependent on existence of United States' citizens' reciprocal right to take property in such aliens' countries on same terms and conditions as residents and citizens thereof, is not a forfeiture statute, but one regulating succession, so that enemy alien heirs of deceased resident of state did not take even defeasible interests in his personalty and hence did not acquire indefeasible interests therein on Alien Property Custodian's acquisition thereof by vesting order before judgment of forfeiture or defeasance. Probate Code, § 259 et seq.; Trading with the Enemy Act, 50 U.S.C.A.Appendix, § 1 et seq.

11. Descent and distribution ⚿1

The right to succession is not inherent or natural right, but exists only by statutory authority, and an heir is entitled to receive any of his ancestor's estate only by virtue of statute.

12. Aliens ⚿10

The primary purpose of statute providing for escheat of decedent's property, which no heirs other than aliens, residing in countries not granting United States citizens' right to take property therein on same terms and conditions as residents and citizens thereof, are eligible to take, was not to establish procedure for escheat or defeasance of non-resident aliens' interests in such property, but to place limitations on such aliens' right to inherit. Probate Code, § 259.2.

13. War ⚿12

The Alien Property Custodian acquires no greater rights or interest in enemy aliens' property than those held by such aliens, so that order vesting in him non-resident enemy alien heirs' interests in property of resident dying intestate did not convert defeasible interests in such property into indefeasible interests. Probate Code, § 259 et seq.; Trading with the Enemy Act, 50 U.S.C.A.Appendix, § 1 et seq.

14. Aliens ⚿13

The words "reciprocal rights" in statute declaring non-resident aliens' rights to take property in state by succession dependent on existence of American citizens' reciprocal rights to take property in such aliens' countries do not mean only rights established by treaty. Probate Code, § 259 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Reciprocal Rights".

15. Aliens ⚿13

In administrator's proceeding for distribution of intestate's estate among himself as intestate's only resident heir and his non-resident alien brother and sisters, evidence of domestic law of country of such aliens' residence was admissible to prove existence of American citizens' reciprocal inheritance rights thereunder, as required by state statute to entitle non-resident aliens to take property in state by succession. Probate Code, § 259 et seq.

16. Evidence ⚿81

The rule that law of foreign country is presumed to be same as that of California, in absence of proof of foreign law, is inapplicable in determining rights of non-resident aliens to inherit property of resident dying intestate, in view of statutory provision imposing burden on such aliens to establish existence of American citizens' reciprocal rights to take property in aliens' country under laws thereof. Probate Code, §§ 259, 259.1.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

In the matter of the estate of Alfred Carl Knutzen, deceased. From a decree settling the administrator's final account and ordering distribution and an order denying a motion for new trial and a motion to vacate the decree, the United States, as successor in interest of deceased's alien heirs, appeals.

Decree reversed, and appeal from order dismissed.

Prior opinion, Cal.App., 161 P.2d 598.

Herbert Wechsler, John F. Sonnett, and David L. Bazelon, Asst. Attys. Gen., Harry LeRoy Jones, Wallace H. Walker, and M. S. Isenbergh, Sp. Assts. to Atty. Gen., Frank J. Hennessy, U. S. Atty., of San Francisco, Thomas O'Hara and Emmet J. Seawell, Assts. U. S. Atty., both of Sacramento, and Arthur J. De Lorimier, Asst. U. S. Atty., of San Francisco, John Ernest Roe, Raoul Berger, James D. Hill, David Schwartz, C. E. Rhetts, Acting Head, War Division, Richard P. Lott, and David E. Feller, all of Washington, D. C., for appellant.

O. H. Speciale, of San Jose, for respondent.

Robert W. Kenny, Atty. Gen. of Cal. and Everett W. Mattoon, Deputy Atty. Gen., amici curiae.

GIBSON, Chief Justice.

The United States, as successor in interest of alien heirs, has appealed from a decree settling a final account and ordering distribution, and from an order denying a motion for a new trial and a motion to vacate the decree. The problems presented concern the inheritance rights of nonresident aliens under sections 259, 259.1 and 259.2 of the Probate Code.

Section 259, as enacted in 1941, provided that the right of nonresident aliens to take real or personal property or the proceeds thereof by succession or testamentary disposition "is dependent in each case upon the existence of a reciprocal right upon the the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries." Section 259.1 then provided: "The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259," and section 259.2 provided: "If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

In 1945 sections 259.1 and 259.2 were repealed and section 259 was amended by deleting the last clause relating to the right to receive payment and by adding a provision creating a presumption that such reciprocal rights exist. The sections were again changed in 1947 to read substantially as they did in 1941, so far as pertinent here; section 259 was amended by omitting the provision for a presumption, and sections 259.1 and 259.2 were re-enacted in their original form.

Decedent, who died intestate on January 24, 1943, was a resident of this state, but the record and findings are silent as to his citizenship. He left surviving him respondent, a brother who resided in this state and was appointed administrator, and another brother and two sisters who were residents and nationals of Germany. The estate consisted of a small amount of cash and some real property which was sold for $1500.

After the administrator filed his petition praying for distribution of the estate in equal shares to himself and his brother and sisters, the Alien Property Custodian issued an order declaring that the nonresident heirs were nationals of Germany, an enemy country, and purporting to vest in himself all their right, title, interest and claim in and to the estate. This order was filed in the probate proceeding, and thereafter, on hearing of the petition for distribution, the court of its own motion invoked the provisions of section 259 et seq. and ordered distribution to the administrator as sole heir. The United States then moved to vacate the decree and for a new trial. On denial of these motions the court modified its decree by striking out a finding that the alien heirs were entitled to have the estate distributed to them in equal shares, and by substituting findings that, but for the provisions of section 259 et seq., the nonresident aliens would each take a one-fourth share of the estate, that no reciprocal rights existed between the United States and Germany, and that the alien heirs were not entitled to inherit any part of the estate.

The United States seeks a determination of the extent of the interests in the estate which vested in the Alien Property Custodian, and the first contention is that sections 259, 259.1 and 259.2, as enacted in 1941 and as applied by the probate court, are in conflict with and therefore inoperative as against the provisions of the 1925 treaty with Germany, Oct. 14, 1925, 44 Stat. 2132, and that those sections are invalid because they invade fields exclusively reserved for and occupied by the federal government.

[1-6] These questions have been determined by the United States Supreme Court, during the pendency of this appeal, in Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431. In that case it was held that the rights secured by the 1925 treaty, as to realty, were in terms a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from discriminatory taxation; that those rights extend to German heirs of "any person" holding realty in the United States, regardless of citizenship; and that the treaty provisions were not suspended or abrogated by the outbreak of war or by any action of the President or of Congress. It was further held that the national policy expressed in the Trading with the Enemy Act, 50 U.S.C.A.Appendix, § 1 et seq., is not incompatible with the right of inheritance granted under the treaty; that the power to vest alien owned property in the custodian is discretionary and not mandatory; that the loss of inheritance by vesting is not inevitable and does not necessarily deprive the alien of all the benefits of his inheritance; and that the disposition of realty is governed by the treaty, and its provisions prevail over any conflicting provisions of California law.

[7, 8] As to personalty, it was held that the treaty refers only to the right of any national of one country to dispose of property in the other country, and that it does not cover personalty located in this country which an American citizen undertakes to leave to German nationals. It was further held that sections 259–259.2, as enacted in 1941, were not unconstitutional as an extension of state power into a field of foreign affairs exclusively reserved to the federal government, and that California had not entered into the forbidden domain of negotiating with a foreign country or of making a compact with it contrary to article I, section 10, of the Federal Constitution.

[9] It follows from the decision in Clark v. Allen, supra, that the probate court erred in distributing all the estate to the resident heir and that the decree must be reversed. The nonresident alien heirs were entitled under the treaty to sell the realty and withdraw the proceeds, and it is immaterial that the property was sold by the administrator, apparently to get funds to pay debts and expenses, instead of by those heirs. In either event, they were entitled to share in the proceeds of the realty, and the Alien Property Custodian was entitled to claim their shares by reason of the vesting order.

The right of the alien heirs under the treaty to succeed to personalty depends on whether the decedent was a citizen of this country or a national of Germany. The record is silent in this respect, and we therefore cannot decide the question, but if the decedent was a national of Germany, the alien heirs were also entitled to share in the personalty.

[10] The United States next contends that section 259 et seq. are not self-executing and that, even if decedent was not a national of Germany, the alien heirs took at least defeasible interests in the personalty which were vested in the United States by action of the Alien Property Custodian

and became indefeasible upon their acquisition by the custodian prior to any judgment of forfeiture or defeasance. This contention is based on the theory that the sections do not amount to a statute of succession and that alien heirs have an estate or interest which is valid until defeated by some judgment of forfeiture or defeasance. Early cases are cited to the effect that an alien acquired by succession an estate defeasible by the state and that, until office found [adjudication in special proceeding for forfeiture], the alien could pass a valid title to a non-alien grantee. See People ex rel., etc. v. Folsom, 5 Cal. 373; Ramires v. Kent et al., 2 Cal. 558; Merle v. Mathews, 26 Cal. 455; Racouillat v. Sansevain, 32 Cal. 376. None of these cases involved a statute similar to section 259. The argument assumes that the aliens have certain existing rights and that the statute merely provides for a forfeiture. This is not the effect of the statute. It is not, and does not purport to be, a forfeiture statute; instead the clear purpose is to regulate succession by providing that a non-resident alien may not inherit unless reciprocal rights are granted to our citizens by the country of which the alien is a resident.

[11, 12] The right to succession is not an inherent or natural right, but one which exists only by statutory authority, and it is only by virtue of the statute that an heir is entitled to receive any of his ancestor's estate. Estate of Perkins, 21 Cal.2d 561, 569, 134 P.2d 231; Estate of Watkinson, 191 Cal. 591, 597, 217 P. 1073; Irving Trust Co. v. Day, 314 U.S. 556, 62 S.Ct. 398, 86 L.Ed. 1734, 137 A.L.R. 1093; In re Wilmerding, 117 Cal. 281, 284, 49 P. 181. While section 259.2 as enacted in 1941 and as re-enacted in 1947 provided for escheat if no heirs were found eligible to take the property, the primary purpose of the legislation was not to establish a procedure for escheat or for defeasance of any interest of nonresident aliens, but to place limitations and conditions on the right of such aliens to inherit. Hence the proper construction is that sections 259 et seq. are laws of succession, that they constitute limitations on the power of aliens to inherit and that nonresident aliens are made ineligible to inherit, and acquire no rights in the estate in the absence of reciprocal rights of American citizens to inherit property in the country in which such aliens are resident.

[13] Moreover, the argument that defeasible interests became indefeasible, when acquired by the United States before any judgment of defeasance, assumes that there was merely an infirmity in title which was thereby cured. However, the only source of the Alien Property Custodian's rights is the estate or interest of the alien, and he acquires no greater rights or interest than those held by the alien. See Chemical Foundation, Inc. v. General Aniline Works Inc., 99 F.2d 276, certiorari denied, 305 U.S. 654, 59 S.Ct. 249, 83 L.Ed. 423; Sutherland v. Selling, 16 F.2d 865, certiorari denied, 273 U.S. 760, 47 S.Ct. 475, 71 L.Ed. 878. Hence the vesting order cannot be said to have created rights or interests which did not theretofore exist.

[14, 15] It is also contended by the United States that, even if the nonresident aliens are not granted inheritance rights by the treaty, as will be the case as to the personalty if it is found that decedent was an American citizen, such aliens may inherit if, in fact, the laws of Germany granted reciprocal inheritance rights to American citizens. On the other hand, it is claimed that the treaty is the sole test of the existence of such rights and that they can be created and controlled only by treaty. It is asserted that local laws and foreign municipal laws cannot establish or control reciprocal rights of inheritance between citizens or nationals of the respective countries, that our states cannot sustain any relations with foreign countries, and that the words "reciprocal rights," as used in section 259 et seq., mean rights established by treaty.

The statute, however, does not refer to treaties, and there is nothing in its wording which requires the construction that "reciprocal rights" include only those established by treaty. Such a construction would defeat the obvious purpose of the statute which was to permit a nonresident alien to inherit when the laws of his country would permit an American citizen to inherit under the same circumstances. Evidence of the foreign domestic law is therefore admissible to prove the existence of reciprocal inheritance rights. Cf. Estate of Blak, 65 Cal.App.2d 232, 236, 150 P.2d 567; In re Nielsen's Estate, Mont., 165 P.2d 792.

[16] Finally, it is contended that it is presumed, in the absence of proof, that the law of a foreign country is the same as that of California and that here there was no proof of the foreign law. See Wickersham v. Johnston, 104 Cal. 407, 38 P. 89, 43 Am.St. Rep. 118; Murphy v. Murphy, 145 Cal. 482, 78 P. 1053, and Christ v. Superior Court, 211 Cal. 593, 296 P. 612. This rule, however, does not apply in view of the express provision of section 259.1, both as enacted in 1941 and as re-enacted in 1947, that the burden is on the nonresident alien to establish the existence of reciprocal rights.

The decree settling the final account and directing distribution is reversed. The appeal from the order denying a new trial and denying a motion to vacate the decree, having been rendered moot, is dismissed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

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31 Cal.2d 580

In re BEVILACQUA'S ESTATE.

S. F. 17058.

Supreme Court of California, in Bank.

March 31, 1948.

1. States 🔑4

The Probate Code sections respecting nonresident aliens' rights to inherit property in state are not unconstitutional as invading fields reserved to federal government. Probate Code, §§ 259–259.2.

2. Evidence 🔑81

Under code sections, declaring nonresident aliens' rights to inherit property in state dependent on existence of American citizens' reciprocal rights to take property in such aliens' countries on same terms and conditions as residents and citizens thereof, there is no presumption that foreign domestic law is same as that of California. Probate Code, §§ 259–259.2.

3. Aliens 🔑10

Proof of American citizens' reciprocal rights to take property in foreign country on same terms and conditions as residents and citizens thereof, as required by statute to entitle nonresident aliens to inherit property in state, is not limited to rights established by treaty. Probate Code, §§ 259–259.2.

4. Statutes 🔑82

The statute, declaring nonresident aliens' rights to inherit property in state dependent on existence of American citizens' reciprocal rights to take property in such aliens' countries on same terms and conditions as residents and citizens thereof, is not invalid as violating constitutional provision forbidding enactment of special laws. Probate Code, § 259 et seq.; Const. art. 4, § 25.

5. Aliens 🔑10
Constitutional law 🔑278(1)

The statute, declaring nonresident aliens' rights to inherit property in state dependent on existence of American citizens' reciprocal rights to take property in such aliens' countries on same terms and conditions as residents and citizens thereof, is not invalid as violating due process clause of federal Constitution. Probate Code, § 259 et seq.; U.S.C.A. Const. Amend. 14.

6. Descent and distribution 🔑1

The right to succession exists only by statutory authority and may be changed, limited or abolished by legislature at any time before ancestor's death.

7. Aliens 🔑10
Constitutional law 🔑278(1)

The statutory provision, placing on nonresident aliens, claiming deceased resident's property in state as his heirs, burden of proving American citizens' reciprocal rights to take property in such aliens' country on same terms and conditions as residents and citizens thereof, is not invalid as arbitrary. Probate Code, § 259.1; U.S.C.A.Const. Amend. 14.

8. Aliens 🔑10

The statutory provision, imposing on nonresident aliens, claiming property in state as deceased resident's heirs, burden of proving American citizens' reciprocal rights to take property in such aliens' countries on same terms and conditions as residents and citizens thereof, is not invalid as placing burden of proof on nonresident enemy aliens forbidden by Trading with the Enemy Act to prosecute any action in law or equity, as Alien Property Custodian has full authority to succeed to such aliens' interests and take any action necessary to enforce and protect their rights. Probate Code, § 259.1; Trading with the Enemy Act, 50 U.S.C.A. Appendix, § 1 et seq.

9. Aliens 🔑10

The statutory provisions that if no heirs of deceased resident, except aliens residing in countries wherein American citizens have no reciprocal rights to take property on same terms and conditions as residents and citizens thereof, are eligible to take decedent's property, it shall be disposed of as escheated property, give more remote resident kindred of decedent, whose nearer relatives residing in foreign country are barred from inheritance thereby, right to inherit his property. Probate Code, § 259.2.

10. Descent and distribution 🔑24
Escheat 🔑4

Under common law, incapacity of heirs first entitled to succeed to decedent's property, will not effect escheat thereof, but property will pass to persons next entitled to take as though first heirs did not exist.

11. Executors and administrators 🔑17(2)

Where widow and adult children of resident dying intestate were nonresident aliens barred by statute from inheriting decedent's property in state, his first cousin, who was his only relative residing in United States, was entitled to inherit such property and hence entitled to letters of administration as against contention that he was not interested person entitled to succeed to estate. Probate Code, §§ 259.2, 422.

12. Aliens 🔑10

The Probate Code section, declaring nonresident aliens' right to inherit deceased residents' property in state dependent on American citizens' reciprocal rights to take property in such aliens' countries and imposing burden on aliens to establish such reciprocal rights, is statute of succession, applicable in any proceeding wherein right to inherit is at issue, not merely in proceeding under subsequent section to determine whether property shall escheat to state, so as to require resident relative of decedent to show, and court to find, existence of such rights before such relative may be granted letters of administration. Probate Code, §§ 259 et seq., 422.

13. Statutes 🔑233

The rule that general language in statute will not be interpreted as applying to governmental agencies, in absence of specific expression of such legislative intent, applies where such construction would result in infringement on sovereign governmental powers, but where no impairment of sovereign powers would result, legislature may be held to have intended statute to apply to governmental bodies, though it used general statutory language only.

14. Executors and administrators 🔑20(7)

When decedent's relative, seeking letters of administration, makes prima facie showing that he is decedent's next of kin and entitled to share in estate, public administrator, seeking such letters, has burden of disproving such relative's claims. Probate Code, § 422.

15. Executors and administrators 🔑17(2), 20(7)

A decedent's resident relative, claiming right as decedent's next of kin to letters of administration and showing that all of decedent's nearer relatives are nonresident aliens, is entitled to rely on statute declaring such aliens' rights to inherit property in state dependent on existence of American citizens' reciprocal rights to take property in aliens' country, and burden is then on public administrator or other person seeking appointment as administrator to show existence of reciprocal inheritance rights. Probate Code, §§ 259 et seq., 422.

16. Executors and administrators ⚷20(7)

A decedent's resident relative, establishing prima facie right to letters of administration by testifying that decedent's widow and children were nonresident aliens and that such relative was first cousin and only relative of decedent in United States, was entitled to rely on such aliens' statutory burden of proving American citizens' reciprocal inheritance rights under laws of country of aliens' residence and entitled to appointment as administrator in absence of evidence of such rights. Probate Code, §§ 259 et seq., 422.

◆

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

In the matter of the estate of Ignazio Bevilacqua, deceased. From an order granting letters of administration to Phil C. Katz, as Public Administrator of the City and County of San Francisco, and denying the petition of Pietro Bevilacqua for such letters, petitioner appeals.

Reversed.

Prior opinion, Cal.App., 161 P.2d 589.

Charles Baer, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., amici curiae.

Henry F. Boyen, Frank J. Fontes and A. E. Levinson all of San Francisco, for respondent.

Herbert Wechsler, Asst. Atty. Gen. of U. S., Harry LeRoy Jones, Wallace H. Walker, and M. H. Isenbergh, Sp. Assts. to Atty. Gen., Frank J. Hennessy, U. S. Atty., Arthur J. DeLorimier, Asst. U. S. Atty., both of San Francisco, Cal., David Schwartz, Chief Trial Attorney, Raoul Berger, General Counsel to Alien Property Custodian, C. E. Rhetts Acting Head, War Division, Richard P. Lott and John Ernest Roe, all of Washington, D. C., amici curiæ.

GIBSON, Chief Justice.

This is an appeal from an order granting letters of administration to the public administrator and denying the petition of appellant, a first cousin of decedent. The questions raised relate to the inheritance rights of nonresident aliens and are similar to those considered in Estate of Knutzen, 191 P.2d 747. The pertinent provisions and history of sections 259, 259.1 and 259.2 of the Probate Code are set forth in that case and need not be repeated here.

At the hearing on the petitions for letters, the only witness was appellant who testified that he was a resident of California, and that decedent, who died about January 28, 1944, was also a resident of this state. He further testified that no will had been found, that decedent died intestate leaving a wife and four adult children, all of whom were aliens residing in Italy, and that appellant was a first cousin, the only relative of decedent residing within the United States. On inquiry by the court, appellant's counsel stated that he was relying on sections 259, 259.1 and 259.2 of the Probate Code and that appellant was entitled to letters in preference to the public administrator because the wife and children were non-resident heirs and not entitled to succeed to the estate. The court then ruled that the code sections were unconstitutional and that the Italian heirs were entitled to the estate subject to the right of the Alien Property Custodian to seize the property. The petition of the public administrator was thereupon granted. No evidence was offered by either party as to the existence or nonexistence of reciprocal rights of inheritance between Italy and the United States, but it is conceded by the parties that there was no treaty in effect between the two countries establishing rights of inheritance.

[1-3] In view of the decisions in Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, and Estate of Knutzen, 191 P.2d 747, it is clear that the trial court erred in adjudging that the code sections were unconstitutional as an invasion of fields reserved to the federal government. Our decision in Estate of Knutzen is likewise controlling on certain other issues, and under these code sections it must be held, on the authority of that case, that there is no presumption that the foreign domesic law is the same as that of California, and that proof of reciprocal

rights is not limited to those established by treaty.

[4] The public administrator nevertheless maintains that he was properly appointed. It is first asserted that sections 259 et seq. violate the provisions of section 25 of article IV of the state Constitution forbidding the enactment of special laws but we see no objection to the statute on this ground. The subject matter is clearly within the legislative control, the statute operates uniformly on all persons within the same class, and it cannot be said that there is any arbitrary classification or that the legislation is special within the meaning of the Constitution. Cf. Estate of Hill, 179 Cal. 683, 687, 688, 178 P. 710.

[5-8] Nor does it appear, as contended, that there is any violation of the due process clause of the Federal Constitution. Amend. 14. The right to succession exists only by statutory authority and may be changed, limited or abolished by the Legislature at any time prior to the death of the ancestor. Estate of Perkins, 21 Cal.2d 561, 569, 134 P.2d 231. There is nothing arbitrary in the provision placing the burden of proof on the nonresident aliens who, presumably, are in a better position than residents to obtain information concerning foreign law. Moreover, there is no basis for complaint, at least insofar as this proceeding is concerned, in the argument that the statute places the burden of proof on nonresidents who are forbidden, by the Trading with the Enemy Act, 50 U.S.C.A. Appendix § 1 et seq., to prosecute any action in law or equity. The Alien Property Custodian is given full authority to succeed to their interests and to take such action as may be necessary to enforce and protect their rights. There is no claim that there was any defect in notice which would deprive the court of jurisdiction (cf. Farmers etc. Nat. Bank v. Superior Court, 25 Cal.2d 842, 155 P.2d 823), but, in any event, since the Alien Property Custodian has issued a vesting order covering all rights of the alien heirs and has stated that he will move to intervene at the proper time, it may be assumed that the interests of those heirs will be properly represented in subsequent proceedings.

[9-11] The public administrator next asserts that in any event it was proper to deny letters to appellant on the ground that he was not an interested party. It is claimed that section 259.2 provides for an escheat when "no heirs other than such aliens" are found to exist, that the quoted words refer to persons in the same degree of kindred, and that there is nothing in the section permitting the substitution of more distant relatives. It is further argued that, if such more distant relatives may take, they can do so only when they claim through ancestors who are not ineligible because of alienage, and that appellant did not prove such a right.

A similar contention was made in Estate of Michaud, 53 Cal.App.2d 835, 836, 128 P.2d 595, 596, and it was there held that "the provisions of section 259.2 which must be construed as giving the more remote kindred resident in this country the right to inherit where the nearer relatives resident in a foreign country are barred from inheritance by section 259. It is a settled rule of the common law that 'Incapacity of the heirs first entitled to succeed to property will not effect an escheat, but the property will pass to the persons next entitled to take as though the first heirs had not existed.' 19 Am.Jur. 388; 30 C.J.S., Escheat, § 2, p. 1166; Orr v. Hodgson, 4 Wheat. [U.S.] 453, 4 L.Ed. 613; Connolly v. Probate Court, 25 Idaho 35, 136 P. 205. The langauge of section 259.2, 'if no heirs other than such aliens are found eligible to take such property,' should be construed in view of this rule of law to entitle respondent Boutin, as a first cousin, to inherit, if all nearer relatives are nonresident aliens barred from inheritance by section 259." This holding is in accord with the purpose and intent of the statute, and we see no reason to depart from it. We therefore cannot say as a matter of law that appellant is not an interested person entitled to succeed to the estate.

[12] It is further contended by the public administrator that section 259.1, relating to burden of proof, applies only in a proceeding to establish the fact of reciprocity, i.e., a proceeding to determine escheat or forfeiture, and that the question of reciprocity cannot be determined in a collateral

proceeding by a judgment which is not binding on the next of kin. It is asserted that under section 259.2 it is only where reciprocal rights are "found" not to exist that other heirs can have any rights, and that such a finding can be made only in a proceeding to determine the fact of reciprocity.

This argument proceeds on the theory that there cannot be a finding in this proceeding as to the right of appellant to succeed to a part of the estate. However, section 422 of the Probate Code, which sets forth the order of priority of the right to letters, provides that the relatives of the decedent are "entitled to priority only when they are entitled to succeed to the estate or some portion thereof." Hence it is essential for such a relative to show, and for the court to find, that he is entitled to share in the estate before the court can grant him letters as against the public administrator. It is therefore not only proper but necessary for the court to make a finding on the matter of the existence of reciprocal rights before it can determine whether appellant is entitled to letters. And it is immaterial that the finding may not be binding on alien relatives or other persons who are not parties to the proceeding. There is nothing in sections 259 and 259.1 to indicate that they were intended to apply only to a proceeding under section 259.2 to determine whether or not the property should escheat to the state. On the contrary, it is plain that the statute is one of succession and that sections 259 and 259.1 apply in any proceeding where the right to inherit is at issue. See Estate of Knutzen, 191 P.2d 747.

[13] Finally it is asserted that section 259.1 is limited in operation to nonresidents and that it does not impose the burden of proving reciprocal rights on the state or the public administrator. It is argued that the public administrator is not claiming any rights through the nonresident heirs or as their successor, that the state is not bound by general words of a statute and that section 259.1 should not be construed as applying to the public administrator on the theory that he is a public officer performing governmental functions and is under a duty to take official action. The public administrator seeks to invoke the rule of statutory construction that general language will not be interpreted as applying to agencies of the government in the absence of a specific expression of legislative intent. This rule has been applied where the result would be to infringe on sovereign governmental powers. See Butterworth v. Boyd, 12 Cal.2d 140, 150, 82 P.2d 434, 126 A.L.R. 838; Bayshore Sanitary Dist. v. San Mateo, 48 Cal.App.2d 337, 339, 119 P.2d 752. "Where, however, no impairment of sovereign powers would result, the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only." Hoyt v. Board of Civil Service Com'rs, 21 Cal.2d 399, 402, 132 P.2d 804, 806.

[14, 15] Moreover, under section 422 of the Probate Code, the next of kin, when entitled to share in the estate, has priority over the public administrator, and when a relative makes a prima facie showing that he is the next of kin and entitled to share in the estate, the public administrator, if he seeks to obtain letters, must undertake the burden of disproving those claims. (Cf. Estate of Olcese, 210 Cal. 262, 268, 291 P. 193; Estate of Gordon, 142 Cal. 125, 132, 133, 75 P. 672; Estate of DeBrum, 26 Cal.App.2d 319, 322, 79 P.2d 414.) When the right of a relative to claim as next of kin is based on sections 259 et seq., and he shows that all nearer relatives are nonresident aliens, he is entitled to rely on the statute, and the burden is then on the public administrator or other person who seeks appointment to show the existence of reciprocal inheritance rights.

[16] In the present case, the action of the probate court, in declaring the statute unconstitutional, was in effect a refusal to pass on the question of the existence or nonexistence of reciprocal rights. Appellant, nevertheless, had already established a prima facie case showing a right to letters when he testified that decedent's wife and children were all aliens residing in Italy, and that he was a first cousin and the only relative of decedent in the United States. Under sections 259 et seq. he was entitled

to rely on the fact that the burden of proving reciprocal inheritance rights was on the nonresident aliens. See Estate of Knutzen, 191 P.2d 747. In the absence of any other evidence, there was some proof that he was entitled to inherit the estate, and it was error to deny him appointment as administrator.

The order granting letters of administration to the public administrator and denying letters to appellant is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

In re GIORDANO'S ESTATE.

CLARK, Atty. Gen. of U. S. v. FINO.

Civ. 3596.

District Court of Appeal, Fourth District, California.

April 8, 1948.

Opinion Adhered to on Rehearing May 21, 1948.

See 193 P.2d 771.

1. Constitutional law 🔑106

A litigant does not have vested right in any matter of procedure, and the fact that change in procedure may make proof of the rights of one party more difficult, or proof by another party less onerous, can be of no avail to either.

2. Aliens 🔑10
Constitutional law 🔑109

Where deceased died intestate in 1945 survived by sister residing in United States and alien mother residing in Italy and statutes then in force placed burden of proving reciprocal rights of inheritance on foreign alien heir, the 1945 amendment which became effective before filing of decree for distribution and which placed such burden on sister did not deprive sister of a vested property right and was more a change in procedure than a change in substantive law. Probate Code, §§ 225, 259, 259.1.

3. Appeal and error 🔑1107

The repeal of statute creating right unknown to common law destroys right of action based on statute, even though repeal becomes effective after judgment in trial court, if repeal is effective before decision of case on appeal, and the same is true of amendment repealing portion of amended statute repugnant to the final amendment.

4. Descent and distribution 🔑1

The right of inheritance is statutory and not a creature of the common law. Probate Code, § 225.

5. Appeal and error 🔑1107

Where procedural statutes in force in 1947 and in 1945 when deceased died intestate survived by sister residing in United States and alien mother residing in Italy placed burden of proving reciprocal rights of inheritance on foreign alien heir and amendments in force from 1945 to 1947 placed such burden on sister, reviewing court was governed by 1947 amendment which became effective pending the appeal so as to entitle sister to estate on failure of Alien Property Custodian representing mother to show existence of such reciprocal rights. Probate Code, §§ 259, 259.1; Civ. Code, § 671.

◆

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Proceeding in the matter of the estate of Giorgio Natalie Giordano, also known as Giorgio Giordano, also known as Giorgi Giordano, also known as Georgi Giordano, also known as Georgi Giordino, also known as G. N. Giordino, also known as George Giordino, also known as George Gardiano, deceased. From a judgment of distribution, distributing all of the property of the estate to Anna Maria Fino, a sister of the deceased, Tom C. Clark, Attorney General of the United States, as substituted successor of the Alien Property Custodian, who appeared in the proceeding as successor to any interest of Maria Giordano, the mother of the deceased, in the property of estate, appeals.

Affirmed.

David L. Bazelon, Asst. Atty. Gen., James M. Carter, U. S. Atty., and Clyde C.

Downing, Asst. U. S. Atty., both of Los Angeles, M. S. Isenbergh, Sp. Asst. to Atty. Gen., and David E. Feller, for appellant.

H. E. Dwelle and Dorsey K. Dwelle, both of Fresno, and J. George Aye, Jr. and James W. Shippe, for respondent.

MARKS, Justice.

This is an appeal by the Attorney General of the United States, as substituted successor of the Alien Property Custodian, from a decree of distribution, distributing all of the property of the estate of Giorgio Giordano, who died intestate Jan. 17, 1945, to Anna Maria Fino, a sister of deceased, who is a citizen and resident of the United States, to the exclusion of Maria Giordano, his mother, who at all material times was an alien residing in Italy. It is not questioned that the Alien Property Custodian, under Federal Statutes, and under a Vesting Order made on November 2, 1945, has properly appeared in these proceedings as successor to any interest of Maria Giordano in the property of the estate; that he requested that the interest of the mother be vested in him on distribution.

There were several brothers and sisters of deceased who were aliens, living in Italy, but as he died intestate, without surviving father, spouse, or issue, it is not necessary to mention them further, as the mother, were she a resident of the United States, would have been his sole heir at law entitled to inherit his property. (Sec. 225, Probate Code.)

The case turns on the effect to be given sections 259, 259.1 and 259.2 of the Probate Code (Stats.1941, Ch. 895) which remained in effect until September 15, 1945, when section 259 was amended and the other sections were repealed. (Stats.1945, Ch. 1160.) Section 259 was again amended and the other two sections were reenacted so that the amended section and the reenacted sections went into effect on September 19, 1947 (Stats.1947, Ch. 1042), in much the same form as they were prior to the 1945 changes.

Section 259.2 has no important bearing on this case so no further attention need be given it. The two other sections, as originally enacted, provided as follows:

Sec. 259. "The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries."

Sec. 259.1. "The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal right set forth in Section 259."

The important portion of the 1945 amendment of Section 259 reads as follows:

"It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code."

It thus appears that at the time of the death of deceased, and up to September 15, 1945, the burden of proving such reciprocal rights rested on the foreign alien heir, or in this case, the Alien Property Custodian who represented her. Commencing on September 15, 1945, and to September 19, 1947, the burden of proof rested on Anna Maria Fino. The enactments effective on September 19, 1947, returned the burden of proving reciprocal rights to the foreign alien heir, or, here, the Alien Property Custodian. Neither of the parties established such reciprocal rights in the court below.

Deceased died on January 17, 1945, during the time the sections in their original form were in effect. The administratrix qualified on February 6, 1945. The final account and petition for distribution were filed on October 27, 1945, after the 1945 amendment, and the repeal of Section 259.1 became effective. The decree of distribution distributing the property of the estate to Anna Maria Fino was filed on November 1, 1946. The transcript on appeal was filed on July 10, 1947. The 1947 amendment of Section 259 and the reenactment of Section 259.1 of the Probate Code became effective while this appeal was pending and before its decision.

Certain of the arguments of respondent in support of the decree of distribution may be summarized as follows:

That under both the civil law and the common law, aliens could not take property by descent or operation of law; that under the provisions of Section 671 of the Civil Code, "Any person, whether citizen or alien, may take, hold, and dispose of property real or personal, within this state"; that under Sections 259 and 259.1 of the Probate Code as in force at the time of the death of deceased, Anna Maria Fino would take the entire estate unless appellant, as representative of Maria Giordano, the nonresident alien, was successful in sustaining the burden of proving reciprocal rights of inheritance in Italy; that heirs at law of a deceased are determined by conditions existing at the time of death and the rights of those heirs are then fixed and become vested at that time and may not be divested by subsequent legislative enactment, citing In re Estate of Benvenuto, 183 Cal. 382, 191 P. 678; In re Estate of Michels, 18 Cal.App.2d 201, 63 P.2d 333, and Johns v. Scobie, 12 Cal.2d 618, 86 P.2d 820, 121 A.L.R. 1404.

Respondent further argues that while the right of inheritance is wholly statutory and within the control of the legislature, the right to inherit the property of her brother vested in her on his death and that the legislature cannot divest her of that inheritance by subsequent legislative enactment; that statutes in force at the time of death control the disposition of the property of an estate and cannot be changed after the vesting of the property at that time, citing In re Estate of Putnam, 219 Cal. 608, 28 P.2d 27; McKay v. Lauriston, 204 Cal. 557, 269 P. 519; In re Estate of Phillips, 203 Cal. 106, 263 P. 1017, and In re Estate of Wellings, 197 Cal. 189, 240 P. 21.

These arguments may be summarized by stating that it is the contention of respondent that as the inheritance from her brother vested in her under the law in force at the time of his death, there being no evidence of reciprocal rights in Italy, this property could not be taken from her by the legislature acting after the vesting; that as the amendment of 1945 would have the effect of depriving her of property, title to which had already vested in her, it cannot be given force and effect in this case. The sum total of these arguments is that the amendments destroyed a vested right in property and were therefore changes in the substantive law and were not merely changes in procedure. There is dicta in Re Estate of Thramm, 80 Cal.App.2d 756, 183 P.2d 97, that supports this argument.

[1] Appellant concedes that if the 1945 amendment is a change in the substantive law, and if given effect here, it would deprive respondent of property that had already vested in her, it cannot be given any force as it must be applied prospectively as affecting rights in property arising after its effective date. However, he argues that as the 1945 amendments became effective before the final account and petition for distribution were filed, and as the only change important here was to shift the burden of proof from one party to the other, they changed only the procedure and must be given effect in the hearing subsequently had on the petition for distribution and as respondent failed to meet the burden of proof placed on her by the 1945 amendment, the presumption in appellant's favor therein contained became conclusive and that the decree of distribution made contrary to that presumption must be reversed. (Sour v. Superior Court, 1 Cal.2d 542, 36 P.2d 373; Heron v. Bray, 122 Cal.App. 79, 9 P.2d 513.) He argues, and correctly so,

that no litigant has any vested right in any matter of procedure, and that the fact that a change in procedure may make proof of the rights of one party more difficult, or proof by another party less onerous, can be of no avail to either. (San Bernardino County v. Ind. Acc. Comm., 217 Cal. 618, 20 P.2d 673; Arques v. National Superior Co., 67 Cal.App.2d 763, 155 P.2d 643.) Appellant points to decisions in which it has been held that changes in a statute regulating the burden of proof are to be applied as changes in procedure only. (MacArthur v. Ind. Acc. Comm., 220 Cal. 142, 29 P.2d 846; Sackheim v. Pigueron, 215 N.Y. 62 109 N.E. 109; Southern Indiana Ry. Co. v. Peyton, 157 Ind. 690, 61 N.E. 722; Wallace v. Western N. C. R. Co., 104 N.C. 442, 10 S.E. 552; Easterling Lumber Co. v. Pierce, 106 Miss. 672, 64 So. 461; Id., 235 U.S. 380, 35 S.Ct. 133, 59 L.Ed. 279.)

[2] A weakness is apparent in the argument of respondent to the effect that title to the estate property absolutely and finally vested in her at the time of death of deceased. Under the provisions of Section 225 of the Probate Code the property of the estate would have vested in Maria Giordano, the mother of deceased, except for the provisions of Section 259 and 259.1 of the Probate Code. It was not until after the hearing involved here, and the failure of either party to introduce any evidence showing that there were reciprocal rights of inheritance in Italy, that the right of either deceased's mother or sister to inherit became established. While it might be true that the vesting occurred at the time of the death of deceased, the individual in whom the property vested, whether the sister or the mother, could not be determined until after the hearing. Therefore we incline to the view that the amendment of 1945 which became effective before the petition for distribution was filed did not deprive respondent of a vested and determined property right and was more a change in procedure than a change in substantive law.

While we incline to this view it does not reguire a reversal of the decree of distribution. Counsel for both parties agree that if the sections as adopted in 1941 and in force at the time of the death of deceased had not been amended the decree of distribution awarding the property to respondent would have been correct as there was no proof of the existence of reciprocal rights of inheritance in Italy. Under the 1947 amendment which is now in effect the same result follows as now the burden of proving such reciprocal rights of inheritance is placed on the nonresident alien where it was prior to the enactment of the 1945 amendment.

[3] It is now well settled that the repeal of a statute creating a right unknown to the common law destroys a right of action based upon it. This is true though the repeal became effective after judgment in the trial court if it was effective before the decision of the case on appeal. The same should be true of an amendment of a statute because the amendment repeals the portion of the amended statute repugnant to the final amendment. In Pacific Gas & Electric Co. v. State of California, 214 Cal. 369, 6 P.2d 78, 80, the court quoted with approval from People v. Bank of San Luis Obispo, 159 Cal. 65, 112 P. 866, 37 L.R.A., N.S., 934, Ann.Cas.1912B, 1148, as follows:

> " 'It is, in the general, true that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not; but if, subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.' "

The case of First National Bank v. Henderson, 101 Cal. 307, 35 P. 899, strongly supports this rule and its facts are somewhat analagous to those of the instant case. See also Lemon v. Los Angeles Terminal Ry. Co., 38 Cal.App.2d 659, 102 P.2d 387; California Employment Commission v. Arrow Mill Co., 45 Cal.App.2d 668, 114 P.2d 727.

[4, 5] As the right of inheritance is statutory and not a creature of the common law, as no right in the property of the estate could have been finally determined as

being in either the sister or the mother prior to a determination of the existence or nonexistence of reciprocal rights of inheritance in Italy and as sections 259 and 259.1 of the Probate Code and the amendments thereto important here, merely fixed the burden of proving those rights on one or the other party and were thus procedural in nature we must be governed by the law as it exists today. That law now places the burden of establishing reciprocal rights of inheritance on appellant where it was at the time of death of deceased. As appellant failed to maintain that burden of proof and as no evidence was introduced tending to indicate the existence of reciprocal rights of inheritance in Italy respondent is entitled to the property of the estate.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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84 Cal.App.2d 728

ABBOT KINNEY CO. v. HARRAH et al.

Civ. 15904.

District Court of Appeal, Second District, Division 1, California.

April 6, 1948.

1. Corporations 🔑319(6)

In action by corporation against directors and others to recover for fraud, complaint alleging that defendants entered into a conspiracy to cheat and defraud corporation by having executive committee composed of defendant directors and another accept bonds on behalf of corporation at price considerably in excess of their actual market value, in settlement of rental obligations, stated a cause of action.

2. Conspiracy 🔑1

Elements of action for civil conspiracy are formation and operation of conspiracy and damage from acts in furtherance thereof, cause of action being damage suffered.

3. Corporations 🔑307, 313

President and directors of corporation occupy fiduciary and trust relationship thereto and may not assume position adverse to corporation.

4. Corporations 🔑312(3)

Transfers of corporate property by president and directors of corporation to themselves are voidable, and trust arises in favor of corporation as against an officer as to anything so received.

5. Corporations 🔑319(7)

In action by corporation against directors and others for damages from alleged fraudulent conspiracy through which bonds were accepted by executive committee composed of directors and another, on corporations' behalf, at price exceeding market value, in settlement of rental obligations, evidence that other defendants were informed of settlement, and that directors put plan into effect because each would personally benefit to substantial degree, sustained finding that conspiracy existed, that fraud was committed, and that other defendants participated.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by the Abbot Kinney Company against William Harrah, Margaret Harrah Schroter, John Harrah, Carleton Kinney, and the Venice Amusement Company and others to recover damages for fraud. Judgment for plaintiff, and the named defendants appeal.

Affirmed.

Harold B. Pool, of Los Angeles, for appellants.

Nicholas & Davis and M. Philip Davis, all of Los Angeles, for respondent.

YORK, Presiding Justice.

The corporate plaintiff recovered a judgment for $11,069.66 against defendants William Harrah, Margaret Harrah Schroter, John Harrah, Carleton Kinney and Venice Amusement Company in an action for damages arising out of an alleged fraudulent conspiracy perpetrated against the plaintiff by said defendants. The latter have perfected this appeal from such judgment.

It appears from the record herein, that on March 4, 1921, by an agreement in writing, respondent owner and operator of the Venice Pier leased to Paul D. Howse & Company a certain parcel of realty known as the Plaza Building for a term of 20 years at $500 per month; that on September 6, 1922, appellant John Harrah through assignment from Howse became one of the lessees under the original agreement; that on November 3, 1924, respondent and appellant Harrah (as well as others not parties to this action) modified and reaffirmed the original lease of March 4, 1921; that in 1937, appellants William Harrah and Margaret Harrah Schroter, son and daughter respectively of appellant John Harrah, became the owners of an interest in said lease and went into possession of the Plaza Building remaining there until the expiration of the lease in 1941.

It also appears that during the period when said William Harrah and Margaret Harrah Schroter occupied the Plaza Building as tenants of respondent they became indebted to the latter in the sum of $16,009.03 on account of unpaid rentals; that during the same period, appellant Carleton Kinney, as tenant of the Ship Cafe, became indebted to respondent for $1660.63 on account of rentals; and likewise, Robbin and Robbin, a copartnership, as tenants of respondent were indebted to it in the sum of $3937.87; that the Robbins were brothers-in-law of Louis M. Halper, a director of respondent corporation.

That many years prior to the time these accounts accrued, i. e., on April 1, 1931, respondent corporation issued its trust indenture securing $350,000 First Mortgage 7% Sinking Fund Gold Bonds due April 1, 1944, naming California Trust Company as Trustee, at which time all of the property of the corporate respondent, except a couple of small lots, was deeded to said trustee as security for the bonds. That on June 11, 1937, said trustee accelerated the maturity of the principal amount of the outstanding bonds and served notice of default upon respondent which recited, in part, as follows: "Now, therefore, California Trust Company by reason of the happening of said event of the default and by reason of said written request of the holders of more than twenty-five per cent in amount of said bonds now outstanding, has declared and does hereby declare the principal of all outstanding bonds of said issue to be due and payable immediately." That thereafter, in 1940, an executive committee, composed of appellant John Harrah, Carleton Kinney, and one Al Newton, was appointed by the board of directors of respondent and given authority to carry on the business of the corporation between meetings of the said board. This committee served continuously until December, 1944, when it was dissolved. In addition to being a member of the executive committee, Carleton Kinney was also a director and the president of respondent corporation from December, 1937, to December, 1944. Appellant John Harrah, at all times material to this action, was chairman of the executive committee, a member of the board of directors, and treasurer of said corporation, as well as acting agent for appellants William Harrah and Margaret Harrah Schroter in their transactions with the corporate respondent.

As of January, 1944, the overdue accounts, unpaid taxes and indebtedness of respondent exceeded $751,500, while its liquid assets did not exceed $50,000.

Early in January of 1944, Frank Williams (now deceased) who was the largest single holder of bonds of the corporation, urged appellant John Harrah to settle the unpaid rental account of the Plaza Building by turning in bonds of the corporation and thereby reduce the number of outstanding bonds and increase the security for the remaining bonds. At this time the bonds had a reasonable market value of $600 for each $1000 bond with all unpaid interest coupons attached.

On January 13, 1944, at a special meeting of the executive committee, at which only John Harrah and Carleton Kinney were present, Margaret Schroter offered

$10,000 of Abbot Kinney Co. bonds, including all unpaid coupons in settlement of Plaza Building account; Harry Robbins offered $2000 in same bonds for settlement of Robbins & Robbins account incurred prior to 1944, and Venice Amusement Company offered $1000 bond in settlement of Ship Cafe account to January 1, 1944. On motion, all of these bonds were accepted and the manager instructed to deliver them to California Trust Company for cancellation. The ten bonds turned in on account of the $16,009.03 unpaid rent of the Plaza Building were purchased for a total of $6000 for the sole purpose of turning them in to respondent corporation in settlement of this account. The two bonds turned in by the Robbins brothers in settlement of their unpaid rental of $3,937.87 were purchased for a total of $1500 for the sole purpose of turning them over to respondent for such indebtedness. Likewise, the one bond turned in by Carleton Kinney was purchased by him for the purpose of paying off his rental account in the sum of $1660.63. It was found by the court that at the time the settlement was made, appellants were financially responsible and able to pay the full amount of their respective indebtedness.

[1] Appellants contend that the complaint does not state facts sufficient to constitute a cause of action for fraudulent conspiracy for the reason that "there is not a single allegation in this complaint to show that any of the defendants were guilty of any *unlawful* act."

Paragraph VIII of the complaint alleges: "That some time prior to the 13th day of January, 1944, the exact date of which is unknown to plaintiff, but is known to defendants, the defendants herein entered into a conspiracy with each other to cheat and defraud plaintiff, Abbot Kinney Company, out of some of its assets by having said Executive Committee accept on behalf of Abbot Kinney Company, 7% Sinking Fund Gold Bonds of Abbot Kinney Company, at a price considerably in excess of their actual market value, in settlement and discharge of rental obligations owed and accruing to plaintiff, Abbot Kinney Company, by the defendants."

As heretofore stated, appellants John Harrah and Carleton Kinney were members of said Executive Committee.

Paragraph XII of said complaint then alleges: "That sometime prior to the 13th day of January, 1944, in furtherance of the aforesaid conspiracy and as a part thereof, the defendants William Harrah and Margaret Harrah Schroter purchased ten $1000 7% Sinking Fund Gold Bonds of plaintiff corporation, for the total purchase price of $6,000 on the open market. That on or about the 13th day of January, 1944, the defendants John Harrah and Carleton Kinney, at a meeting of the Executive Committee of plaintiff corporation, in furtherance of the aforesaid conspiracy and as a part thereof, voted and agreed to accept an offer made by Margaret Harrah Schroter to assign, set over and transfer to plaintiff * * * the said ten $1000 7% Sinking Fund Gold Bonds as payment in full for the said rental indebtedness to the plaintiff corporation in the sum of $16,009.03, as aforesaid. That on or about said 13th day of January, 1944, in furtherance of the aforesaid conspiracy and as a part thereof, and after authorization so to do had been given by the Executive Committee as aforesaid ten $1000 7% Sinking Fund Gold Bonds of Abbot Kinney Company were delivered to said Abbot Kinney Company and said indebtedness for rental in the sum of $16,009.03 was marked fully paid on the books of account of plaintiff corporation. That all of the defendants knew that the defendants John Harrah and Carleton Kinney were members of the Executive Committee of Abbot Kinney Company and were members of the Board of Directors of said corporation and that said transaction was fraudulent and in violation of the fiduciary obligations which defendants John Harrah and Carleton Kinney owed to the plaintiff corporation. That defendants John Harrah and Carleton Kinney knew that the said ten bonds had been purchased by the defendant Margaret Harrah Schroter and William Harrah for the sum of $6,000.00.

"XIII. That at the time plaintiff corporation accepted said ten $1000 7% Sinking Fund Gold Bonds of plaintiff * * * in payment of said rental indebtedness of $16,009.03, the defendants owing the same were financially able to pay the full amount of said indebtedness in the sum of $16,009.03 to plaintiff and would have paid the same to plaintiff * * * if it had not been for the fraudulent acts and conspiracy of defendants, as aforesaid.

"XIV: That said ten Abbot Kinney Company bonds so turned over to plaintiff by defendants, other than Carleton Kinney, in settlement of said indebtedness of $16,009.03, as aforesaid, did not have a market value in excess of $6,000 at the time of said transaction and could have been purchased by plaintiff at said price of $6000, which facts were well known to all of the defendants herein.

"XV. That as a direct result of the fraudulent settlement of the above claim by defendants and of the conspiracy above set forth, plaintiff was damaged in the sum of $10,009.03."

The complaint then alleges as a separate cause of action the indebtedness of Carleton Kinney and the Venice Amusement Company for rental of the Ship Cafe in the amount of $1660.63; the offer of said Carleton Kinney to turn over one $1000 bond in payment thereof, the acceptance by John Harrah and Carleton Kinney, as members of the Executive Committee, of such offer in payment of such rental resulting in damage to plaintiff in the sum of $1060.63, all in furtherance of the conspiracy to defraud the plaintiff, and in violation of the fiduciary obligation which said John Harrah and Carleton Kinney owed to plaintiff corporation.

There is no escape from the conclusion that the complaint states a cause of action.

[2] As was stated in Mox, Incorporated, v. Woods, 202 Cal. 675, 677, 262 P. 302, 303: "The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. The cause of action is the damage suffered. 'It is a general and well-settled principle of law that, where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action. Herron v. Hughes, 25 Cal. 555; Davitt v. [American] Bakers' Union, 124 Cal. 99, 56 P. 775; Dowdell v. Carpy, 129 Cal. 168, 61 P. 948; Menner v. Slater, 148 Cal. 284, 83 P. 35. In such an action, the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tort-feasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity. Cohen v. Nathaniel Fisher & Co., 135 App.Div. 238, 120 N.Y.S. 546; White v. White, 132 Wis. 121, 111 N.W. 1116; Miller v. John, 208 Ill. 173, 70 N.E. 27. A plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or cooperated in inflicting a wrong upon him. Herron v. Hughes, supra; More v. Finger, 128 Cal. 313, 60 P. 933; Nevin v. Gary, 12 Cal.App. 1, 106 P. 422.' Revert v. Hesse, 184 Cal. 295, 301, 193 P. 943, 946. See, also, Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann.Cas.1915B, 1011; 5 Cal.Jur., p. 528, §§ 29–31. The advantage gained in charging a conspiracy is that the act of one during the conspiracy is the act of all if done in furtherance thereof, and thus defendants may be held liable who in fact committed no overt act whatsoever and gained no benefit therefrom. Revert v. Hesse, supra." See, also, Neblett v. Elliott, 46 Cal.App.2d 294, 302, 115 P.2d 872.

[3, 4] Appellants also urge that the evidence does not support the finding that a conspiracy ever existed or that any fraud was committed; and even assuming that a conspiracy did exist, William Harrah and Margaret Harrah Schroter did not participate therein and knew nothing about it.

It is conceded that both John Harrah and Carelton Kinney were fiduciaries of respondent corporation at all times material to this action. Carleton Kinney was its president, a director and member of its executive committee; John Harrah was its treasurer, a director and chairman of its executive committee. It was held in Lowe v. Copeland, 125 Cal.App. 315, at page 332, 13 P.2d 522, that the president and directors of a corporation occupy a fiduciary and trust relationship thereto and they are not permitted to assume a position adverse to the corporation. Transfers of corporate property by such officers to themselves are voidable, and a trust arises in favor of the corporation as against an officer as to anything so received.

[5] With respect to the participation of William Harrah and Margaret Harrah Schroter in the alleged fraudulent transaction, their father, appellant John Harrah, testified as follows:

"Q. Prior to the meeting of the executive committee on January 13, 1944, had you had a discussion or conference with any of the defendants herein regarding the settlement of any of these accounts? * * * A. Yes.

"Q. With whom had you discussed the matter? A. I had talked to William Harrah about it and I had talked to Margaret Schroter about it.

"Q. And what was the occasion of that discussion? A. The occasion was that Frank Williams told me he had sold his horses which he had been devoting his time to, racing horses, and he wanted to spend more time in connection with the Kinney Company and he would like to get those two long-standing rent accounts secured by one of the Robbins and the other of the Plaza Building Company and he talked to me about it, so we had two or three discussions and then I called up Bill (Harrah) and talked to him about it and then I talked to Frank and told him that Bill—to get hold of the loose bonds—Frank wanted loose bonds turned in and if he could get hold of loose bonds he would get Margaret to turn in ten bonds in settlement of the account, that he could not turn them in himself by reason of what we called the six-party agreement on the bonds whereby he had agreed with the parties to that agreement not to buy any bonds. But he didn't know whether he could do that or not, but he would do that if he could do it, so Frank said it was agreeable and then I talked to Margaret about it and all I told her was that it looked like the old rent account could be settled that way. No, first I talked to—yes, speaking of talking to the defendants, I talked to Margaret about it.

"Q. Yes. A. And I told her Frank wanted it done and Bill wanted to do it and she would have to be the one to do it because Bill couldn't on account of the contract he had entered into and she said that was all right, so she wrote out some kind of a rental statement, or rather I wrote it out and she signed it, directed to the Kinney Company which said she was turning in ten bonds in settlement of the Plaza Building Company account."

Appellants John Harrah and Carleton Kinney were obligated to protect the best interests of the respondent corporation, and instead of closely scrutinizing the suggestion of Frank Williams, who was the largest holder of Abbot Kinney bonds which were long in default and upon which the statute of limitations had run, and to whose advantage it was to arrange for the retirement of the bonds not covered by the trust indenture—said apppellants Harrah and Kinney embraced such suggestion and proceeded to put it into effect because each would personally benefit to a substantial degree thereby.

The record herein is replete with evidence of appellants' fraudulent dealings and fully justifies the judgment of the trial court.

For the reasons stated the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

84 Cal.App.2d 765

OLMOS v. SOUTHERN PAC. CO. et al.

Civ. 16304.

District Court of Appeal, Second District, Division 2, California.

April 8, 1948.

1. New trial ⚿10

A litigant waives matters constituting grounds for new trial which come to his attention during course of trial or of which he should by exercise of reasonable diligence have acquired knowledge, where he fails to make objection at the time of occurrence and seek to have defect cured. Civ.Code, § 3516.

2. New trial ⚿26

In railroad crossing collision action, plaintiff waived right to urge on motion for new trial fact that it was prejudicial irregularity to hold trial in court house located less than 200 feet from tracks of defendant railroad where plaintiff's attorney, who had offices in court house building and knew of noise made by passing trains, requested that case be tried at that place and failed to object during trial to either question asked of plaintiff relative to noise made by passing trains or to argument of railroad's counsel to jury in which he referred to noise of trains in vicinity of court room. Civ.Code, § 3516.

◆

Appeal from Superior Court, Los Angeles County; Frederick F. Houser, Judge.

Personal injury action by George Olmos against the Southern Pacific Company and others. A verdict was rendered in favor of defendants. From an order granting plaintiff's motion for a new trial the defendants appeal.

Reversed.

C. W. Cornell, O. O. Collins, John R. Allport and Randolph Karr, all of Los Angeles, for appellants.

Arlo E. Rickett, Jr., of Pomona, for respondent.

McCOMB, Justice.

From an order granting plaintiff's motion for a new trial in an action to recover damages for personal injuries resulting from a collision between an automobile operated by plaintiff and a passenger train of corporate defendant, defendants appeal.

These are the undisputed facts:

Plaintiff's attorney, whose office was located in the courthouse building in Pomona, which building is situated within 200 feet of the railroad tracks upon which trains of corporate defendant are operated, filed an action for personal injuries against corporate defendant arising from a collision between an automobile operated by plaintiff and one of said defendant's trains.

At the time of the filing of the complaint, plaintiff's attorney requested[1] that the action be transferred to the Pomona department of the superior court for trial. Thereafter the case was called for trial before a jury in the courthouse building of the superior court located in the city of Pomona.

The accident occurred during a fog, and among other questions involved was the amount of noise arising from the operation of corporate defendant's trains. Frequently during the trial trains of said defendant passed on the adjacent track, and on several occasions it was necessary due to the noise to recess the trial for several minutes until the trains had passed.

During the cross-examination of plaintiff he was asked and answered without objection the following question:

"Q. Have you been able to hear these trains go by today while we were on trial? A. Yes, I heard them."

Again during the course of the argument to the jury, counsel for defendant made reference to the noise of the trains in the vicinity of the courtroom. No objection was made to such reference in the argument. Thereafter a verdict was rendered in favor of defendants.

Plaintiff later made a motion for a new trial upon the following grounds: (1) irregularity in the proceedings, (2) insufficiency of the evidence, and (3) that the verdict was contrary to the law and facts in that there was no evidence to show that plaintiff was guilty of contributory negligence. The motion was granted as to the first ground[2] and denied as to the second and third grounds.

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[1] At the time of filing the complaint, plaintiff's attorney filed a certificate for assignment of the action which read in part as follows: "This is to certify that the above entitled action is entitled to be transferred to the Pomona 'A' Department of the Superior Court of Los Angeles County, * * *."

This is the sole question presented for our determination:

By failing to object to the alleged irregularity, that is, (a) asking plaintiff if he were not able to hear the trains as they passed at the time of the trial, and (b) by defendant's counsel's alluding in his argument to the jury to the noise made by the the passing trains, did plaintiff waive the right to urge such alleged error as an irregularity which entitled him to a new trial?

[1] This question must be answered in the affirmative, and is governed by this rule: A party litigant is deemed to have waived matters constituting grounds for a new trial which come to his attention during the course of the trial, or of which he should by the exercise of reasonable diligence have acquired knowledge, where he fails to make objection at the time of the occurrence and seek to have the defect cured. (Kershaw v. Tilbury, 214 Cal. 679, 690 et seq., 8 P.2d 109; Sheehan v. Hammond, 2 Cal.App. 371, 374, 84 P. 340; Zibbell v. Southern Pacific Co., 160 Cal. 237, 253, 116 P. 513; Sec. 3516, Civil Code.[3] See also 39 Am.Jur., 1942, New Trial, p. 39, sec. 14.)

[2] The foregoing rule is applicable to the facts in the instant case, and it is evident that plaintiff has waived the right to urge on his motion for a new trial the fact that it was a prejudicial irregularity to hold the trial in the Pomona courthouse which was located less than 200 feet from the railroad tracks of the corporate defendant, for the reason that his attorney, having his offices in the courthouse building, obviously knew of the noise that the passing

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[2] The trial court in granting the motion for a new trial filed the following memorandum:

"Memorandum Ruling Upon Motion by Plaintiff for New Trial.

"Motion for new trial is granted on the following ground:

"Irregularity in the proceedings of the court and an adverse party by which the plaintiff was prevented from having a fair trial.

"This ground for new trial was supported by affidavit of plaintiff's attorney.

"This court is of the definite opinion, after very careful consideration of the matter that no personal injury case where the defendant is a railroad company can be given a fair trial in the Pomona Department of the Superior Court. This judge presided in the Pomona Department during the month of June, 1947, and would estimate that at least 30 minutes is lost on each trial day in said department by reason of the necessity of recessing the court 10 or 15 times each day, for several minute intervals, in order to permit trains of both the Southern Pacific Company and the Union Pacific to pass by the courtroom which is located on the top floor of a six story building within about 200 feet of the railroad tracks and on the side of the building facing said tracks.

"The unfairness of conducting the trial in the Pomona Department is aggravated in this particular case by the following facts:

"(1) Counsel for defendant when cross-examining plaintiff and again in his closing argument to the jury alluded to the noise made by the passing trains.

"(2) In the court's opinion the defendant was clearly guilty of negligence and the only real issue for the jury to determine was that of contributory negligence. In reaching its verdict as to contributory negligence the noise or lack of noise made by the approaching train was a very important factor. The engineer testified that the train was coasting on a down grade ('I didn't use any power at all—it was drifting') in an extremely heavy fog, where the visibility was around thirty-five to forty feet, at a speed of approximately sixty miles per hour. (F. F. H.)

"Unfortunately the court did not think of the unfairness of the place of trial until the plaintiff made his motion for a new trial which of course was after the jury rendered its verdict.

"The court is definitely of the opinion that the place of trial prevented the plaintiff from having a fair trial and therefore the motion of plaintiff for a new trial is granted."

[3] Section 3516 of the Civil Code reads thus: "Acquiescence in error takes away the right of objecting to it."

trains made; that in spite of this knowledge he requested that the case be tried in Pomona, and failed to object during the trial to either the question asked of plaintiff relative to the noise made by the passing trains or to the argument of defendant's counsel to the jury in which he referred to them.

The order is reversed.

MOORE, P. J., and WILSON, J., concur.

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84 Cal.App.2d 736

ANDERSON v. BADGER.

Civ. 15963.

District Court of Appeal, Second District, Division 3, California.

April 7, 1948.

Hearing Denied June 3, 1948.

1. Master and servant ⇨1
Principal and agent ⇨1

If one who is to perform service is subject to control as to manner of performance by one for whom service is to be rendered, he is an "employee" or "agent".

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Employee".

2. Master and servant ⇨5

If one who is to perform service is not subject to control as to manner of performance by one for whom service is to be rendered but is engaged to produce a certain result by means and manner of his own choosing, he is an "independent contractor."

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

3. Master and servant ⇨1

The right of discharge, although not necessarily controlling, is an important factor indentifying master and servant relationship.

4. Principal and agent ⇨8

If obligations assumed render one an independent contractor, that relationship is not changed to one of agency by his being designated in the contract as an agent.

5. Principal and agent ⇨8

A statement in a contract that one party is thereby appointed agent of the other will be disregarded if the contract as a whole shows that it was not a contract of agency but a contract whereby one agreed to sell certain articles to the other at a stated price.

6. Contracts ⇨177

Whether parties to a contract have created a particular relationship depends on their actual intention as determined from the writing in accordance with ordinary rules governing interpretation of contracts.

7. Sales ⇨7

If general intent and purpose was to bind respective parties as they would be bound by a purchase and sales agreement, a limitation of defendant's obligation to that of a mere agent would be repugnant to general purpose and intent and could be disregarded. Civ.Code, § 1652.

8. Principal and agent ⇨48

Where an agent has bound himself to accomplish a certain result for his principal, the agent must perform his agreement.

9. Principal and agent ⇨48

Where defendant advertised that he had a particular machine for sale and represented to plaintiff that he was in a position to furnish it, entire matter of acquiring machine was in defendant's hands, and plaintiff executed a purchase order purporting to authorize defendant as agent to purchase the machine for a specified sum, the agreement was one whereby defendant obligated himself unconditionally to furnish specified machine for price stated and was obligated to return amount paid where machine furnished did not meet specifications. Civ.Code, §§ 1647, 1652.

10. Contracts ⇨189

The word "purchase" implies acquisition of title, and defendant's undertaking to purchase a machine for plaintiff obligated defendant to obtain title to it.

See Words and Phrases, Permanent Edition, for all other definitions of "Purchase".

11. Money received ⚷18(3)

In action to recover amount paid on account of purchase of a machine, evidence sustained determination that machine delivered did not meet specifications of plaintiff's order.

12. Contracts ⚷189

Where defendant's contract obligated him unconditionally to furnish a specified machine for a stated price, the fact that agreement provided that all representations and guaranties in connection with order were those of original supplier, and that defendant assumed no further responsibility other than to properly apply all money received, did not relieve defendant from liability where machine delivered did not meet specifications of order.

13. Trial ⚷395(1)

Findings should be prepared with great care and accuracy in order to establish the true factual basis for the court's decision.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Ecton Anderson, doing business under the fictitious name of Anderson Precision Shop, against Richard Gorham Badger, doing business under the fictitious name of Badger & Company, to recover for the amount paid on account of purchase of a machine which defendant failed to deliver to plaintiff, wherein defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Affirmed.

A. W. Brunton, of Los Angeles, for appellant.

Henry C. Rohr, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by defendant from a judgment in the amount of $2,250, which sum plaintiff had paid to defendant on account of the purchase of a machine which was not furnished or delivered to plaintiff. A machine was shipped to plaintiff by W. E. Brandt, of Pittsburgh, but it did not meet the specifications of plaintiff's order. It was rejected by plaintiff and was sold for a nominal sum to meet shipping charges. Defendant had a cross-complaint, to be referred to later, on which judgment went against him.

Two questions were presented to the trial court, (1) was defendant the vendor of the machine or only plaintiff's agent for the purchase of it from a third party, and (2) did defendant, as vendor or as agent, fail to perform his duty to furnish the machine according to plaintiff's order.

Plaintiff's purchase order, hereinafter referred to as the agreement, contained the following controlling provisions: "To Badger & Co. * * * Dear Sirs: This is your authority to purchase for us as our agents in this transaction the equipment described below subject to instructions, specifications and conditions as noted. * * * 1 3" New Britan, 6 spindle, originally chucker changed over for bar operation, Rebuilt in 1942. Machine in Good Condition. $4250.00." Handwritten on the printed form was the following: "Money deposit on Davenport may be applied on this order—whichever order accepted by original supplier first." "It is understood that all representations and guarantees in connection with this order, are those of the original supplier. Badger § Co. assumes no further responsibility other than to properly apply all monies received. It is understood that Badger & Co. will purchase the foregoing equipment from the original supplier at a lesser amount than the purchase price herein offered and that said difference in cost and the foregoing offered price is to be retained by Badger & Co. for services rendered in locating and purchasing said equipment. We further agree that if the equipment herein described is not taken by us according to this offer, the entire balance shall immediately become due and payable together with any attorney fees or legal expense which may be incurred in the collection thereof. In addition, shipping costs and any State and Federal taxes involved, are to be paid direct by Anderson Precision Shop. It is specifically understood that the balance due is to be paid upon notification of arrival of the bill of lading, or not later than the date of arrival of the shipment at Los Angeles, Calif. This order is not subject to cancellation or refund except by agreement with Badger & Co. and the original supplier." The contract also contains the following provision: "All machines ordered on this form in Rebuilt Condition carry a 30 day guarantee from date of shipment from the original supplier, as per OPA Rebuilt & Guaranteed regulations. All prices are made subject to the regulations of the Price Stabilization Divn. of the Advisory Commission to the Council of National Defense. Should any prices be made that exceed the ceiling price so established by this Division, through misunderstanding or error, any excess charge will be gladly refunded upon proper representation." The explanation of the reference to the money deposited on the Davenport machine is that plaintiff had ordered such a machine through defendant and had paid on account of the purchase $2,250. The machine was never delivered and although defendant had forwarded a part of the purchase price of the Davenport machine it had been returned to him at the time the New Britain machine was ordered. Plaintiff alleged in his amended complaint that the agreement did not express the true intent of the parties; that he was misled to believe that he was dealing with defendant as vendor of the machine and was induced by defendant's fraud to sign the agreement without reading it. The findings were that the agreement was not induced by fraud of defendant. Therefore, the writing must be taken as expressing the full agreement of the parties.

The court made findings to the effect that defendant on November 5, 1944, offered for sale one 3″ New Britan 6 spindle automatic machine for $4,500, and held out to plaintiff that he was in a position to supply said automatic machine capacitated to handle 3″ stock material; that defendant offered said machine for sale for $4,250, the same being originally a chucker machine changed over for bar operation; that plaintiff understood that he was buying an automatic machine that would handle 3″ bar stock, and that plaintiff and defendant both had in mind such a machine. It was found that the machine shipped was not an automatic machine capacitated to handle 3″ stock material, and that nothing could be done to make it handle 3″ stock bars; that upon discovering these facts plaintiff promptly rescinded his purchase. The defense relied upon is that defendant merely undertook to act as plaintiff's agent, that he ordered the machine specified by plaintiff from W. E. Brandt, of Pittsburgh, thereby fulfilling his obligation as agent, that he was charged with no negligence, was not found to have been negligent, and in fact was not negligent. This defense is based upon defendant's interpretation of the agreement as one of mere agency and in no respect an agreement upon defendant's part to furnish the specified machine.

The answer to the question whether defendant was an independent contractor or only plaintiff's special agent is determinative as to defendant's liability if he is found to have been the vendor of the machine, since he did not deliver the machine plaintiff ordered. If the agreement be interpreted as effective to appoint defendant as agent, the question would still remain whether he obligated himself to acquire for plaintiff and to deliver the particular machine ordered by plaintiff. If he assumed such an obligation it is immaterial whether he did so as an independent contractor or pursuant to his appointment as agent. The obligations of an agent, of course, are measured, by the terms of his agreement. One of the conclusions of law was that defendant breached his agreement and that plaintiff was entitled to judgment "whether the contractor is deemed to be one between a principal and agent, or between vendor and vendee, as the same rules of contract apply."

The trial court correctly interpreted the agreement as one that required defendant to acquire and deliver the machine ordered by plaintiff. This conclusion is sustainable under either of two theories of interpretation. The first is that no relationship of principal and agent was created by the agreement. This theory has support in the features of the relationship of principal and agent which distinguish it from that created by the undertakings of an independent contractor.

[1-3] If the one who is to perform the service is subject to control as to the manner of performance by the one for whom the service is rendered he is an employee, or agent, whereas, if he is not subject to control but is engaged to produce a certain result by means and in a manner of his own choosing he is an independent contractor. The right of discharge, although not necessarily controlling is an important factor in identifying the relationship. Rest., Agency, sec. 1(1, 2), sec. 2(1, 3); Burlingham v. Gray, 22 Cal.2d 87, 94, 137 P.2d 9; Brooks v. Johnson, 22 Cal.App.2d 618, 621, 72 P.2d 194; Thompson v. Robinson-Roberts Co., 13 Cal.App.2d 166, 168, 56 P.2d 599; Barton v. Studebaker Corp. of America, 46 Cal.App. 707, 715, 189 P. 1025; Press Pub. Co. v. Industrial Acc. Comm. 190 Cal. 114, 120, 210 P. 820. Plaintiff had no right of control over the actions of defendant. The understanding was that defendant was to accomplish a certain purpose or result, he alone to choose and follow the means by which it would be accomplished. This was the obligation of an independent contractor. Furthermore, the agreement did not reserve to plaintiff the right to discharge defendant as his representative. Upon the contrary, he was firmly bound to accept the machine and to pay for it when it was delivered, and payment could be enforced by defendant. Plaintiff's agreement to purchase could not be terminated without the consent of defendant and the original supplier from whom defendant was acquiring the machine. Hence, the essentials of the relationship of principal and agent were lacking.

[4-6] If the obligations assumed render one an independent contractor, that relationship is not changed to one of agency by his being designated in the contract as an agent. A statement in a contract that one of the parties is thereby appointed agent of the other will be disregarded if the contract as a whole shows that it was not a contract of agency but a contract whereby one party agreed to sell certain articles to the other at a stated price. Bessing v. Prince, 52 Cal.App. 190, 198 P. 422. A statement in an agreement that one party is to act in a transaction solely as the agent of the other will be disregarded if it is shown that the assumed relationship was not, in fact, one of agency but that the one ostensibly appointed acted throughout as the agent of a third person. State Finance Co. v. Smith, 44 Cal.App.2d 688, 112 P.2d 901. Whether the parties to a contract have created a particular relationship depends upon their actual intention as determined from the writing in accordance with the ordinary rules governing the interpretation of contracts. Universal Sales Corp. v. Calif. Press Mfg. Co., 20 Cal.2d 751, 765, 128 P.2d 665. The trial court would have been justified in disregarding the purported appointment of defendant as agent, if it had been found necessary to do so in order to give effect to the intentions of the parties.

[7] A second reason supporting the trial court's interpretation is that if effect should be given to the purported appointment of defendant as agent it would have to be one which was so limited as to be consistent with and subordinate to the general intent and purposes of the whole contract, under the rule stated by section 1652 of the Civil Code, reading as follows: "Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." If the relationship was purely one of principal and agent, defendant would have been obligated only to use ordinary care in the performance of his duties, whereas, if his agreement was to furnish the machine as ordered, failure to fulfill his agreement would not be excusable on the ground that he had been free from neglect. If, therefore, the general intent and purpose was to bind the respective parties as they would be bound by a purchase and sale agreement, a limitation of defendant's obligation to that of a mere agent would obviously be repugnant to the general intent and purpose.

[8] It is not impossible to give some effect to the purported appointment of de-

fendant as agent. If, for instance, he had acquired the machine for himself and had refused to deliver it to plaintiff, the court might under proper circumstances have held that he acquired it as agent and for the use and benefit of plaintiff. But the mere fact that under some circumstances the relationship of principal and agent might have been recognized furnishes no reason for giving such effect to the agency feature as would be destructive of the substance of the agreement. Furthermore, when an agent has bound himself to accomplish a certain result for his principal, he must perform his agreement. There is no room for doubt as to the law once it is established that the agent has bound himself to do a specific thing. Elementary rules are found in the Restatement, Agency, as "the existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties interpreted in the light of the circumstances under which it is made." (Sec. 376.) "A person who makes a contract with another to perform services as an agent for him is subject to a duty to act in accordance with his promise." (Sec. 377.) "Also the agent may warrant that his undertakings will be successful or that he will render service which, irrespective of the quality of its performance, will be satisfactory to the employer. In such cases there is a breach of contractual duty or a failure to perform a condition by the agent if he fails to accomplish what he agreed would be achieved." (Sec. 379, com. a.) See, also, section 400: "An agent who commits a breach of his contract with his principal is subject to liability to the principal in accordance with the principles stated in the Restatement of Contracts" and comments a and b with respect to the agent's liability: "There are no rules which are peculiar to agency * * * thus if an agent employed to purchase goods from a third person for the principal, fails to purchase them, thereby breaking his contract with the principal the agent is subject to liability to the principal for the value of the contract which he should have obtained."

[9] The interpretation given the agreement by the trial court is borne out by a consideration of the circumstances under which it was made and the matter to which it related (Civ.Code, sec. 1647.) Defendant advertised that he had a particular machine for sale, and, as found by the trial court, represented to plaintiff that he was in a position to furnish it. The entire matter of acquiring the machine was in the hands of defendant. There was nothing that plaintiff was required to or could do about it. Plaintiff could not have bound himself more firmly by the agreement if defendant had then had title to the machine.

[10] Defendant's undertaking to *purchase* the machine for plaintiff obligated him to buy it, acquire it, obtain title to it. This is the sense in which the verb is commonly used as defined by the lexicographers and the courts (51 C.J. 93; the word "purchase" implies acquisition of title, Greer v. Blancher, 40 Cal. 194; Marsh v. Lott, 8 Cal.App. 384, 391, 97 P. 163; People v. Cockrill, 62 Cal.App. 22, 33, 216 P. 78; People v. Superior Court, 10 Cal.2d 288, 294, 73 P.2d 1221; Reiter v. Anderson, 87 Cal.App. 642, 648, 650, 262 P. 415; see, "purchase"—["acquisition"] 35 Words and Phrases, Perm. Ed., page 476). It is clearly the sense in which it was used by the parties. Therefore, the court properly construed the agreement as one by which defendant obligated himself unconditionally to furnish a specified machine for the price stated.

[11] The sole remaining inquiry is whether defendant fulfilled his obligation. It is undisputed that defendant placed with Brandt an order for the machine as described in his agreement with plaintiff, and that he paid the purchase price asked by Brandt of $3,500, using $2,250 which he had received from plaintiff and $1,250 of his own. It is also undisputed that plaintiff and defendant inspected the machine upon its arrival in Los Angeles, and that plaintiff promptly refused to accept it because it did not meet his specifications.

A 3″ 6 spindle bar machine was described by plaintiff as one that would take three-inch bar material in each of the 6 spindles and make the bar stock into parts automatically, whereas, a chucking machine generally has three jaw chucks on it which are usually opened and closed by hand, "to chuck a piece on the surface." It is clear from the testimony of plaintiff that he expected to get an automatic machine that would handle three-inch bar stock and that defendant so understood it. Plaintiff testified that he exhibited to defendant the fuse body for an ordnance shell which he was manufacturing from round bar stock of 2⁹⁄₁₆ inches diameter. From this evidence the court could reasonably have concluded that the parties understood the description in the agreement to mean that the machine would take bar stock of three-inch diameter.

The evidence established without conflict that the machine was originally a chucker, or hand-operated machine, that some work had been done to change it over to a bar machine, that this work had not been completed before the machine was shipped, and that it could not be changed into a bar machine that would machine a bar of more than one inch diameter, for a length of five inches in a single operation. Brandt evidently did not have a machine that would meet the specifications of the order that was placed with him. The machine that he was offering for sale did not meet the specifications of the order as plaintiff and defendant understood them. The machine had not been fully changed over from a chucker to a bar machine. It would not handle, and could not be made to handle, three-inch stock.

Upon these facts, no purchase of a machine was accomplished. Brandt did not deliver the machine that defendant ordered and defendant did not order or accept the machine that Brandt shipped to plaintiff.

[12] Defendant quotes the following from the contract: "It is understood that all representations and quarantees in connection with this order, are those of the original supplier. Badger & Co. assumes no further responsibility other than to properly apply all monies received," contending that he was required only to place the order and that Brandt had the sole responsibility to furnish plaintiff the machine as ordered. Such an interpretation of this provision is untenable, in view of what we have said.

By his cross-complaint defendant sought recovery of $1,250, which he had paid in addition to the money provided by plaintiff, and also $750 as lost profits and $250 attorney's fees. For the reasons we have stated, he was not entitled to recover on the cross-complaint.

[13] This appears to us to be an appropriate occasion for some observations as to the matter of findings. The court found all of the allegations of defendant's answer to plaintiff's first amended complaint to be untrue, and all the allegations of plaintiff's answer to the cross-complaint to be true. Our analysis of these pleadings involved a considerable waste of time and it disclosed that the court thereby found to be untrue numerous allegations of facts which were admitted by the pleadings and others which were established by other admissions of the parties and by uncontradicted evidence, and also found many facts as to the terms of the agreement which were directly contrary to its clear provisions. We are able to disregard certain of these unfounded and obviously incorrect findings because they are in conflict with admitted facts, and others because they are not controlling as to the questions involved on the appeal. The court has been unduly burdened with the task of analyzing and reconciling the conflicting findings, and in arriving at the conclusion that, considered with the pleadings, they furnish support for the judgment. This is not the first time we have had occasion to say that findings should be prepared with great care and accuracy in order to establish the true factual basis for the court's decision. It happens with great frequency that broad, general findings do not speak the truth. The burden of the trial court, and of the reviewing court as well, would be considerably lightened if attorneys generally would become more aware of their duty in the preparation of findings. It is a real responsibility and in some instances the most important one connected with the trial.

The judgment is affirmed.

WOOD J., and VALLEE, Justice pro tem., concur.

85 Cal.App.2d 67

CENTRAL BUSINESS BUREAU v. DEER CREEK TUNGSTEN MINE et al. (ROCKWELL, Third-Party Claimant and Respondent).

Civ. 3711.

District Court of Appeal, Fourth District, California.

April 16, 1948.

Rehearing Denied May 6, 1948.

Hearing Denied June 10, 1948.

1. Judgment ⚷363

Where notice of time and place of hearing on petition of third-party claimant to automobile on which judgment creditor had levied execution was duly served, judgment creditor's failure to appear at hearing was deliberate, and judgment creditors subsequently and deliberately released automobile from levy of execution, refusal to vacate judgment for third-party claimant on ground of mistake, inadvertence, surprise or excusable neglect was not an abuse of discretion. Code Civil Proc. § 473.

2. Execution ⚷193

Issues presented by third-party claim to automobile on which judgment creditor had levied execution were not moot at time of rendition of judgment for claimant, notwithstanding judgment creditor had instructed sheriff to release automobile, where automobile was not released until two days after rendition of judgment.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Central Business Bureau against Deer Creek Tungsten Mine and others wherein Mabel MacFerran Rockwell filed a third-party claim to automobile on which execution had been levied. From an order refusing to vacate a prior order determining that the third-party claimant was the owner and entitled to possession of the automobile, the plaintiff appeals.

Affirmed.

Sherrill Halbert, of Modesto, for appellant.

George I. Devor, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from an order refusing to vacate a prior order or judgment of the Superior Court.

John E. Wright is an individual who was doing business under the name of Central Business Bureau. At all material times Evelyn G. Hall was manager of Central Business Bureau.

Central Business Bureau was a judgment creditor of Deer Creek Tungsten Mines, Blake Wilson, David Bushnell and William Morris. There was an unpaid balance of $310.67 on this judgment.

On September 16, 1946, execution on this judgment was issued and placed in the hands of the Sheriff of Los Angeles County with instructions to levy on the community interest of David Bushnell in a certain 1941 Mercury sedan. The levy was made on October 1, 1946. About October 8, 1946, Mabel MacFerran Rockwell served her third party claim to the automobile and plaintiff gave an undertaking to the Sheriff to hold the property.

About October 18, 1946, Mabel MacFerran Rockwell filed her petition for a hearing on her third party claim praying that she be decreed the owner of and entitled to the possession of the automobile. This petition was regularly set for hearing on the 4th day of November, 1946, and due notice of the hearing was served by mail on October 19, 1946.

According to the order and the notices given a hearing was had on November 4, 1946, on the petition of Mabel MacFerran Rockwell to determine the third party claim to the automobile, and no one appearing to contest her claim it was adjudged that she was the owner and entitled to the possession of the automobile. It does not appear that notice of this judgment was served on plaintiff, it having made no appearance at the hearing.

Under date of April 22, 1947, plaintiff gave notice that on the 28th day of April, 1947, it would move to vacate the order of November 4, 1946, on the ground "that said default judgment was taken against plaintiff through plaintiff's mistake, inadvertence, surprise and excusable neglect." This motion was denied by a formal order dated April 30, 1947, filed May 3rd, 1947, and this appeal followed.

The notice of motion to vacate the judgment of November 4, 1946, is supported by an affidavit of merits by John E. Wright which is in the usual form, and affidavits by the attorney for plaintiff, and one by Evelyn G. Hall. The reasons for asking that the judgment of November 4, 1946, be set aside, appearing in the affidavit of the attorney, seem to be the filing of a petition in bankruptcy by David Bushnell and "that by reason of the fact that said third party claim is based upon a claim of ownership and right to possession, your affiant verily believes that said Mabel MacFerran Rockwell was not entitled to have said judgment entered as aforesaid, and affiant further verily believes that said judgment should not have been entered for the reason that the issues were at the time of the entry of said judgment moot." It is further stated in this affidavit that plaintiff was not served with notice of the judgment and learned of its rendition by accident. Apparently this was given as an explanation of the delay in filing the motion to vacate and not as an added reason why the judgment should be vacated.

[1] The relief asked for must come under the provision of section 473 of the Code of Civil Procedure. It is admitted that under the facts before us the order refusing to vacate the judgment of November 4, 1946, cannot be reversed except on a showing of an abuse of discretion by the trial court. We can find no such abuse of discretion here, nor is there any sound reason shown for vacating the judgment because of the "mistake, inadvertence, surprise or excusable neglect" (Sec. 473 Code Civ.Proc.) of plaintiff or its attorney.

There was due service of the notice of the time and place of the hearing of the petition for hearing on the third party claim. Plaintiff does not deny such service.

Mrs. Hall stated in her affidavit "that on or about the 19th day of October, 1946, the defendant, *the defendant,* David Bushnell, also known as David Sherman Bushnell, filed a voluntary petition in bankruptcy; that notice of the filing of said petition in bankruptcy came to the attention of plaintiff on or about October 24th, 1946; that upon being advised of the filing of the petition in bankruptcy by the defendant, David Bushnell, also known as David Sherman Bushnell, your affiant communicated with the attorney for plaintiff and asked him for advice concerning the then existing status of this matter; that after making a study of the matter, plaintiff's attorney advised affiant to instruct the Sheriff of Los Angeles County, California, to release said Mercury Sedan automobile and let the Trustee in Bankruptcy take over any interest that the defendant David Bushnell, also known as David Sherman Bushnell, might have in said Mercury Sedan automobile." She further stated that on November 1, 1946, a letter was written to the Sheriff instructing him to release the automobile; that "on or about the 1st day of November, 1946, your affiant telephoned to the offices of Messrs. Bradley and Bradley, the attorneys for Mabel MacFerran Rockwell, and advised said attorneys of plaintiff's intention to release said Mercury Sedan automobile from the levy of said execution." The return of the Sheriff shows that he released the automobile from the levy on November 6, 1946.

It thus appears that the failure to appear at the hearing was deliberate and considered on the part of the attorney for plaintiff. There is nothing in the record to indicate that Bushnell was ever adjudged a bankrupt or that a Trustee in Bankruptcy had been or ever was appointed. Further the Trustee, if one was appointed, is not here complaining of the judgment. Plaintiff subsequently and deliberately released the automobile from the levy of the execution so it is difficult to understand how it can now be considered as prejudiced by the judgment of November 4th.

[2] Nor is there any merit in the contention that the issues decided by the trial court were moot on November 4th. The automobile was then held by the Sheriff of Los Angeles County and was not released by him until two days later. The argument that the issues were moot would be more appropriate at this time after

the plaintiff had released the automobile from the lien of the levy.

What was said in Binford v. Boyd, 178 Cal. 458, 174 P. 56, 59, seems appropriate here:

"The failure of the defendant Lucile Boyd, to be personally present was due to her neglect, it is true; but the neglect was not excusable. The main point in support of this claim is that some two months before the trial the plaintiff's attorney stated to the defendants' attorney that he intended to amend his complaint, and that for some unexplained reason the defendants' attorney, because of this statement, did not expect the trial to take place at the time set and did not prepare therefor. The excuse is wholly insufficient to justify any neglect to prepare for the trial."

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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84 Cal.App.2d 726

In re SOMERS' ESTATE.

SOMERS v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 13690.

District Court of Appeal, First District, Division 2, California.
April 6, 1948.

1. Homestead 🔑144

Time during which the separate property of a deceased shall be held as a homestead is a matter resting in court's sound discretion. Probate Code, § 661.

2. Homestead 🔑141(1)

Court in exercising its discretion under Probate Code providing that court can set apart separate property of a deceased only for a limited period as homestead for surviving spouse, properly considered fact that only a small part of deceased's apartment building could be occupied as a home by widow, that from remainder of building she would receive a substantial income, that realty was almost a third of deceased's entire estate, and that widow already had a substantial income of her own and her separate home. Probate Code, § 661.

3. Homestead 🔑144

The most important factor in determining length of a limited probate homestead should be the necessity of the widow or other family to be secured in a home. Probate Code, § 661.

4. Homestead 🔑144

Where only realty in deceased's estate was a building consisting of five apartments from which a substantial income was being received, and widow already had a substantial income of her own and her separate home, probate court did not abuse its discretion in ordering the realty set aside as a homestead for only six months. Probate Code, § 661.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of John Arthur Somers, also known as John A. Somers, deceased, wherein Ruth Jensen Somers filed a petition to set aside real estate of the deceased to her as a probate homestead. From an order ordering the realty set aside as a homestead for only a period of six months, Ruth Jensen Somers, opposed by the Bank of America National Trust & Savings Association, etc., and others, appeals.

Order affirmed.

See also 187 P.2d 433.

Phil F. Garvey and James A. Himmel, both of San Francisco, for appellant.

Lane & Casey, of Los Angeles, and James F. Brennan, of San Francisco, for respondent.

DOOLING, Justice.

Appellant is the widow of John Arthur Somers, deceased. The decedent died testate leaving an estate which has been appraised at $78,000. He bequeathed $10,000 to appellant, the principal beneficiary of his will being an adult son by a prior marriage.

The only real property in the estate is improved with a building consisting of five apartments and was appraised at $25,000. From the rental of these apartments at a gross per year of $3090 the net annual profit is $2100 or $2200. This real property was the separate property of decedent.

Appellant petitioned the probate court to set this property aside to her as a probate homestead. In addition to the facts above recited it developed on the hearing of this petition that appellant owns a home of her own and that she is employed at a salary of $4400 per year.

The court ordered the real property set aside as a homestead for the period of six months. Appellant appeals from this order.

Section 661 Probate Code provides as to a homestead on the decedent's separate property:

"If the property set apart is the separate property of the decedent, the court can set it apart only for a limited period, to be designated in the order, and in no case beyond the lifetime of the surviving spouse * * *."

[1] "The time during which the separate property of the decedent shall be held as a homestead is a matter resting in the sound discretion of the court." 11a Cal.Jur. 638.

[2-4] The court was entitled in exercising this discretion to consider the fact that only a small part (one apartment out of five) of the building could be occupied as a home by appellant and that from the rest she would receive a substantial income, that the real property was almost one-third of the entire estate, and that appellant already had a substantial income of her own and her separate home. The most important factor in determining the length of a limited probate homestead should be the necessity of the widow or other family to be secured in a home. Here that necessity is slight if not non-existent. Weighing these factors we cannot say that the probate court abused its discretion. In Estate of Barkley, 91 Cal.App. 388, 267 P. 148, an order setting aside a probate homestead in the deceased spouse's separate property for one year was affirmed. In Estate of Levy, 141 Cal. 646, 75 P. 301, 99 Am.St.Rep. 92, the probate court set apart a three flat building as a homestead during the period of administration only. In Estate of Ettlinger, 56 Cal.App.2d 603, 132 P.2d 895, the homestead was limited to five months.

The order appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

84 Cal.App.2d 815

TURNER et al. v. FOLLMER et al.

Civ. 16201.

District Court of Appeal, Second District, Division 2, California.

April 12, 1948.

Appeal and error 🔑113(3)

An order granting a motion to set aside a default before judgment has been entered is not appealable.

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action by Charles T. Turner and Margaret M. Turner against Stanley W. Follmer and Elizabeth C. Follmer, also known as Elizabeth C. Copeland. From an order granting the motion of Elizabeth C. Copeland to set aside her default and to permit her to file an answer, the plaintiffs appeal. On motion of respondent Elizabeth C. Copeland to dismiss the appeal.

Motion granted.

Carl Yanow, of Los Angeles, for appellants.

Kenneth C. Beatson, of Los Angeles, for respondent Stanley Follmer.

Demetriou & Viney, of Los Angeles, for respondent Elizabeth C. Copeland.

McCOMB, Justice.

Respondent (defendant) Elizabeth C. Copeland moves to dismiss this appeal from an order of the trial court granting said respondent's motion to set aside her default and permit her to file an answer *for the reason that an order setting aside a default before a judgment has been entered is not an appealable order.*

This proposition is tenable and is governed by this rule: An order granting a motion to set aside a default before a judgment has been entered is a non-appealable order. (Sherman v. Standard Mines Co., 166 Cal. 524, 525, 137 P. 249; Strosnider v. Superior Court, 17 Cal.App.2d 647, 650, 62 P.2d 1394; Rauer's Law etc. Co. v. Standley, 3 Cal.App. 44, 46, 84 P. 214.) In the instant case a judgment had not been entered when the order setting aside the default of defendant was made; therefore the foregoing rule is applicable.

The motion is granted and the appeal is dismissed.

MOORE, P. J., and WILSON, J., concur.

DOTSON et al. v. INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES AND MOVING PICTURE MACHINE OPERATORS OF UNITED STATES AND CANADA, LOCAL 162, et al. *

Civ. 13520.

District Court of Appeal, First District,
Division 1, California.
April 9, 1948.
Hearing Granted June 7, 1948.

1. Associations 🔑5

Constitution and by-laws of unincorporated association are contract between association and members, and rights and duties of members as between themselves and in relation to their associates, in matters affecting internal government, are measured by constitution and by-laws provided they do not contravene public policy or law of the land.

2. Associations 🔑20(1)

Generally, an officer or member of either a parent or affiliated voluntary association may not resort to courts for relief for grievances until he has first exhausted rights afforded by tribunals of association.

3. Trade unions 🔑4

In action by motion picture projectionists against local union and others to compel admission of projectionists to membership, evidence failed to show that projectionists had exhausted their remedy within union before commencement of action.

4. Trade unions 🔑4

Compliance with requirement in constitution of international union for presentation of grievances that members appeal to executive board or to union in convention was condition precedent to resort to the courts.

5. Appeal and error 🔑1010(1)

In action by motion picture projectionists against local union and others to compel admission of projectionists to membership, finding that there was no conspiracy, fraud, or coercion to deny membership, being supported by competent and substantial evidence, was binding upon appeal.

6. Constitutional law 🔑277(1)

Right to earn a living is "property" within Fifth Amendment, and a union may not deprive person of his constitutional rights of liberty and property. U.S.C.A. Const. Amend. 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

7. Trade unions 🔑8

Maintenance by union of a closed union and closed shop, thus denying right to work to otherwise qualified individuals, violates public policy of state.

8. Trade unions 🔑4, 8

It must appear that persons complaining of closed union have arbitrarily been denied membership and the right to work.

9. Trade unions 🔑4

In action by motion picture projectionists against local union and others to compel admission of projectionists to membership, evidence to show that local union had a closed membership and was operating under closed shop agreements with substantially all employers in violation of public policy did not sustain granting of relief, in absence of evidence that projectionists had ever applied for or been denied membership in local.

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* Subsequent opinion 210 P.2d 5.

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Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Leslie Dotson and another against the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, Local 162 Thereof, and others, to compel admission of plaintiffs to full membership in local and for other relief. From portion of judgment denying damages for loss of wages and denying any recovery for exemplary damages, plaintiffs appeal; from portion of judgment directing admission of plaintiffs to full and equal journeyman membership in local and enjoining interference with plaintiffs' employment as projectionists within jurisdiction of local, the defendants appeal.

Judgment on plaintiffs' appeal affirmed; judgment on defendants' appeal reversed.

Bodkin, Breslin & Luddy, Peter E. Giannini, and Michael G. Luddy, all of Los Angeles, for appellant.

Gladstein, Andersen, Resner & Sawyer by Herbert Resner, all of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiffs, Leslie Dotson and Walter J. Murrah, brought this action against Local 162 of the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada (hereafter referred to as I.A.), certain of its officers, and the members of its executive board to compel the union by mandate to admit plaintiffs to full membership as projectionists into the local, for an injunction to restrain the local's officers from preventing plaintiffs' employment in this area, for general damages for alleged loss of wages, for exemplary damages for an alleged conspiracy on the part of the officers of defendant local to prevent plaintiffs from working in this area, for the restitution of certain sums for claimed overcharges in dues.

After a lengthy trial the court, by its findings and judgment, denied plaintiffs any damages for loss of wages, and denied any recovery for exemplary damages, finding that there was no conspiracy on the part of the officers of defendant union. From these portions of the judgment plaintiffs appeal. The court, by writ of mandate and by its judgment, directed defendants to admit plaintiffs "to full and equal journeymen membership in Local Union 162 with seniority and membership rights and privileges of said plaintiffs to commence as of June 29, 1945, and said plaintiffs' membership in said Local Union 162 shall be deemed for all intents and purposes to commence with, and shall be retroactive to, the date of June 29, 1945." The lower court also granted an injunction restraining defendants from interfering with plaintiffs' employment "as moving picture machine operators and projectionists within the jurisdiction of Local Union 162, or refusing to allow or permit said plaintiffs to have and keep employment as moving picture machine operators and projectionists within the jurisdiction of Local Union 162, or refusing to dispatch them to and keep them on employment * * * with seniority, status, and membership rights and privileges the same as and equal to those possessed by journeymen members of Local Union 162, said plaintiffs' seniority, status and membership rights and privileges to commence as of and be retroactive to June 29, 1945." From these portions of the judgment the defendants appeal. The lower court also determined that the defendant local union had overcharged the plaintiffs certain amounts of money, and judgment was given in favor of plaintiffs for these sums. The defendants have not appealed from these portions of the judgment and admittedly, since the entry of judgment, have paid to plaintiffs these sums. The propriety of the ruling of the trial court as to these found overcharges is therefore not involved on this appeal.

The Pleadings.

The complaint, so far as pertinent here, alleged that defendant local union was a voluntary unincorporated association affiliated with the I.A.; that each plaintiff was a qualified projectionist and member in good standing of the I.A.; that defendant local exercised jurisdiction over moving picture projectionists in the counties of San Francisco and Marin; that the individual defendants were officers and members of defendant local executive board and dominated, controlled, managed and operated its business; that defendant local for many years maintained and exercised a monopoly in the employment of moving picture machine operators in San Francisco and Marin Counties, and possessed closed shop agreements with the moving picture theaters in those counties; that in order to obtain work in such territory it was necessary to acquire membership in defendant local; that each plaintiff had transferred from the jurisdictions of their home locals and worked in San Francisco out of defendant local; that defendant local thereby accepted said plaintiffs into membership but refused to issue to them an indicia of such membership or to allow them the rights and privileges of membership; that on July 13, 1945, defendants expelled plaintiff Murrah from the jurisdiction of defendant local and deprived him of his right to work within the jurisdiction of such local, and that the same thing was done to plaintiff Dotson on July 25, 1945; that the reason for such expulsion was that plaintiffs opposed payment of an overcharge of 1% of their salaries imposed upon them as outside members of Local 162, and complained because they were allowed no voice or vote in the affairs of defendant local; that on or about March 15, 1945, the defendants formed a conspiracy to expel plaintiffs from the jurisdiction of defendant local and to deprive them of their right to earn a livelihood; that pursuant to such conspiracy defendants informed employers within their jurisdiction not to employ plaintiffs, and refused to dispatch plaintiffs to any employment; that on or about October 15, 1945, plaintiffs petitioned the I.A. for a redress and correction of their grievances, but the I.A. refused to aid them; that it was impossible for the plaintiffs to get relief from defendant local and they could not therein get a fair hearing because the defendants had already prejudged the matter and were prejudiced against plaintiffs.

It will be noted that the main theory of the complaint was that, by assigning plaintiffs to work in this jurisdiction for many years, defendant local had in fact accepted plaintiffs into membership, and that plaintiffs were in fact members of defendant local but had been deprived of the benefits of such membership by an alleged conspiracy among the individual defendants.

The answer of defendants denied all of the allegations that plaintiffs were members of defendant local or had been accepted into membership; admitted that plaintiffs were members in good standing in the I. A.; admitted that plaintiffs, while working out of defendant local, had paid to defendant local 2½% of their salary, whereas members of defendant local paid but 1½%; admitted that plaintiffs were not allowed to participate in the affairs of the local, but alleged that this was because they were not members of such local; alleged that plaintiffs were allowed all of the rights of visiting members or outside members of other locals of the I.A.; denied all of the allegations of conspiracy; denied that plaintiffs had been expelled from the jurisdiction of the local union; denied that plaintiffs had been deprived of their right to work in the jurisdiction of defendant local; alleged, by way of affirmative defense, that plaintiffs, before commencing this action on November 5, 1945, had not exhausted their remedies within the I.A. The other alleged defenses are no longer in issue herein.

Facts.

The plaintiffs, for approximately twenty years, have been motion picture projectionists and have been members of the I.A. in good standing. The home local of Dotson is Fort Smith, Arkansas, while the home local of Murrah is Bartlesville, Oklahoma. At all times after being admitted to their respective locals, and down to the time of trial, plaintiffs have paid their regular dues to their respective local unions. Under the constitution of the I.A. it is permissible for members to enter jurisdictional areas other than those of their home locals, and, subject to certain limitations, to secure work in such areas through the officers of the union located there. Such I.A. member working outside the area of his home local is referred to as an "outside member." Preference in employment, however, must be given to local members. In this connection § 16 of Art. 19 of the I.A. constitution provides: "Affiliated locals are required to insist that all positions within their jurisdiction be filled by their own members. In the event of the local membership being unable to care for all vacancies, preference must be given to members of sister locals affiliated with this Alliance. Not until the available members of the resident and out-of-town locals have been employed shall the engagement of non-members be permitted."

After being admitted into their respective home locals the plaintiffs worked out of their respective locals for a while and then worked in various other cities, being assigned to work as outside members by the locals in such cities. Murrah arrived in San Francisco in November, 1938, and immediately was assigned to work by officials of Local 162 as an outside member. He was continuously employed as an outside member from that date until July 13, 1945. Dotson arrived in San Francisco in February, 1939, and was immediately assigned to work by officials of Local 162 as an outside member. He was continuously employed as an outside member from that date until July 25, 1945. From July, 1945, to date of trial plaintiffs have not worked within the jurisdiction of Local 162, but have secured intermittent employment in various other cities not within the area jurisdiction of Local 162. In this connection the trial court found that in July, 1945, the plaintiffs "picked up or took back from Local 162 their respective membership cards which theretofore each plaintiff had deposited with the office of Local 162, and plaintiffs therefore were not available for work within the jurisdiction of Local 162 from said dates until the time of trial." As already pointed out, it was the theory of the complaint, and plaintiffs sought to prove at the trial, that a conspiracy existed among the individual defendants, all officials of Local 162, to deprive them of the benefits of membership in Local 162, and to prevent them from being employed as projectionists in this area. In this connection the trial court found that "it is not true that a conspiracy existed or that fraud, malice, intimidation or coercion was practiced by or on the part of defendants, or any of them, to deprive plaintiffs of their livelihood as motion picture operators or of their membership in the International union, or to deny them admission into Local 162."

In order to understand the contentions of the parties, brief reference must be made to certain provisions of the I.A. constitution. It is therein provided, in effect, that an outside member may apply for membership in the local in which he is working in either of two ways, that is, by applying directly for membership therein, or by the transfer method, that is, by securing a transfer card from his home local and submitting his transfer application to the local he desires to join. In either event the member desiring to join the local where he is working has no absolute right to membership in that local. He can be admitted only after a favorable vote of the members of the local he desires to join. Under the I.A. constitution (§ 2 of Art. 19) all affiliated locals are granted so-called home rule privileges defined "to confer upon each local union the authority to exercise full and complete control over its own affairs" so long as nothing is done in conflict with the I.A. constitution and by-laws.

Art. 21 of the I.A. constitution provides the procedure for initial entry into a local by original application filed by the member with the local he desires to join. It is an admitted fact that plaintiffs at no time have attempted to secure membership in Local 162 under Article 21.

With respect to the transfer method, § 11 of Art. 21 provides that "members of this Alliance shall be entitled to the transfer privileges set forth in § 18 of Article Nineteen of this Constitution." That mentioned section of Art. 19 provides that: "Local unions shall be obliged upon request to issue to any member in good standing a transfer card to enable him to gain admission to another affiliated local union." It is further therein provided that: "After obtaining a transfer card from his local union the member desiring to transfer shall deposit the card with the local union with which he wishes to become affiliated, which local union shall, within sixty days thereafter, either accept or reject such applicant." In later provisions of that same section it is provided that: "If the local union to which the member desires to transfer rejects his application, it shall return to him his transfer card. The member shall, within ninety days of its date of issue, return the transfer card to the local union which issued it." It is an admitted fact that plaintiffs at no time have attempted to secure membership in Local 162 under this transfer method. Thus, at all times it must be kept in mind that while the writ of mandate and the judgment direct that plaintiffs be made members of Local 162, they have, at no time, applied for membership in that local in either of the ways permitted by the I.A. constitution.

The constitution of the I.A. contains detailed provisions for the handling of all controversies between the members and their local unions, or between members and the I.A. After providing for the presentation of disputes to the local union, § 1 of Art. 17 provides: "Any member aggrieved by the decision of a tribunal of this Alliance may appeal his case in the following order (1) from the decision of the local union to the International President of this Alliance; (2) from the decision of the International President to the General Executive Board; (3) from the ruling of the General Executive Board to this Alliance in convention assembled and the latter body shall be the tribunal of ultimate judgment. However, in the interim, rulings of any proper tribunal of this Alliance shall be enforced pending disposal of appeal." Section 2 allows thirty days within which to file the appeal with the next highest appeal authority. Section 3 provides that the appeal must be in writing, must be signed by the appellant, and must set forth the grounds upon which he relies for a reversal. Section 4 provides for service upon the lower tribunal and gives it a fixed period in which to answer. It likewise requires the lower tribunal within the same fixed period to forward to the appellate tribunal the record in the case. Section 6 provides: "The members of this Alliance shall submit all their rights within the Alliance to the determinations of its proper tribunals, and agree that the decisions of these tribunals shall be conclusive as to all rights and privileges accruing from membership." Section 7 provides: "The members of this Alliance further consent to be disciplined in the manner provided by this Constitution and By-Laws, and under no circumstances to resort to the civil courts until all the remedies therein provided shall have been exhausted."

The trial court found that "from March, 1945, until October, 1945, plaintiffs made repeated efforts to obtain a hearing in connection with their grievances, namely, their grievances as 'outside men' desiring membership in Local 162. That plaintiffs attempted to get a hearing and a redress of these grievances from Local 162, from the officers and Executive Board of Local 162, and from the International Officers of the International union, particularly the International President Richard F. Walsh. That none of the persons or agencies so mentioned gave any hearing or made any effort to consider or grant a redress of plaintiffs' grievances. That insofar as it was possible for them to do so, plaintiffs exhausted their remedy within Local 162 and the International union prior to the commencement of the present action on November 5, 1945." So far as this finding is concerned, the parties dispute as to whether plaintiffs ever applied to Local 162, its officials or to the international president for a redress of their grievances as outside members. The evidence on this matter will be later discussed. Regardless of that dispute, however, it is an admitted fact that plaintiffs at no time, in any fashion, directly or indirectly, formally or informally, ever applied to the general executive board or to the convention of the international for a redress of any grievance. Admittedly, the general executive board holds two regular meetings a year and the convention meets once every two years. A convention was had in 1946.

Exhaustion of Remedies Within the Union.

The basic contention of defendants, which contention is stated in various ways, is that plaintiffs, as members of the I.A., were bound by the constitution and by-laws of that organization, including the provisions to which reference has been made relating to the exhaustion of remedies within the I.A. before resorting to the civil courts for a settlement of grievances. It is urged that the finding of the trial court on this issue above quoted is unsupported by the evidence, and that, since plaintiffs did not exhaust their remedies within the framework of the union, the trial court was without jurisdiction to proceed.

[1] As is usual in such controversies the dispute does not involve so much the applicable law, but more the application of that law to the facts. It is now too well settled to be subject to dispute that the constitution and by-laws of an unincorporated association constitute a contract between the association and it members, and that the rights and duties of the members as between themselves and in relation to their associates, in matters affecting its internal government, are measured by the provisions of such constitution and by-laws, provided they do not contravene public policy or the law of the land. DeMille v. American Federation of Radio Artists, 31 Cal.2d 139, 187 P.2d 769; Stoica v. International etc. Employees, 78 Cal.App.2d 533, 178 P.2d 21; Bush v. International Alliance, 55 Cal.App.2d 357, 130 P.2d 788 (the last two cases involved the same constitution and union here involved); Levy v. Magnolia Lodge, I.O.O.F., 110 Cal. 297, 42 P. 887; Lawson v. Hewell, 118 Cal. 613, 50 P. 763, 49 L.R.A. 400; Smith v. Kern County Medical Assn., 19 Cal.2d 263, 120 P.2d 874.

[2] It is also well settled, as a part of the above basic rule, with certain exceptions not here involved, that an officer or member of either a parent or affiliated voluntary association may not resort to the courts for relief for grievances until he has first exhausted the rights afforded him by the tribunals of the association. Killeen v. Hotel & R. Emp. etc. League, 84 Cal.App.2d 87, 190 P.2d 30; Stoica v. International etc. Employees, 78 Cal.App.2d 533, 178 P.2d 21; Bush v. International Alliance, 55 Cal.App.2d 357, 130 P.2d 788, Hughes v. American Trust Co., 134 Cal.App. 485, 25 P.2d 491; Simpson v. Salvation Army, 49 Cal.App.2d 371, 121 P.2d 847; Dingwell v. Amalgamated Ass'n, etc., 4 Cal.App. 565, 88 P. 597; Coffey v. Los Angeles Firemen's Relief Ass'n, 22 Cal.App.2d 510, 71 P.2d 328; Greenwood v. Building Trades Council, 71 Cal.App. 159, 233 P. 823.

[3, 4] As already pointed out, the trial court has found that "insofar as it was possible for them to do so, plaintiffs exhausted their remedy within Local 162 and the International union prior to the commencement of the present action." Defendants assert that this finding is not supported by evidence.

On this issue the record shows the following: By March of 1945 plaintiffs had been continuously working in this jurisdiction since 1939. They were outside members and, as such, had no voice in the affairs of Local 162. They paid their local dues to their respective home locals and were assessed 2½% of their total salaries by Local 162, Local 162 members paying but 1½%. As outside members, their position, so far as job preference was concerned, was inferior to Local 162 members. Local 162 had an apprentice affiliation, and, as a result, certain junior apprentice members were assigned to work as projectionists by Local 162. In addition, there were certain "B" and other locals in the San Francisco area consisting of various types of employees working in the amusement field, other than projectionists, that were affiliated with the I. A., in which there were some qualified projectionists. The local business agent of Local 162, Floyd Billingsley, had interpreted the I. A. constitution to mean that such "B" local members who were qualified projectionists were on a parity with outside members who were connected with projectionists' unions so far as job preferences were concerned. This interpretation was later confirmed by the international president of the I. A. Outside members had not been taken in as members of Local 162. These various facts had caused the plaintiffs and several other outside members to feel that they had been discriminated against. The plaintiffs seemed to feel, with some cause, that Billingsley controlled the membership policies of Local 162, that he was opposed to outside members becoming members of Local 162, and that he favored the "B" local and the junior members. Plaintiffs seemed to feel that they could not secure redress of their grievances from Local 162 or from Billingsley. Up until this time (March of 1945) they had never attempted formally or informally to present their grievances to Local 162, to its executive board, or to its officers. Early in March of 1945 the two plaintiffs, and several other outside members, retained the services of the law firm of Andersen & Resner, and talked their problems over with Herbert Resner of that firm. Resner, under date of March 7, 1945, wrote a letter to Richard F. Walsh, International President of the I. A., on behalf of his clients, without, however, disclosing the identity of his clients. In this letter Resner told Walsh that he had been consulted by several of the outside members working out of Local 162 relative to what they felt were abuses of administration in that union. The letter listed as the complaints made to him (1) the overcharge of 1% made against outside members; (2) that they desired membership in Local 162 but had been denied this right; (3) that local "B" union members were being extended equal rights to projectionist work with outside members who were members of "A" projectionist unions. Receipt of this letter was acknowledged by the assistant international president in the absence of Walsh. Walsh made no other reply to Resner, but his office sent a copy of the letter to Local 162. On May 22, 1945, the Andersen & Resner legal firm again directed a letter to Walsh in which the same complaints of their clients were listed, but again they did not disclose the names of their clients other than to state that they were I. A. members working as outside members in the jurisdiction of Local 162. Walsh sent a copy of this letter to Local 162, and, under date of June 12, 1945, wrote to the law firm of Andersen & Resner advising them to first take up the complaints of their clients with Billingsley, and that, if the problems could not be worked out with him, to communicate again with him, Walsh. The lawyers did not see fit to follow this suggestion, and at no time communicated on this subject with Billingsley or with Local 162.

It is quite apparent that plaintiffs and the other outside members who had consulted Resner felt that if they disclosed their identities Billingsley would take revenge by depriving them of work in this area. Although Billingsley and the other defendants denied any such intent, it is a possible and reasonable inference from the record that just that might have happened. At any rate, when copies of the two lawyer-written letters were received by the officers of Local 162 a great deal of resentment grew up among the officers against the writers of these letters. A part of the resentment seems to have been based upon the fact that charges had been made anonymously, part upon the fact that charges had been made to the international president without first presenting them to Local 162, and, it is very likely, part upon the fact that outside members had presumed to make any charges at all against the officials of Local 162. At various union meetings, at which plaintiffs were present but not permitted to vote, Billingsley expressed himself most forcefully on this subject and threatened to "run out of town" the instigators of the letters upon discovery. Plaintiffs were suspected of being mixed up in the affair, and Billingsley finally, in conversation, accused them of being two of those who had retained Resner. Both plaintiffs sought interviews with Billingsley and Noriega, the president of Local 162, and both hotly and persistently denied that they were connected in any way with the transaction, and offered to execute affidavits denying participation. Both testified that they denied retaining Resner because they feared that if they admitted their connection with the letter they would be denied employment in this area. Finally, plaintiff Murrah told Billingsley that if he, Murrah, was suspected of instigating the letter, Billingsley had better give him some time off to loaf around while the officers of the union investigated the matter. Murrah testified that Billingsley replied that it would do Murrah no good to leave town because he could always be located and charges could be preferred against him. Billingsley finally asked Murrah if he wanted to give his "two weeks' notice," it being customary in this jurisdiction for those who desired to leave their employment to give such a notice to the business agent. Murrah replied that he did, it being his testimony that he was scared and wanted to get out of town. He worked the two weeks and quit on July 13, 1945. Shortly thereafter he requested, by letter, that his working card, which all outside members had to deposit with the local from which they were working, be returned to him, and it was. He left this area and at no time since has deposited his working card with Local 162, and at no time since has he requested work here nor has he applied for membership in this local.

Plaintiff Dotson had deposited his working card with Local 162, and from 1939 to 1945 he had deposited his dues for his home local with Local 162, and the office girl of Local 162 then sent such dues on to the home local. He testified that in July, 1945, he was delinquent in the payment of his dues to his home local, and that that local had, for that reason, delayed sending him his current working card. A few days prior to July 25, 1945, he gave the girl in the office of Local 162 a $30 money order to forward to his home local. On July 25, 1945, according to his testimony, Billingsley told him to pick up the money and to send for his current card himself. Dotson called for his money order but did not pick up his delinquent working card. He thereupon left this area. Since that date he has not deposited his current work card with Local 162, has not requested work here, and has not applied for membership in this union. Since July of 1945 both plaintiffs have secured but intermittent employment in various areas removed from San Francisco.

After the two plaintiffs had quit work in San Francisco they joined in writing two letters to Billingsley, one dated September 27, 1945, and the other dated October 9, 1945, in which they made inquiries concerning the possibility of their facing their accuser on the "Resner letter" matter, and asked that they be allowed to appear and defend themselves before the union with regard to what they termed "the misinformation upon which you have based your accusations against us." They also stated: "we want you to know we are not making these requests with any intention or hope of your placing us back to work, but only to remove this stigma cast upon us." One of the plaintiffs, during this same period, talked to Noriega and demanded a hearing on the charge that he and the other plaintiff were back of the Resner letter. No hearing on this issue was granted to them by Billingsley or by the executive board of Local 162. Plaintiffs contend that they were demanding a hearing before Local 162 on all of the charges contained in the Resner letter, but a reading of the two letters and of the oral testimony relating to the conversations with Noriega indicates that the only request for a hearing was on the suspicion that plaintiffs had instigated the writing of the Resner letter. The record fails to show that at any time plaintiffs requested even informally, far less in the manner provided in the I. A. constitution, a hearing by Local 162 on the charges contained in the Resner letter. The executive board of Local 162 denied plaintiffs' requests for a hearing on the charge that they were the clients on whose behalf Andersen & Resner had written the letters to Walsh on the ground that no charges were pending against plaintiffs on this issue, and therefore there was nothing to hear.

After the executive board of Local 162 had turned down the requests of plaintiffs for a hearing, the two plaintiffs telegraphed Walsh under date of October 16, 1945. They informed Walsh that Billingsley "has placed oral accusations against us as a result we are out of work and our reputation as members of the IATSE is in jeopardy. Our oral demand through President Noriega to the Executive Board of Local 162 for a hearing was met with the reply that there could not be a hearing as there were no charges and that we were entitled to enjoy all the rights and benefits of any IA man in good standing." They demanded therein that an "impartial investigator" be appointed to investigate the matter immediately. The I.A. acknowledged receipt of the wire, but did nothing about it.

This is a fair summary of the evidence on the "exhaustion of remedies" issue. It is at once apparent that at no time did plaintiffs make any pretense of following the provisions of the I.A. constitution for the presentation of grievances and appeal from one tribunal to another within the union. A fair reading of the record demonstrates that the plaintiffs made no real attempt to present their grievances to Local 162 and did so only anonymously so far as the international president is concerned. Even if it be assumed that the letters from plaintiffs to Billingsley, and the discussions with Noriega and Billingsley, constituted petitions for a hearing on the charge that outside members had been improperly denied membership in Local 162 (although in fact they did not), and if it be assumed that the telegram to Walsh of October 16th should be interpreted as the second step in the appeal process set up by the I.A. constitution (although in fact it did not), such assumptions would in no way assist plaintiffs. There is not one word of testimony that plaintiffs ever attempted to comply with the requirements that they appeal to the I.A. executive board or to the Alliance in convention. These steps, under the rule of the cases already cited, were indispensable conditions precedent before the plaintiffs were entitled to seek the aid of a court. The finding of the court that, insofar as it was possible for them to do so, plaintiffs have exhausted their remedies, is not only not supported by the evidence but is contradicted by the evidence.

Public Policy Issue.

[5] But, say plaintiffs, even if it be admitted that we did not exhaust our remedies within the union, and even if it be assumed that that is normally necessary before resorting to the courts for a redress of grievances, such was not required in this case because the evidence shows that Local 162 had a closed membership and was operating under closed shop agreements with substantially all employers in this area; that this is contrary to the public policy of this state; and that, as a result of this violation of public policy, plaintiffs have been deprived of membership in Local 162. Under such circumstances, so it is urged, it was not necessary for plaintiffs to have exhausted their remedies within the union before resorting to the courts.

Before directly discussing these contentions reference must be made to state of the record on this issue.

The evidence shows, and the trial court found, that within the geographical area over which Local 162 possesses jurisdiction there are about 80 motion picture theaters; that Local 162 has closed shop agreements with 75 of these theaters; that in order to secure employment as a projectionist in any of these 75 theaters the employee must be dispatched through Local 162; that, as of the date of trial, Local 162 had 103 journeymen members; 15 junior or apprentice members; 48 outside members; 37 "B" union members; and 3 permit men (the latter requiring no union affiliation); that at said time there were 178 jobs available within the jurisdiction of Local 162; that between 1909 and 1924 eight outside members were admitted into membership in Local 162; that between 1924 and July, 1945, no outside members were admitted into membership in Local 162; that in August, 1945, five outside men, and in March, 1947, six more outside men, were admitted into membership in Local 162 as new members; that from 1919 to the date of trial no transfer members have been admitted into Local 162; that prior to 1945 only a limited number of junior or "B" local men were admitted into membership, but in 1945 and 1946, prior to the trial of this action, ten junior and "B" local men were admitted. These findings are not challenged by defendants. Based on these facts the trial court concluded that Local 162 has a monopoly of employment of motion picture projectionists in this area, and that since 1919 the union has maintained an arbitrarily closed union.

The court also found, however, that "it is not true that a conspiracy existed or that fraud, malice, intimidation or coercion was practiced by or on the part of defendants, or any of them, to deprive plaintiffs of their livelihood as motion picture operators or of their membership in the International union, or to deny them admission into Local 162." While the evidence and the reasonable inferences therefrom on this issue are conflicting, and would support a finding either way, the trial court has found that there was no conspiracy, fraud or coercion to deny plaintiffs membership in Local 162, and that finding, being supported by competent and substantial evidence, is binding upon us.

In addition, it is an admitted fact, although no finding was made on the issue, that neither plaintiff at any time ever applied for a transfer or new membership into Local 162.

[6-9] Now, what is the law applicable to that set of facts? It is the law of this state that "the right to earn a living is deemed to be property within the concept of the Fifth Amendment to the Federal Constitution, and a union, in the service of its interest, may not deprive a person of his constitutional rights of liberty and property." DeMille v. American Federation of Radio Artists, 31 Cal.2d 139, 187 P.2d 769, 778. It is also now settled, as a result of the well reasoned case of James v. Marinship Corporation, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900, and the cases following it, that it violates the public policy of this state for a union to maintain a closed union and a closed shop and to thus deny the right to work to otherwise qualified individuals. The rule was thus stated in the Marinship case, 25 Cal.2d at page 730, 155, P.2d at page 335, 160 A.L.R. 900:

"It does not follow, however, that a union may maintain *both* a closed shop agreement or other form of labor monopoly together with a closed or partially closed membership. We have found no case in this state that supports such a right and there is no decision of the United States Supreme Court that compels its recognition as a proper labor objective. * * *

"In our opinion, an arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living."

The cases following the Marinship case have reaffirmed this most salutary and fundamental rule of public policy. Bautista v. Jones, 25 Cal.2d 746, 155 P.2d 343; Williams v. Int. etc. of Boilermakers, 27 Cal.2d 586, 165 P.2d 903; Thompson v. Moore Drydock Co., 27 Cal.2d 595, 165 P.2d 901. But before these principles can or should apply it must appear that the persons complaining have arbitrarily been denied membership and the right to work. Here the court has found that there was no conspiracy, and no fraud or coercion, to deny plaintiffs membership in the union. From 1939 to 1945 plaintiffs worked continuously out of such union and at no time applied for membership in the union. Never having applied, plaintiffs were, of course, never denied membership. Since July, 1945, plaintiffs have not even applied for work through Local 162 as outside members. While the record shows that this union failed to admit into membership outside members from 1924 to July of 1945, and admitted but eight outside members from 1909 to 1924, it fails to show how many outside members applied for membership during those periods. The record also shows that in August, 1945, five outside men were admitted as new members. This was about three months before this action was filed. In March, 1947, six more outside members were admitted. The record shows that several outside members, not the plaintiffs, were turned down for membership, but the reasons for such refusal to admit into membership do not appear. Under such circumstances how can we say that plaintiffs have been arbitrarily denied membership into the union? How can we say, in the absence of a finding on the issue, that, had the plaintiffs applied for membership, their applications would have been arbitrarily denied? While there can be no doubt that this union has substantially a monopoly of projectionists jobs in in this area, and has maintained, for many years, substantially a closed membership, and while there can be no doubt that such actions, if they result in denying to qualified persons the right to earn a living, would violate the public policy of this state, the indispensable condition precedent for the application of such rule is that qualified persons have been denied membership in the union. That indispensable condition precedent was not here found to exist. It is very difficult to see how plaintiffs could have been wrongfully denied membership into Local 162 unless there was a conspiracy among the officers to deny them membership, or at least collusion among such persons. Yet the trial court has found that no such conspiracy or collusion existed. Moreover, as already pointed out, the evidence shows that neither plaintiff has ever applied for membership or has ever been denied membership. We cannot assume, in the absence of a finding on the issue, that it would have been useless for plaintiffs to have applied for membership, nor can we assume that, had such an application been made, it would have been arbitrarily denied. There is evidence in this record, denied by defendants, which would have supported a finding that before August of 1945 this union was run in a quite arbitrary fashion by Billingsley and the other officers, and there is, in addition, evidence, also denied by defendants, that outside members were, to say the least, discouraged from applying for membership. Not only are there no findings on these issues, but the uncontradicted evidence shows that since August of 1945 a substantial number of outside members have been admitted into membership. This admission of outside members into the union, both before and after the filing of this suit, is some indication that the officers and members of Local 162, whatever their attitudes may have been prior to August of 1945, may now desire to comply with the law and the public policy of this state.

Under these facts, and primarily because the evidence does not show that plaintiffs ever applied for membership in the local, and so of course does not show that they ever were denied, arbitrarily or otherwise, membership in the union, we think the plaintiffs have failed to prove their cause of action, and that the rulings of the trial court to the contrary must be reversed.

This conclusion makes it unnecessary to consider in detail plaintiffs' appeal. If the plaintiffs have failed to prove a cause of action, obviously it was not error to have denied them actual or exemplary damages based on such presumed cause of action.

The order directing the issuance of the peremptory writ of mandate is reversed, and the writ discharged; the portions of the judgment appealed from by defendants are reversed; the portions of the judgment appealed from by plaintiffs are affirmed.

WARD and BRAY, JJ., concur.

85 Cal.App.2d 40

TAYLOR v. HUMBIRD et al.

Civ. 16138.

District Court of Appeal, Second District, Division 1, California.

April 15, 1948.

1. Appeal and error 🔑**1011(1)**

The presence in record of conflicting evidence furnished insufficient basis for disturbing judgment where record disclosed substantial evidence in support of trial court's findings.

2. Appeal and error 🔑**1012(1)**

The determination of weight and credibility of evidence is for the trial court rather than for the appellate court.

3. Appeal and error 🔑**931(1)**

In passing on sufficiency of evidence, appellate court must accept as true all evidence tending to establish correctness of finding as made, taking into account all inferences which might reasonably have led to same conclusion, and conflicts in the testimony are to be resolved in favor of finding.

4. Appeal and error 🔑**1010(1)**

Where both parties to compromise agreement settling claims to property were represented by able counsel, assets involved appeared to have been considered and agreement advisedly entered into, and record disclosed substantial evidence that no fraud had been committed, agreement could not be impeached on appeal by one of parties on ground that trial court erroneously determined that she was bound by information of her attorney not disclosed to her.

◆

Appeal from Superior Court, Los Angeles County; A. K. Wylie, Judge.

Action by Delia Taylor against Myrtie M. Humbird and others to rescind, for alleged fraud, a compromise agreement relating to property interests, wherein the administratrix of the estate of Rex P. Taylor filed a cross-complaint. Judgment for the defendants, and the plaintiff appeals.

Judgment affirmed.

Louis J. Euler, of Los Angeles, for appellant.

Brown, Berry, & Rognes, of Los Angeles, for respondent Myrtie M. Humbird.

L. D. Uhlman, of Long Beach, for respondent Cleda J. Taylor, administratrix of Carl L. Taylor's Estate.

DORAN, Acting Presiding Justice.

This is an action seeking rescission, for alleged fraud, of a compromise agreement dated October 17, 1944, pursuant to which Myrtie M. Humbird and Carl L. Taylor conveyed to the heirs or devisees of Rex P. Taylor, deceased, certain real and personal property. Also, pursuant to said agreement, the appellant Delia Taylor, widow and sole heir at law of Rex P. Taylor, assigned to Myrtie M. Humbird and Carl L. Taylor a one-half interest in the distributable assets of the said Rex P. Taylor.

Appellant's brief avers that "the consent of Delia Taylor to the division of the estate of Rex P. Taylor was based upon the understanding that all of the properties that stood in the name of Rex P. Taylor, doing business as Carl L. Taylor and Myrtie M. Humbird, was to be included in the settlement agreement," and that on October 1, 1945, "Delia Taylor first obtained personal knowledge that Myrtie M. Humbird, also known as Maxine M. Taylor, had through the joint action of Rex P. Taylor and Myrtie M. Humbird acquired the property (known as the McKee Avenue property,) first in the name of Rex P. Taylor and Maxine M. Taylor, his wife. The deed was dated June 1, 1944, and four days thereafter Rex P. Taylor conveyed said property to Maxine M. Taylor" (respondent Myrtie M. Humbird), named in the deed as the "wife of the grantor." Actually there appears to have been no marriage between the named parties although there is evidence that respondent Humbird, and the said Rex P. Taylor lived together in that relation. Rex P. Taylor was, in fact, then legally married to the appellant, Delia Taylor.

"It is the contention of Delia Taylor," according to appellant's brief, "that Rex P. Taylor intentionally concealed * * * any references whatsoever to said real estate (conveyed to Maxine M. Taylor) for the purpose of cheating and defrauding the plaintiff of her rights in and to the community property." It is further claimed that "Rex P. Taylor opened a safety deposit box in which he deposited * * * $11,530.13," the box being "taken in the name of Carl L. Taylor, the name under which Rex P. Taylor did business." On October 11, 1945, approximately one year after the making of the compromise agreement hereinbefore mentioned, appellant Delia Taylor caused to be served upon defendants a notice of rescission based upon fraud and concealment, and thereafter the present action was filed. The answer denied the allegations of fraud, and a cross-complaint by the administratrix of the Rex P. Taylor Estate sought to quiet title to the various items of property.

After a trial of the issues without a jury, judgment was rendered in favor of respondents, the trial court having found "that there was no concealment of any kind"; and that the assignment made by appellant in conformity with the compromise agreement hereinbefore mentioned, was made "with full knowledge of the facts and without reliance upon any false representations." The court further found that in 1939, Rex P. Taylor, then estranged from appellant wife, came to California with a brother, Carl L. Taylor, who had $4,500, Rex P. Taylor then possessing no property; that Carl L. Taylor purchased a restaurant business which was thereafter operated by the Taylor brothers and respondent Myrtie M. Humbird as a partnership or joint adventure. It was further found that the real estate known as the "McKee Avenue property" was purchased in the names of Rex P. Taylor and Maxine M. Taylor (Myrtie M. Humbird) with money derived from Myrtie M. Humbird's father, which property was later quitclaimed to the respondent Humbird under the name of Maxine M. Taylor.

[1, 2] It is the appellant's contention that the judgment in question is erroneously "based upon findings of fact that are not supported by the evidence and in numerous instances contrary to the evidence." Appellant's brief then cites certain items of evidence claimed to be contrary to the court's findings, which, it is insisted, justify a judgment other than the one rendered. In other instances, as pointed out in the respondents' brief, "appellant seeks to have this court disregard as of no consequence evidence believed by the trial court and made the basis of its findings." In this respect, all that appellant's brief presents is that the record contains certain conflicting evidence. That the record discloses substantial evidence in support of the trial court's findings, cannot be disputed. In such a situation, the rule is elementary that it is the function of the trial court rather than that of an appellate court, to determine the weight and credibility of the evidence.

[3] The rule, as stated in Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 142, 134 P. 1157, quoted in Whitham v. Whitham, 127 Cal.App. 481, 484, 15 P.2d 1105, 1106; and many times reiterated, is that "in examining the sufficiency of the evidence to support a questioned finding, the appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding." Appellant's insistence that the testimony of Myrtie M. Humbird is "fantastic and incredible", and should not have been believed by the trial court, is likewise answered by the same rule, for the credibility of witnesses is a matter for the trial court to determine.

[4] It is further claimed that "The Court erred in holding that plaintiff was bound by the information of her attorney, David E. Field, regarding the McKee Avenue property which was not disclosed to her" when the compromise agreement was signed. In this connection appellant's brief quotes from Victor Oil Co. v. Drum, 184 Cal. 226, 241, 193 P. 243, 249, that: "The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded * * * on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part." But, as was also said in the Victor Oil Co. opinion, "The present case is not of that character." Relief has not been denied "to a party plainly shown to have been actually defrauded"; on the contrary, the record herein discloses substantial evidence that no fraud has been committed. Both parties to the compromise agreement were represented by able counsel; the various assets including the McKee Avenue property, appear to have been considered and the agreement advisedly entered into. In such a situation the appellant's argument is without merit. The other contentions presented by appellant are likewise untenable.

The judgment is affirmed.

WHITE, J., and BARTLETT, Justice pro tem., concur.

84 Cal.App.2d 746

Ex parte HYNES.

Cr. 2069.

District Court of Appeal, Third District, California.

April 7, 1948.

1. **Habeas corpus 🔑85(1)**

The burden is on habeas corpus petitioner to establish essential allegations of petition.

2. **Habeas corpus 🔑85(1)**

The regularity of proceedings in support of judgment attacked by habeas corpus petition is presumed, in absence of contrary evidence.

3. **Habeas corpus 🔑25(2)**

Allegations of probation officer's application, for order declaring minor girl a ward of juvenile court that she had no parent or guardian willing or able to exercise proper parental control and was in need of such control, stated facts giving court jurisdiction at least as against collateral attack in habeas corpus proceeding. Welfare and Institutions Code, §§ 700(b), 722.

4. **Habeas corpus 🔑30(1)**

Where probation officer's petition to declare minor a ward of juvenile court purports or attempts to state facts conferring jurisdiction on court, sufficiency of statement will not be considered in habeas corpus proceeding, even if petition is obviously demurrable for insufficient statement of facts. Welfare and Institutions Code, §§ 700(b), 722.

5. **Infants 🔑16**

The code provision for investigation by probation officer before filing petition to declare minor a ward of juvenile court is not mandatory, and does not require such investigation as necessary prerequisite to filing of petition. Welfare and Institutions Code, § 721.

6. **Infants 🔑16**

An assistant probation officer, filing petition to declare minor a ward of juvenile court and making affidavit of truthfulness of charges therein, though not sworn to, must be presumed to have investigated facts and approved filing of charges. Welfare and Institutions Code, §§ 721, 722.

7. **Infants 🔑16**

A probation officer's failure to swear to affidavit supporting her petition to declare minor a ward of juvenile court constituted mere defect of pleading and did not deprive court of jurisdiction. Welfare and Institutions Code, § 722.

8. **Pleading 🔑290(2)**

Failure to verify complaint or petition in special proceeding, as required by law, constitutes only a defect in pleading not affecting court's jurisdiction.

9. **Infants 🔑16**

A minor child's mother, served with citation 24 hours before hearing on probation officer's petition to declare child a ward of juvenile court, and failing to appear or appearing and failing to object to petition on ground of petitioner's failure to swear to attached affidavit signed by petitioner, must be deemed to have waived such defect. Welfare and Institutions Code, § 722.

10. **Habeas corpus 🔑85(1)**

Where petition to declare minor child a ward of juvenile court alleged that named woman was child's mother and judgment making such declaration recited that due and legal notice was given to all parties entitled thereto, District Court of Appeal, in mother's habeas corpus proceeding on child's behalf, must assume that mother was duly served with citation, in absence of contrary evidence. Welfare and Institutions Code, § 726.

11. **Habeas corpus 🔑85(1)**

In habeas corpus proceeding for minor's release from custody under judgment declaring her juvenile court's ward pursuant to probation officer's petition, District Court of Appeal must assume that juvenile court judge or clerk regularly set time for hearing of petition, in absence of adequate evidence as to matter. Welfare and Institutions Code, § 723.

12. **Infants 🔑16**

The fact that probation officer's petition for order declaring minor a ward of juvenile court contained unsigned printed form, stating that petition was set for hearing by court at time inserted in typewriting, did not show that matter was not set for hearing by either judge or clerk, as required by law, since law does not require petition to contain evidence of setting of cause or time of hearing. Welfare and Institutions Code, § 723.

13. Infants ⚷16

Failure to issue and serve on minor child's mother, previously awarded child's custody, a citation in proceeding to have child declared a ward of juvenile court 24 hours before hearing therein, as required to confer jurisdiction on court, may be waived by mother's personal appearance at hearing without objection on that ground. Welfare and Institutions Code, § 726.

14. Infants ⚷16

A subpoena, served on minor child's mother, to appear as witness in proceeding to have child declared a ward of juvenile court, is adequate substitute for proper citation of mother to appear at hearing in proceeding. Welfare and Institutions Code, § 726.

15. Habeas corpus ⚷85(1)

Where complaint in proceeding to have minor child declared a ward of juvenile court was filed therein on April 15, subpoena served on child's mother commanded her to appear as witness on April 16, and commitment of child to training school was made in open court on April 17, District Court of Appeal, in mother's habeas corpus proceeding on child's behalf, may assume, in absence of contrary evidence, that hearing was regularly set for April 16, but continued to following day, and order making such declaration was adequately supported by record as against mother's contention that citation was not issued and served on her at least 24 hours before hearing. Welfare and Institutions Code, § 726.

◆

Proceeding by Thelma Hynes, for and on behalf of Darlene Staser, a minor, for a writ of habeas corpus to release the minor from custody as a ward of the juvenile court.

Writ discharged, and ward remanded.

Archibald D. McDougall, of Sacramento, for petitioner.

John Quincy Brown, Dist. Atty., and John B. Heinrich, Supervising Deputy, both of Sacramento, and Fred N. Howser, Atty. Gen., for respondent.

THOMPSON, Justice.

Thelma Hynes, the mother of Darlene Staser, a minor, by means of habeas corpus, seeks the release of said minor after she was adjudged by the Juvenile Court of Sacramento County to be a ward of the court and was placed in the custody of The University Mound Training School of San Francisco.

It is claimed the juvenile court lacked jurisdiction to declare the minor a ward of the court for the reasons that: (1) The application by the probation officer was not verified and stated no grounds for the order as required by Section 722 of the Welfare and Institutions Code; (2) no citation of said application or hearing was served upon the mother or father of the minor twenty-four hours before the hearing, or at all, as required by Section 726, and that the parents had no previous notice or knowledge thereof, and had not consented to said order; (3) the hearing and order were made without notice on the same day the application therefor was filed in the juvenile court.

The petition for the writ of habeas corpus alleges that Thelma Hynes is the mother of said minor child who was then sixteen years of age; that petitioner and her former husband, Roy C. Staser, were divorced August 19, 1942, and their daughter, Darlene, was awarded to the custody of her mother by the terms of the decree of divorce, and still remains in her sole custody; that the child was adjudged to be a ward of the court and placed in the custody of The University Mound Training School at San Francisco, on April 15, 1946, without previous citation, notice or knowledge on the part of her mother, upon written application of the probation officer, which was not verified and which stated no grounds therefor; that said application was filed in the juvenile court and the hearing had, without notice; that the order was made at 9 o'clock A. M. on the same date last mentioned; that the court lacked jurisdiction and that the order adjudging the child to be a ward of the court is therefore void. Copies of the order of court and the subsequent order modifying it, on August 30, 1946, are attached to the petition for a writ of habeas corpus, and made parts thereof.

The return and answer to the petition for a writ of habeas corpus affirmatively alleges that the application to declare the minor a ward of the juvenile court was filed April 15, 1946; that "Notice of the Hearing was actually served upon Thelma Hynes, * * * the mother of the minor child herein, and the person having the care and custody of said minor child, in accordance with the provisions of Section 726 of the Welfare and Institutions Code"; that a subpoena was issued and served upon her on April 15, 1946, requiring her to appear and testify in said matter, and that the hearing occurred on April 17th, upon which date the judge, in "open court," made his written order determining that the minor is a ward of the juvenile court and committing her to The University Mound Training School at San Francisco. The said order and subsequent modification thereof were attached to the answer and made parts thereof. The answer denied all other allegations of the petition for a writ of habeas corpus.

Upon hearing in this court of the petition for a writ of habeas corpus, the application of the probation officer to declare said minor a ward of the court, the order of commitment and modification thereof, together with the subpoena were received in evidence. No oral testimony was adduced. The minutes, records and proceedings of the juvenile court, upon hearing of the application to adjudge the minor a ward of the court, are not otherwise before this court.

[1, 2] The burden is on the petitioner to establish the essential allegations of his petition for a writ of habeas corpus. The presumption of the regularity of the proceedings in support of a judgment prevails in the absence of evidence to the contrary. In re Knight, 62 Cal.App.2d 582, 586, 144 P.2d 882; In re Wallace, 24 Cal.2d 933, 938, 152 P.2d 1; 13 Cal.Jur. 275, sec. 53. In the present proceeding the petitioner failed to sustain that burden.

[3, 4] An examination of the record before this court discloses the fact that the probation officer's application for the order adjudging the minor to be a ward of the court was filed in the juvenile court April 15, 1946. It is signed by the assistant probation officer, as is also the verification, but the verification does not appear to have been sworn to before an officer. The application alleges that Darlene Staser "comes within the provisions of Subdivision (b) of Section 700 of the Welfare and Institutions Code; * * * That the said alleged ward has no parent or guardian willing to exercise or capable of exercising proper parental control; and who is in need of such control." It states the names of the parents and the address of the mother. The subpoena, which was issued in that matter and served on the mother on April 15th, commands her to appear as a witness in that matter in the juvenile court on April 16th. The written judgment recites that "due and legal notice having been given to all parties entitled thereto" (the name and address of the mother appearing in the petition), and "It duly appearing to the said Court that said person comes within the terms of Subdivision b of Section 700 of the Welfare and Institutions Code, * * * Now, therefore, it is hereby expressly found that all statements of fact contained in said petition [of the probation officer] are true." Said facts, so alleged, are that the ward is in need of control, and that she has no parent or guardian "willing to exercise or capable of exercising proper parental control." The judgment, which was rendered "in open Court this 17th day of April, 1946." and signed by Peter J. Shields, Judge of the Superior Court, declares that Darlene Staser is a ward of the court, and commits her to the care of The University Mound Training School of San Francisco. The subsequent modification of that order is immaterial for the purpose of this proceeding.

The petitioner in this habeas corpus proceeding contends that the application of the probation officer fails to state facts sufficient to authorize the juvenile court to make the order adjudging the minor to be a ward of the court. The complaint, however, states that the minor comes within Section 700, Subdivision (b) of the code, and that she "has no parent or guardian willing to exercise or capable of exercising proper parental control" and that she is "in need of such control." The court found that those allegations were true. This is an apparent attempt to state facts bringing the minor within the provisions of the code, even though it may be deemed to be subject to demurrer for uncertainty for lack of more particular details. Assuming that the pleading is subject to demurrer, it nevertheless conferred jurisdiction on the juvenile court, and is not subject to collateral attack, on that ground, upon habeas corpus. In re Marmaduke, 114 Cal.App. 278, 282, 299 P. 835; In re Edwards, 208 Cal. 725, 734, 284 P. 916; Matter of Maginnis, 162 Cal. 200, 206, 121 P. 723; In re Gutierrez, 46 Cal.App. 94, 188 P. 1004; 14 Cal.Jur. 146, sec. 35. In the Marmaduke case, supra [114 Cal.App. 278, 299 P. 837], the court said:

"* * * According to the decisions in analogous matters by the courts of this state, a nicety of pleading is not required. In the case entitled In re Gutierrez, 46 Cal. App. 94, 96, 188 P. 1004, 1005, it is held that; 'even where the petition is obviously open to demurrer for an insufficient statement of the facts, *if it appears from the declarations that there is a purported or attempted statement of facts which would confer jurisdiction, the question as to such sufficiency of statement will not be examined into on habeas corpus.*'" (Italics added.)

We are of the opinion the pleading in this case adequately states facts which gave the court jurisdiction, at least as against the collateral attack of petitioner in this habeas corpus proceeding.

[5, 6] Section 721 of the Welfare and Institutions Code does not require the probation officer to make an investigation of a charge as a necessary prerequisite to filing the petition. That provision is not mandatory. It is merely discretionary. In re Peterson, 56 Cal.App.2d 791, 794, 133 P. 2d 831. In this case the assistant probation officer, herself, filed the petition. She made an affidavit of the truthfulness of the charges, although it was not sworn to. It must be presumed that she investigated the facts and approved the filing of the charges.

[7, 8] It is true that the petition in the juvenile court was not verified before an officer authorized to administer the oath. The probation officer, however, signed the affidavit, averring that the facts contained therein were true of her own knowledge. Section 722 of the code declares that "Such petition shall be verified." The omission to swear to that affidavit attached to the petition constituted a mere defect of pleading. It did not deprive the court of jurisdiction. Board of Education v. Mulcahy, 50 Cal.App.2d 418, 423, 123 P.2d 114; Henderson v. Palmer Union Oil Co., 64 Cal.App. 81, 83, 220 P. 672; Jenssen v. R. K. O. Studios, Inc., 20 Cal.App.2d 705, 707, 67 P. 2d 757; In the Mulcahy case, supra [50 Cal. App.2d 418, 123 P.2d 118], it is said:

"* * * While it is true that in certain actions, such as to quiet title, and practically all special proceedings, the law requires the complaint or petition to be verified, it is the established rule that failure to do so constitutes only a defect in pleading *not affecting the jurisdiction of the court.* * * *" (Italics added.)

[9, 10] If the mother of the child was served with citation twenty-four hours before the hearing, and she failed to appear, or was present and failed to object to the petition on that ground, she must be deemed to have waived that defect. The petition for the order alleged that Thelma Staser was the mother of the child, and that she resided at 605 12th Street, Sacramento. The judgment recites that due and legal notice was given to "all parties entitled thereto." In the absence of evidence to the contrary, we must assume, in support of the findings and judgment, that she was duly and legally served with citation, as required by law. Moreover, the affidavit of the truthfulness of the allegations of the petition was actually signed by the probation officer, although it was not sworn to. We are of the opinion the failure of the officer to swear to her petition, under the circumstances of this case, did not deprive the court of jurisdiction.

[11, 12] The petitioner asserts that the court was without jurisdiction to hear or de-

termine the application, for the reason that the hearing was not set as required by Section 723 of the code. That section provides that "Either the judge of the juvenile court or the clerk thereof may set the time for the hearing of such petition." No adequate evidence was adduced at this habeas corpus hearing as to whether said petition was or was not set for hearing as required by the statute. In the absence of such evidence we must assume the officers performed their duty and regularly set the matter for hearing as required by law. The minutes of the juvenile court may show that the *judge* set the matter for hearing on a proper date. No evidence was offered in that regard. The petitioner argues that, because the petition contains an unsigned printed form at the bottom thereof, into which the date is inserted in typewriting, which reads, "The within petition is hereby set for hearing *by the Court* on April 15, 1946, at the hour of 9:00 o'clock A. M.," it is therefore evident that the matter was not set for hearing by either the judge or the clerk. That does not necessarily follow. The law does not require the petition to contain evidence of the setting of the cause or the time of hearing thereof. That very printed form contemplates that the order setting the time of hearing would be made "by the court." The fact that the form is not signed by the clerk furnishes no evidence that the juvenile court did not regularly set the time of hearing as required by law. The regular setting of the cause was an issue in this proceeding. The minutes of the court were not offered in evidence. No witness was called upon that issue, or at all. We must therefore assume that it was regularly and duly set for hearing.

[13] Finally, the petitioner insists that the court was without jurisdiction to make the order determining that the minor is a ward of the court because no citation was issued or served on the mother, who was conceded to have been awarded the custody of the child, twenty-four hours before the hearing. We assume that the issuance and service of a citation upon the mother twenty-four hours before the hearing was a necessary prerequisite to confer jurisdiction on the court (People v. Spiers, 17 Cal. App.2d 477, 484, 62 P.2d 414; Welfare and Institutions Code, sec. 726), although that failure may be waived by personal appearance of the mother at the hearing, and without objection on that ground. People v. Spiers, supra. No evidence was adduced at the habeas corpus proceeding to show whether the citation was issued or whether the mother was or was not present at the hearing in the juvenile court. The petitioner's attorney did state that he wanted to call the mother as a witness for that purpose, but he failed to do so.

[14, 15] The order of commitment recites that "due and legal notice having been given to all parties entitled thereto," as we have previously stated. The application to make the minor a ward of the court affirmatively shows that the mother was the only party entitled to that notice. The complaint shows that it was filed in the juvenile court on April 15th. The commitment was made "in open Court," on April 17th. That was the second day after the pleading was filed. It may not therefore be held, in the absence of evidence to the contrary, as the Spiers case clearly infers, that it was impossible to have served the citation on the mother twenty-four hours before the hearing. The record before us discloses the fact that the hearing was not held on the same day the complaint was filed, which was April 15th, as the petitioner contends, because the subpoena which was served on the mother that day to appear in that matter as a witness commands her to do so "on the 16th day of April, A. D. 1946." That subpoena may not be deemed to be an adequate substitute for a proper citation. It is merely referred to as evidence that the hearing did not take place on the same day the complaint was filed. In the absence of evidence to the contrary, we may assume the hearing was regularly set for April 16th, but that it was continued to the following day, the 17th of April, since the commitment was then made "in open Court" on the last-mentioned date.

For the reason that the petitioner, Thelma Hynes, failed to sustain the burden cast upon her to prove that the citation was not issued and served on her at least twenty-four hours before the hearing and that she did not appear and waive due notice thereof, we are constrained to hold that the order adjudging the minor to be a ward of the court is adequately supported by the record.

The writ is discharged and the ward is remanded.

ADAMS, P. J., and PEEK, J., concur.

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84 Cal.App.2d 769

RESERVE OIL & GAS CO. et al. v. METZENBAUM et al.

Civ. 3598.

District Court of Appeal, Fourth District, California.

April 8, 1948.

1. Mines and minerals 🔑74

Where assignment of oil and gas lease did not require that "notice of default" be personally served upon assignees but only required that assignors give written notice to assignees to remedy such defect, giving assignees notice of default by mail was proper.

2. Mines and minerals 🔑74

Where there had been a showing that assignees of oil and gas lease had received notice of default from assignors pursuant to provision in the assignment and that assignees had failed to remedy the default claimed, prejudice did not result to assignees by reason of method adopted by assignors in giving such notice.

3. Mines and minerals 🔑74

Where notice of default pursuant to provision in assignment of oil and gas lease was served by assignors on assignees and time to remedy such breach had expired, an additional notice declaring that assignment of the lease was forfeited was not required before assignors had cause of action to quiet title to their leasehold interest. Code Civ.Proc. § 1161.

4. Mines and minerals 🔑74

Even if additional notice of assignors' election to terminate assignment of oil and gas lease upon failure of assignees to cure default was necessary, filing of complaint and service of summons on assignees in action to quiet assignors' title in and to the leasehold interest constituted an election on part of assignors of their declaration of defendant.

5. Contracts 🔑274

If facts exist which justify rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract.

6. Mines and minerals 🔑74

The rights or obligations of parties under assignment of oil and gas lease would be measured by what the assignment actually provided.

7. Mines and minerals 🔑74

Where assignment of oil and gas lease specifically provided that failure of assignees to remedy default within 30 days after written notice to do so had been given by one of assignors should terminate agreement at option of such assignor, a notice of default signed by designated assignor alone was not insufficient because of failure of other assignors to join in the notice.

8. Mines and minerals 🔑74

Where defendants, as assignees of oil and gas lease, agreed to perform all obligations of lease and not to permit any default to be made in performance of lease with respect to described land, defendants, under terms of their agreement, could not be relieved of a default by reason of a claimed severance of the leasehold based on defendant's subsequently subleasing 300 acres of the 460 acre tract covered by the lease.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Reserve Oil & Gas Company and others against M. Metzenbaum, etc., Walter Metzenbaum and Rose Metzenbaum and others, to quiet title of plaintiffs in and to 410 acres of oil and gas leasehold interests covering 460 acres in the aggregate. From judgment for plaintiffs, the defendants Walter Metzenbaum and Rose Metzenbaum alone appeal.

Affirmed.

Walter Metzenbaum, of Bakersfield, for appellants.

Morrison, Hohfeld, Foerster, Shuman & Clark and Alfred L. Gibson, all of San Francisco, for respondents.

GRIFFIN, Justice.

This is an action to quiet title of plaintiffs and respondents in and to 410 acres of oil and gas leasehold interests covering 460 acres in the aggregate.

The complaint was filed on June 8, 1946. Defendants and appellants appeared by answer, denied plaintiffs' ownership and right of possession and set up, as substantiating their claim, that they had a one-half interest, by reason of a partnership existing between defendant and appellant Walter Metzenbaum and defendant M. Metzenbaum, in an agreement and assignment of interest by plaintiffs of a portion of the original lease, dated February 14, 1944. M. and Miriam Metzenbaum appeared by answer but failed to appear at the time of trial. Judgment went against them. They are not appealing. Other defendants filed disclaimers.

The factual background, as disclosed by the evidence, shows that on December 20, 1940, Tejon Ranch Company, as lessor, leased to plaintiff Reserve Oil and Gas Company, for a term of five years, and so long thereafter as oil was produced, certain lands in Kern County. A one-half interest in said lease was subsequently assigned to respondents Edwin W. and Barbara J. Pauley. On February 14, 1944, all plaintiffs entered into an assignment and agreement with M. Metzenbaum and Miriam Metzenbaum, covering the 460 acres of land involved in this action. On January 6, 1945, defendants M. Metzenbaum and Miriam Metzenbaum entered into a sublease with the defendant Hilo Oil Company, subleasing 300 acres of the 460 acre tract covered by the February 14, 1944 assignment. Prior to January 6, 1945, defendant M. Metzenbaum drilled and completed a producing gas well on a portion of the land held under his sublease. Subsequently, between March 11, 1945, and September 8, 1945, Hilo Oil Company drilled and completed four wells. In the assignment of February 14, 1944, from plaintiffs to defendants M. and Miriam Metzenbaum, it was provided in paragraph 3 that the sublessees should drill a test well and that if this should not produce oil and gas in paying quantities, then the sublessees were obligated, within 60 days after the completion or abandonment of the test well, to commence drilling a second well or else reassign the lease to plaintiffs. The same paragraph of the assignment further provided that if oil and gas was found in paying quantities the sublessees "shall continue to drill additional wells on said lands as rapidly as one string of tools working with reasonable diligence can complete them until there shall have been drilled and completed on said lands as many wells, having producing intervals of less than three thousand (3,000) feet in depth * * * as shall equal the total acreage held by second parties hereunder divided by ten (10), and as many wells, having producing intervals of three thousand (3,000) feet or more in depth measured from the derrick floor, as shall equal the total acreage held by second parties hereunder divided by twenty (20); * * *."

The evidence shows and the court found that all the wells drilled by the sublessees on the land had and have producing intervals of less than 3,000 feet, and that no further wells were ever drilled or completed by any of the sublessees herein, on any of the lands at any time thereafter. On April 6, 1946, plaintiff Reserve Oil and Gas Company served upon all defendants herein a notice of default and of termination of the lease of February 14, 1944, by registered mail. It should be noted here that the notice of default and termination of lease did not relate to the five wells drilled by the sublessees and their sublessee Hilo Oil Company and ten acres surrounding each such well. It is pointed out that those wells and the ten acres surrounding each well are not involved here, as, under the terms of the agreement of February 14, 1944, the sublessees are entitled to retain those wells and ten acres surrounding each of them. The findings show that no further drilling or attempt to drill by any of the defendants herein upon any of the property in question took place *after the service of the no-*

tice and prior to the commencement of this action.

The trial court found that the defendants and appellants were in default; that their lease, ever since May 7, 1946, was of no legal force and effect, and concluded that the plaintiffs were entitled to a judgment quieting their title.

At the trial appellants contended, not that they had complied with the terms and conditions of the assignment of February 14, 1944, and not that any of the wells drilled satisfied any of their obligations under the lease, but contended only that the notice of default and of termination of the lease served upon them was insufficient, and further, that upon the theory of "severance" the appellants, in any event, and regardless of their breach of the conditions of the sublease, were entitled to retain possession of the property without drilling.

The agreement of February 14, 1944, in reference to default, notice and forfeiture, provides that upon the violation of any of the terms of the assignment and agreement by said lessees and their failure to remedy such default within thirty days "after written notice from Reserve Oil Company so to do then" at its option, the assignment and agreement shall forthwith cease and terminate and all rights of sublessees shall be at an end, except as to ten acres surrounding each producing or drilling well in respect to which sublessee shall not be in default. The sublessees, in that agreement, assumed and agreed to perform all of the terms and conditions of the original oil and gas lease dated December 20, 1940, with respect to the lands described in the sublease of February 14, 1944. The written "Notice of Default" provided that "you are in default in the performance of the terms and conditions of that certain assignment and agreement * * * in that you * * * failed * * * for more than sixty (60) days from the date of completion of the last well drilled by you upon the land described in said assignment and agreement to 'continue to drill additional wells' * * * and that upon your failure to remedy such default within thirty (30) days after this notice by commencing actual drilling in the ground of an additional well upon said land and thereafter to prosecute the drilling thereof with reasonable diligence, the undersigned elects to declare, and *does hereby declare,* said assignment and agreement terminated * * * and upon failure of you to remedy said default as aforesaid, demand is hereby made upon you to quietly and peaceably surrender possession * * *". Signed: "Reserve Oil and Gas Company. * * *." (Italics ours.)

An affidavit in evidence shows that such "Notice of Default" was mailed to appellants at their address, by registered mail, and a return receipt therefor was appropriately signed, line 1, "W. Metzenbaum"; line 2, "I. Kaine (Signature of Addressee's Agent * * *) Date of Delivery 4/4/46." Another such return receipt was signed "Walter Metzenbaum, per Victor Metzenbaum, (Signature of Addressee's Agent * * *) Date of delivery 4/8/1946."

Appellant's main argument is that since the lease provides for a "Notice of Default" but does not provide that such notice may be given by mail, such notice must be personally served on the persons in default, citing such cases as Alphonzo E. Bell Corporation v. Lisle, 55 Cal.App.2d 300, 130 P.2d 251; Long v. Chronicle Publishing Co., 68 Cal.App. 171, 179, 228 P. 873; Williams v. Bergin, 108 Cal. 166, 171, 41 P. 287.

Plaintiffs cite Colyear v. Tobriner, 7 Cal. 2d 735, 743, 62 P.2d 741, 109 A.L.R. 191.

Appellants have appealed on the judgment roll only and they included in the notice to the clerk to prepare a transcript a request that the exhibits introduced in evidence be included in the record on appeal. These exhibits include among them, the original lease of December 20, 1940, the assignment and agreement of February 14, 1944, and a copy of the "Notice of Default" with affidavit of service, as indicated.

The trial court found, from all the evidence produced, that on April 6, 1946, plaintiffs "served upon all defendants herein a good, valid and sufficient notice of default and of termination of the said lease of February 14, 1944", and at the time of the filing of this action all defendants were in default under the agreement and that no wells were drilled upon said lands after September 8, 1945.

There is no evidence and there is no contention made that appellants did not receive the "Notice of Default" as indicated by the proof of service.

[1, 2] It should be here noted that the assignment and agreement of February 14, 1944, does not require that the notice of default be personally served upon the lessees, but only requires that the Reserve Oil and Gas Company give *written notice* to remedy such default, and on their failure to do so, at the option of the company, the agreement shall forthwith terminate.

In Conrad v. Hawk, 122 Cal.App. 649, 10 P.2d 534, under a similar claimed default, notice of such default and termination of lease was served by registered mail and such method of service was upheld. To the same effect is Wright v. Western States Life Insurance Co., 61 Cal.App. 488, 214 P. 990. There the insured was permitted to make an election "by written notice to the company" and it was held that a letter addressed to the company at its home office and deposited in the post office, postage prepaid, was sufficient compliance with the provisions of the policy, and the receipt of such notice by the company was presumed, citing sec. 1963, Code Civ.Proc., subdivision 24, and Stockton, etc., Works v. Houser, 109 Cal. 1, 41 P. 809.

Appellants cite the rule applicable to notice of termination of tenancy under such sections as 827 and 1946 of the Civil Code, and a statement in Alphonzo E. Bell Corporation v. Listle, 55 Cal.App.2d 300, 301, 130 P.2d 251, where it is said, quoting from the syllabus: "Where an oil lease does not provide for notice of default by mail, it should be construed as requiring the lessor to give the lessee personal notice of default."

In Colyear v. Tobriner, supra, 7 Cal.2d at page 743, 62 P.2d at page 745, 109 A.L.R. 191, it was, as to those sections of the Civil Code above mentioned, stated: "As to the matter of notice, it may be said that where a statute requires notice and does not specify how it shall be given, the presumption is that personal service is required. * * * The post office department, as well as any other type of messenger, may be used to effect personal service", citing Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863, where it was held that the receipt of a notice served by mail is legally equivalent to a personal service; and Heinlen v. Heilbron, 94 Cal. 636, 30 P. 8, which is to the same effect.

In the Alphonzo E. Bell Corporation case, supra, relied upon by appellants, the notice of default was mailed by registered mail but was not received by the defendants until a much later date. A default was declared after 60 days from the date of mailing, but within the 60-day period from the date the notice was *received* and there was evidence that work had been resumed before the expiration of the 60 days from the date the notice was received. There is nothing in that case which holds that personal service could not be made by registered mail. We must therefore conclude that the method of giving defendants notice of default in the instant case was proper. First National Bank in Santa Ana v. Coast Consolidated Oil Co., 84 Cal.App.2d 250, 190 P.2d 214. Since there has been a showing, not only by presumption but factually, that defendants did *receive* such notice and that they failed to remedy the default claimed, no prejudice resulted by reason of the method adopted in giving such notice.

[3] The next argument is that even though notice of default was served and the time to remedy such breach had expired, an additional notice was required declaring that the lease was forfeited before plaintiffs had a cause of action, citing Amsbury and Jones Work on "Oil & Gas Law of California" pages 78 and 79; Calhoma Oil Corporation v. Conniff, 207 Cal. 648, 279 P. 771; Conrad v. Hawk, 122 Cal.App. 649, 10 P.2d 534; and 15 Cal.Jur. 779, sec. 197; and other cases arising under sec. 1161 of the Code of Civil Procedure.

It should be noted here that this is an action to quiet title and the notice itself provided that appellants "were in default" in the premises described and upon their failure to remedy it within 30 days "after this notice" plaintiff Reserve Oil and Gas Company "elects to declare" and "*does hereby declare*" said agreement terminated. Defendants knew, as well as plaintiffs, that the default had not been corrected, and likewise knew from said notice that as a result thereof plaintiff elected to declare and did thereby declare said agreement terminated.

In Hanes v. Coffee, 212 Cal. 777, 300 P. 963, which was an action to quiet title, and in which the defendant set up an interest in the property under a lease by which he was given the exclusive right to prospect for and develop oil, gas and other hyrocarbon substances on the property, the contention was made that the proceeding to quiet title was improper for lack of notice of the termination of the lease as required by the statute. It was there held that such contention could not be maintained, as the landlord's remedy of ejectment, unlawful detainer and quiet title are distinct, and the statutory notice provided for in section 1161 of the Code of Civil Procedure is unnecessary in an action to quiet title, citing cases.

Even in Calhoma Oil Corporation v. Conniff, supra [207 Cal. 648, 649, 279 P. 771], relied upon by appellants, it is stated in the syllabus that "In such action, assuming, only that the lessors of the land should have given some other or further notice than the one given declaring a forfeiture of the lease, any defect in or failure of demand or notice may be regarded as having been waived by the lessee, where the lessee all along contested the right of the lessors to claim possession." See, also, Williams v. Edge, 192 Cal. 254, 219 P. 747; Taylor v. Hamilton, 194 Cal. 768, 230 P. 656; Stetson v. Orland Oil Syndicate, Ltd., 42 Cal.App.2d 139, 108 P.2d 463.

[4] Even if it could be claimed that an additional notice of plaintiff's election to terminate the lease upon failure to cure the default was necessary, the filing of the complaint and service of summons on defendants constituted an election on the part of plaintiffs of their declaration. Danielson v. Neal, 164 Cal. 748, 130 P. 716; Schutt v. Scott, 62 Cal.App. 539, 217 P. 565; Neuhaus v. Norgard, 140 Cal.App. 735, 740, 35 P.2d 1039; Allan v. Guaranty Oil Company, 176 Cal. 421, 168 P. 884; Moon v. Marker, 26 Cal.App.2d 33, 78 P.2d 460.

[5] In House v. Piercy, 181 Cal. 247, 248, 183 P. 807, it is said, quoting from syllabus number 5: "If the facts exist which justify a rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract * * *."

[6, 7] There is no merit to the next point raised by appellants that a notice of default signed by the Reserve Oil and Gas Company alone was insufficient because there was more than one lessor and that the failure of all lessors to join in the notice was fatal as to its effectiveness. The agreement of February 14, 1944 specifically provides that the failure of the appellants to remedy such default within 30 days "after written notice from Reserve Oil and Gas Company to do so" shall terminate the agreement "at the option of Reserve Oil and Gas Company". Obviously, the parties, by their contract, provided that the notice of default should be given by the company only and that the Pauleys did not have to join therein. The rights or obligations of the parties in this case must be measured by what the lease actually provides and the case of Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 167 P. 369, relied upon by appellants, is factually different and not in point. When parties have provided by their agreement that notice shall be given in a particular way, notice given in such manner is binding and sufficient. Devonshire v. Langstaff, 10 Cal.App.2d 369, 51 P.2d 902; Moon v. Marker, supra.

[8] Lastly, appellants contend that by reason of the agreement of January 6, 1945, whereby apppellants subleased 300 acres of the 460 acre tract involved in this action to the Hilo Oil Company, there was a severance of the 300 acre tract from the 460 acre tract and that by reason thereof they have been relieved of the obligation of drilling wells on their retained portion of the lease. This contention depends upon the wording of the master lease, the consent appended to the agreement of January 6, 1945, signed by the Tejon Ranch Company and the consent appended thereto signed by Reserve Oil and Gas Company and the Pauleys. The master lease provided for assignment in whole or in parts and that such holdings would constitute separate holdings and the holder thereof would be required to comply with and perform the lessees' obligations under the lease, to the extent of his portion

of the lease. In the event of default, as applied to any such portion so assigned, such default should not operate to defeat this lease in so far as it covers the parts retained by lessee or then held by any assignee upon which there is no default. The consent signed by the company and the Pauleys is that they "* * * hereby consent to the foregoing sublease and agree to a severance and separate holding of said subleased premises * * * and do hereby agree that a default with respect to any portion of the leased premises other than said subleased premises shall not constitute a default as to said subleased premises". However, there is a second paragraph of the consent which reads: "This consent shall be without prejudice to any right, title or interest of the undersigned in and to the subleased premises under and by virtue of said lease of December 20, 1940, and under said assignment dated February 14, 1944; and any provisions of the foregoing sublease not consistent with the provisions of said lease of February 20, 1940 and said assignment of February 14, 1944, shall be without force or effect with respect to, and shall not be binding upon, the undersigned. Any termination of said sublease by surrender, forfeiture, or otherwise, shall forthwith vest in the undersigned such right, title and interest as they may have in and to the premises so surrendered or forfeited under said lease of February 20, 1940 and said assignment of February 14, 1944, respectively."

The agreement of February 14, 1944, paragraph 6, provides that lessees "hereby assume and agree to perform each and all the terms, covenants and conditions of said oil and gas lease dated *December 20, 1940* by the lessee thereunder to be performed with respect to the lands herein particularly described", and they "shall not permit or suffer any default to be made in the performance of said oil and gas lease with respect to the lands hereinafter particularly described."

Defaults exist with respect to both parcels and relate to the 460 acres. As long as Hilo Oil Company performed that obligation the Metzenbaums did not have to perform any drilling operations on the 160 acres retained by them, but by the very language of the consent which created a severance, drilling obligations of the assignment of February 14, 1944, were preserved with respect to the entire 460 acres, and as soon as Hilo Oil Company ceased drilling on its 300 acre parcel the Metzenbaums had to commence drilling on their retained 160 acre parcel or the entire sublease of February 14, 1944, would be in default.

It is argued that the notice of default is based on the failure of the lessee defendants to continue drilling after five wells had been drilled; that in view of the severance of the 160 acre parcel, this parcel could only be in default as to the drilling of an original well; that a notice of default will, under no circumstances, cover any default except that default named in the notice; that the 160 acre parcel was in no way in default because lessors claimed additional wells should be drilled; that it was severed from the 300 acres upon which five wells had been drilled; that the notice of default was defective and could in no way reach the 160 acre parcel.

The court specifically found that no drilling by any of the defendants upon the entire leasehold took place after September 8, 1945; that "In paragraph 6 of said agreement of February 14, 1944, said defendants Metzenbaum assumed and agreed to perform all the obligations of the lease of December 20, 1940 * * * and agreed that they 'shall not permit or suffer any default to be made in the performance of said oil and gas lease with respect to the lands hereinafter particularly described.'" It then found that all defendants, including appellants, were in default with respect to the provisions of the agreement of February 14, 1944. Appellants, therefore, under the terms of their agreement, were not relieved of their default by reason of any claimed severance of the leasehold. 24 American Jurisprudence p. 595, sec. 90.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

84 Cal.App.2d 810

JAFFE v. VITZ.

Civ. 16160.

District Court of Appeal, Second District, Division 1, California.

April 12, 1948.

1. Contracts ⚿89

In action for breach of contract to pay plaintiff for services rendered in connection with transfer of property, where defendant denied that there was any consideration for contract, testimony of plaintiff's employee concerning time spent showing defendant property was admissible to show that services were rendered the defendant.

2. Contracts ⚿346(10)

In action for breach of contract for rendition of services in connection with transfer of property, testimony concerning time spent by plaintiff's employee showing defendant's property did not create a variance where answer had denied that any services were rendered by plaintiff.

3. Appeal and error ⚿1052(8)

Error, if any, in admission of evidence furnished no basis for complaint where other evidence was sufficient to support findings and judgment.

4. Appeal and error ⚿931(6)

Where competent independent evidence supports judgment without recourse to testimony erroneously admitted, the error is not prejudicial, since it will be presumed that trial judge relied upon the competent evidence in making his findings and rendering judgment.

5. Appeal and error ⚿1046(5)

Remarks of trial court, before whom case was tried without a jury, including statement that defendant was a liar, did not constitute prejudicial misconduct where at time remarks were made the witness had been thoroughly impeached by a disinterested witness.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Harry Jaffe against Joseph L. Vitz to recover for breach of contract for rendition of services by plaintiff for the defendant. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

Bertram H. Ross, of Los Angeles, for appellant.

Loeb & Loeb and Keating Coffey, all of Los Angeles, for respondent.

BARTLETT, Justice pro tem.

This is an appeal from a judgment rendered in favor of the plaintiff for $5,000 on an action brought by him for the breach of the following agreement:

"October 5, 1945

"In consideration of services rendered by Harry Jaffe to the undersigned in connection with the transfer of possession of the Hermoyne Apartments, the subject of Pacific States Savings and Loan Company sales file H–4, the undersigned hereby agrees simultaneously with the execution of the agreement of transfer to pay to the said Harry Jaffe in full for such services the sum of Five Thousand ($5000.00) Dollars. Payable $1000.00 per month. Nov. 10, 1945. JLV

"(J. L. Vitz)"

The complaint set forth the contract and alleged the rendition of services by plaintiff for defendant and that there was a valuable consideration for the written contract. The answers denied that any services were rendered by plaintiff; denied that there was any consideration for the contract, and affirmatively alleged "that plaintiff has done nothing of value for this defendant other than to obtain from defendant the agreement set forth and pleaded * * *." The answer also, as an affirmative defense, plead fraud.

[1, 2] The appellant charges that the court erred in admitting certain evidence regarding services rendered prior to the date of contract by respondent in acquainting appellant with the Hermoyne Apartments and the other apartment houses, and further contends that there was a variance between the pleading and the proof. He charges too that the trial judge was guilty of prejudicial misconduct.

At the time the rulings were made concerning the introduction of evidence of which plaintiff complains, the witness was Ted Berns, an employee of the plaintiff, who was being examined concerning time he had spent showing appellant the Hermoyne and other apartment houses. Appellant objected to this line of testimony and the following occurred:

"Q. Approximately how much time during every day did you spend with Mr. Vitz showing him properties?

"Mr. Ross: That is objected to as incompetent, irrelevant and immaterial. If the plaintiff is entitled to recover he is entitled to recover on the contract and not the time spent that this man showed buildings.

"The Court: Why is that not so, Mr. Coffey? He is not suing for time lost.

"Mr. Coffey: The issue, your Honor, has been raised that there was no consideration for this contract and my purpose is to show there were considerable services rendered by Mr. Jaffe.

"The Court: Well, if that is the purpose I think you have the right to show what was done in either time or money.

"The objection is overruled. * * *"

Appellant placed in issue the question of the services rendered and as to whether or not there was any consideration for the contract by his answer. Therefore, the court's rulings were correct and there was no variance between the pleading and the proof.

[3] As indicated, we are of the opinion that this evidence was properly admitted but if it were not, appellant is in no position to complain. If appellant's motion to strike all of Mr. Berns' testimony had been granted there was still sufficient evidence to support the findings and judgment, as will be seen from the following significant statements of appellant in his brief:

"Appellant testified as to one version of the transaction, and respondent gave diametrically opposite testimony. It must be conceded that respondent's version of the transaction was corroborated by the deposition of Lenore D. Underwood, a Deputy Attorney General of the State of California, who had charge of the properties of the defunct Pacific States Savings & Loan Association."

"We shall not indulge in any argument concerning the conflict in evidence; suffice it to say that there was sufficient evidence to support a finding either in favor of the appellant or the respondent * * *. The fact is that the trial court rejected appellant's views and the evidence is sufficient to justify that course."

[4] The law concerning the matter is clearly stated in Keating v. Basich Bros., etc., Co., 66 Cal.App.2d 258, 263, 151 P.2d 892, 894, as follows:

"The general rule prevailing in California on this subject is this: Where there is competent independent evidence in the record which supports the judgment without recourse to the testimony erroneously admitted, generally the error is not prejudicial as it will be presumed on appeal that the trial judge considered and relied upon the competent evidence in making his findings and rendering the judgment. Evans v. Gibson, 220 Cal. 476, 31 P.2d 389; Roy v. Salisbury, 21 Cal.2d 176, 130 P.2d 706; Frazure v. Fitzpatrick, 21 Cal.2d 851, 136 P.2d 566; Ford v. Lou Kum Shu, supra [26 Cal.App. 203, 146 P. 199]; Watt v. Copeland, 92 Cal.App. 161, 267 P. 928; Cordi v. Garcia, 56 Cal.App.2d 584, 132 P.2d 887."

[5] The only other question to consider is whether or not the trial judge was guilty of any prejudicial misconduct. The acts of misconduct specified are three in number as follows:

1. "The Court: This man seems to think every question you ask him is an excuse for opening his mouth and letting the words pour out."

2. "By the Court: How did you come to initial it? Aren't those your initials? This is a simple question: Aren't those your initials? A. It looks like my initials, your Honor.

"Q. How did you come to initial it? A. Well, I don't know how it comes there, but it looks like mine, although there are signatures that look like others.

"The Court: All right. I do not see what some people expect the court to believe. Go ahead."

3. "The Court: Judgment for the plaintiff as prayed and I will state very frankly that the defendant has shown himself to be such a liar that I did not consider his testimony too highly, and the testimony was that a rough draft of this particular document was shown to him and that was not only testified to by the plaintiff, but also by a disinterested witness, Mrs. Underwood, who is a state officer, and who testified by her deposition that sheets were brought in and shown to both of them. I think the defendant is about as big a liar as I have seen in court for some time."

This case was tried before the court without a jury. From a reading of the entire record it is apparent that both sides received a fair trial. Appellant calls our attention to two cases; one of these is Rosenfield v. Vosper, 45 Cal.App.2d 365, 114 P.2d 29, where the judge, before the defendants had an opportunity to introduce any evidence, urged them to settle the case for $7,500. This they failed to do and at the conclusion of the trial, the court rendered judgment against them for over $12,500. Nothing like that happened here. Appellant does not charge, and there is no intimation, that the judge prejudged the case. In fact the remarks of the court, of which complaint is made, were uttered either after the case had closed or as the end of the trial neared and the witness in qustion had already been thoroughly impeached by an entirely disinterested witness.

More nearly in point is the other case cited by appellant, Smith v. Coleman, 46 Cal.App.2d 507, 116 P.2d 133. In that case the same judge was accused of misconduct. The similarity of the import of the remarks as made and the rule to be applied are well shown by the following excerpt from 46 Cal.App.2d at pages 513 and 514, 116 P.2d at page 136, of the opinion in that case:

"Defendants charge that certain remarks of the trial judge made at the conclusion of the trial show bias and prejudice on his part. These remarks were to the effect that defendants, whom the judge referred to as 'butchers and bunglers,' were either committing perjury or were suffering from a loss of memory; and that Dr. Cass, an expert witness for defendants, 'was doing all he could to cover up his professional brethren.' In reference to the firm for which plaintiff was employed, the judge said: 'If the concern were to fail—and if Roosevelt remains in office much longer everybody will fail—then he may be looking for another job.' The action was tried before the court without a jury and it was the duty of the judge to pass upon the credibility of the witnesses and to determine the facts from the evidence. The judge had the right to announce the mental processes by which he determined the credibility of the witnesses and by which he arrived at his conclusions. A new trial cannot be demanded upon the ground that the judge in exercising this right may have exceeded the bounds of propriety."

Judgment is affirmed.

DORAN, Acting P. J., and WHITE, J., concur.

84 Cal.App.2d 830

MOSS v. WILLIAMS et al.

Civ. 15941.

District Court of Appeal, Second District, Division 3, California.

April 13, 1948.

Hearing Denied June 10, 1948.

1. War ⚿4

Where contract was primarily for sale of realty with consideration to be received by seller consisting of cash and right to remain in posssession for not more than two years from date of sale, relationship of "landlord and tenant" did not exist and housing regulations of OPA were not applicable, though words "rent," "tenancy," and "tenants" appeared in contract. Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. Appendix, § 901 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Landlord and Tenant".

2. Forcible entry and detainer 🔑6(1)

Where contract for sale of realty provided that vendor should have right to remain in possession of realty for two year period after date of sale, but when two year period elapsed, vendor's assignor refused to surrender realty, unlawful detainer was proper form of action by purchaser to recover realty. Code of Civ.Proc. §§ 1161a, 1174.

3. Forcible entry and detainer 🔑30(5)

Where contract for sale of realty provided that vendor should have right to remain in possession of realty for a two year period after date of sale, but when two year period elapsed, vendor's assignor refused to surrender realty, evidence in purchaser's unlawful detainer action against vendor's assignor was sufficient to support judgment for treble damages. Code of Civ.Proc. §§ 1161a, 1174.

4. Forcible entry and detainer 🔑16

In an unlawful detainer action, determination of question of jurisdiction depends on amount claimed in the ad damnum clause of the complaint.

5. Forcible entry and detainer 🔑16

Superior Court had jurisdiction of unlawful detainer action, where it was alleged that plaintiff sustained damages in the amount of $16,500 or $250 a month.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action in unlawful detainer by Edith R. Moss against Nadia Williams and others. From a judgment for plaintiff, the named defendant appeals.

Judgment affirmed.

Louis Naiditch, of Los Angeles, for appellant.

Nicolas Ferrara, of Los Angeles, for respondent.

WOOD, Justice.

In this action in unlawful detainer, plaintiff obtained judgment for possession of the premises and for treble damages in the sum of $945. Plaintiff's motion for judgment on the pleadings, as to the issue of possession, was granted. Testimony was received upon the issue of damages. Defendant Williams appeals from the judgment.

Plaintiff commenced the action without having complied with the Emergency Price Control Act of 1942, as amended, 50 U.S.C.A.Appendix, § 901 et seq., and the Rent Regulation for Housing prescribed by the Office of Price Administration under authority of that act. The question on appeal is whether the relationship between plaintiff and defendant was that of landlord and tenant or was that of vendor and vendee. Defendant (appellant) contends that the relationship between plaintiff and defendant was that of landlord and tenant, and that since plaintiff did not comply with the provisions of said act and rent regulation, the judgment should be reversed. Plaintiff asserts that the relationship between the parties was that of vendor and vendee, and that the provisions of that act and regulation are not applicable when such a relationship exists.

The complaint alleged that on July 11, 1944, defendant Williams and Irena Tom entered into a written agreement for the purchase and sale of certain real property located in Glendale, California; that said agreement is attached to the complaint and made a part thereof; that on August 11, 1944, and pursuant to said agreement, defendant Williams sold said property to Irena Tom; that about January 29, 1946, plaintiff purchased said property from Irena Tom, and on said date Irena Tom assigned the said agreement by written assignment to plaintiff, and plaintiff is now the owner thereof; that at all times mentioned therein plaintiff was and is the owner and entitled to possession of said property; that said property has been sold by defendant Williams, as therein above alleged, and "the title under the sale has been duly perfected as of on or about August 11, 1946"; that defendant Williams has been in possession of said property for some time prior to and since July 11, 1944; that three other persons (other defendants herein) are in possession of said property as tenants of defendant Williams; that about August 13, 1946, plaintiff served on defendant Williams a notice in writing requiring her to quit possession of the said property within three days after the service of said notice; that a copy of said notice was attached to said complaint and made a part thereof; that about August 15th plaintiff served similar notices to quit on the other defendants; that more than three days have elapsed since the service of said notices, and that defendants continue in possession of the premises without the consent of plaintiff; that the reasonable value of said property is $16,500; that plaintiff has sustained damages by reason of said detention of said premises in the amount of $16,500 or $250 a month.

The written agreement for the sale of said property, which is attached to said complaint, recites that the agreement was entered into on July 11, 1944, between defendant Williams, referred to therein as the owner, and Irena Tom, referred to therein as the buyer; that "In consideration of the covenants and agreements hereinafter set forth herein" the owner agreed to sell to the buyer and the buyer agreed to purchase from the owner the said described real property, subject to conditions, restrictions and reservations of record and "subpect also to all provisions contained in this agreement, which covenants and agreements are part of the consideration for the sale" of said premises; that the purchase price was $12,500 cash to be paid on the day the title company advised the parties that the grant deed was ready to be recorded. It is then provided in said agreement as follows: "It is mutually covenanted and agreed that part of the consideration for the sale by the owner is that the owner and the persons now occupying the premises on the lower floor of the said property, may remain in possession by paying to the buyer, the sum of $75.00 per month as rent, but that the said tenancy shall in no event be for a period of more than two years from the day the purchase and sale is completed. The owner, however reserves the right to vacate the said premises at any time within the said two year period, which includes the persons now occupying part of the lower floor or who may occupy the same during the said period." It is then provided therein that the owner might complete her contract for closing in the front porch with glass, and that the buyer, in addition to paying the purchase price, would reimburse the owner for the expense of such improvement provided it did not exceed $400. It is then provided therein that certain furniture in the house was included in the purchase price. It is then provided therein as follows: "It is agreed and understood that the buyer is to pay all utilities for the upper and lower tenants, there being only one meter for gas, electricity and water respectively and that the Seller in order to derive the rentals has paid all utilities and that from and after the recordation of the papers conveying the said premises from the seller to the buyer, the buyer shall pay all expenses in connection with the maintenance of the said premises, including all utilities." It is then provided therein that the agreement should serve as the escrow agreement and that the owner should pay a certain real estate company a certain commission for the sale of the property; that the owner acknowledged receipt of a certain sum of money as a deposit on the purchase price; and that the rent, taxes and insurance should be prorated as of the day the deed was recorded.

Also attached to said complaint is a writing dated July 24, 1944, signed by said seller and buyer, which provides in substance as follows: That said writing constituted an amendment and supplement to the agreement theretofore entered into in connection with the sale of said property; that in consideration of the seller's cancellation of the clause in the original agreement relative to enclosing the front porch "the parties hereto have compromised by permitting the seller, who is to retain possession for a period of two years or vacate sooner at her option, to construct a small room" at the end of the porch; that the buyer agreed to pay to the seller $100 to reimburse her for the construction of that room; and that the seller agreed to wait for the payment of the $100 "until the day she is ready to vacate the premises whether that be within the two year period or sooner."

The answer of defendant Williams admitted all the allegations of the complaint, except those regarding damages. She denied, in her answer, that plaintiff had been damaged. She alleged therein that the three days' notice which was served on her "is insufficient in that it is not in compliance with the provision of Section 6 of the Rent Regulation for Housing, entitled 'Removal of Tenant' issued pursuant to the Emergency Price Control Act of 1942, O.P. A. as amended." As a separate defense she alleged that the complaint did not state a cause of action in unlawful detainer; that the court had no jurisdiction over the subject matter therein; and that the Justice's Court of Glendale Township is the proper court for the maintenance of said action. The other three defendants defaulted.

The court found that the reasonable value of the use of said premises "for the period defendants wilfully, intentionally and deliberately withheld possession thereof with knowledge of termination of their right to possession on August 11, 1946, and against the will of plaintiff, is $315, and plaintiff has been damaged thereby in the sum of $315.00, which sum is trebled, and plaintiff is entitled to recover and is allowed treble damages in the sum of $945.00." The court stated, as conclusions of law, that plaintiff was entitled to immediate possession; that plaintiff was entitled to judgment that she recover treble damages for wilful, intentional and deliberate withholding of said premises in the sum of $945; that "No relationship of landlord and tenant ever existed with respect to said premises occupied by defendants either from August 11, 1944, to August 11, 1946, or after August 11, 1946, or at the time of the commencement of the action herein, and that the Regional Rent Director, Office of Price Administration, has no jurisdiction over the subject of the action herein."

The contract was primarily one for the sale of the property by the defendant Williams and the purchase of it by plaintiff's assignor, Mrs. Tom. The matter of retaining possession (of part of the property) by the seller was an incidental and subordinate part of the basic transaction between the parties, that is, the sale of the property. The right on the part of the seller to retain possession for two years and the right on the part of the buyer to obtain possession immediately thereafter were a part of the consideration of the contract for the sale and purchase of the property. The consideration to be received by the seller, for conveying title to the property, was $12,500 cash and the right to remain in possession of the property for a period which "in no event" should be for "more than two years from the day the purchase and sale is completed," provided that she pay $75 per month as rent for each month she remained in possession during that period. The consideration to be received by the buyer, for paying the $12,500 and granting the seller the right to remain in possession for such time, was a conveyance of title to the property and possession of the whole property within two years after the title to the property had been conveyed to the buyer. Since the deed, conveying title to the property, was recorded on August 11, 1944, a part of the consideration to be received by the buyer was possession of the whole property not later than August 11, 1946. The relationship between the plaintiff's assignor (and the plaintiff) and the defendant Williams was that of vendor and vendee.

Although the words "rent," "tenancy," and "tenants," which usually appear in a lease agreement, are in the written agreement involved herein, their significance is to be determined from a consideration of the intention of the parties, and the objects and purposes to be accomplished by the parties, as indicated by the context of the whole agreement. As above mentioned, the whole context shows that it was their intention, object and purpose to effect a sale of the property upon certain specific terms and conditions. The retention of possession by the seller of a part of the property for a limited time after the conveyance of title was one of the terms and conditions of the agreement of sale. The buyer complied with all the provisions of the agreement on her part to be performed, namely, the paying of $12,500 cash and permitting the seller to occupy the property for the two years. The seller complied with a part of the agreement on her part to be performed, namely, she conveyed the title to the property to the seller on August 11, 1944. She occupied the property for the two years thereafter, but she failed to comply with a substantial and important part of her agreement of sale, namely, to deliver possession of the property at the end of the two years.

[1] Appellant asserts that she was entitled to remain in possession of the property after the termination of the two years, by virtue of the provisions of section 6 of the Housing Regulation of the Office of Price Administration, and that by virtue of said section her alleged tenancy was extended indefinitely beyond the time she agreed to deliver possession. This contention is not sustainable. She asserts that the facts in the case of Lovett v. Bell, 30 Cal.2d 8, 180 P.2d 335, 337, are similar to those in the present case, and that the decision in that case is controlling herein. In that case the court held that the "defendants indisputably were tenants of plaintiffs," and that "Upon the undisputed facts, the rights and obligations of the parties stemming from their landlord-tenant relationship continued after the expiration of the lease," by virtue of said Rent Regulation. The facts in that case, stated generally, were as follows: That defendant in 1940 had come into possession of the property under a written lease for five years ending in 1945, which lease provided in effect that the lessors should be permitted to sell the premises during the term of the lease and thereby terminate the lease, and that the lessees should have an option to renew the lease upon the expiration of the five years; that in 1944 the parties, by written agreement, so modified the lease that the lessors relinquished their right to sell the premises free and clear of the lease prior to the expiration of the lease, and that the lessees relinquished their right to exercise the option to renew the lease and stated that they did not have any interest in said premises after the expiration of said lease term of five years; and that the lessees paid the lessors $1,250 for such modification. In other words, the lessees therein, in order to be secure in their occupancy of the premises for the full five years, paid the lessors $1,250 and agreed to surrender possession at the end of the five years; and that the lessors gave up their right to terminate the lease during the five years. The relationship between the parties in that case, being based solely upon the lease, was that of landlord and tenant, and the provisions of the Rent Regulation were applicable therein. It is therefore clear that that case is distinguishable from the present case.

In the case of Bowles v. Strano, D.C., 62 F.Supp. 9, an agreement to sell real property was made in February, 1945, and by another agreement which was made a part of that agreement the sellers were given an option to remain in possession of the property for one month after June 1, 1945, and no longer, on condition that they pay a rental of $110, that they agree they were not lessees in the ordinary sense of the word, and that they waive the provisions of the Rent Regulation. By reason of delay on the part of the sellers therein the sale was not completed until July 3, 1945, when the buyers paid the balance of the purchase money, and another agreement was entered into by which it was provided that the sellers might remain in possession until August 1, 1945. The sellers therein failed to deliver possession of the property on August 1st, and the buyers commenced an action in ejectment. Thereafter plaintiff Bowles, as Price Administrator, sought an injunction in the United States District Court enjoining the buyers from proceeding with the ejectment action. The injunction was denied, the court stating that: "While the agreement between the vendors and vendees was described in part as a lease, its actual character was qualified by the exhibit attached thereto and made part thereof, and was an agreement between the vendors and vendees which was not under the jurisdiction and control of the Price Administration office or the Area Rent Director. * * * The vendors having accepted the final payment for the premises in question, and at the same time having formally agreed to deliver possession on August 1, 1945, are estopped from seeking the powers of the O.P.A. and the Area Rent Director to enable them to violate their contract and maintain their possession of the premises conveyed in violation of their contract."

The case of Montano v. Kimmel, 185 Misc. 165, 57 N.Y.S.2d 281, 282, was an action for specific performance of a contract to sell real property, and the defendant therein (the seller) contended that by reason of a provision in the contract for a six months' lease he became plaintiff's (buyer's) tenant and was therefore under the protection of the Rent Regulation for Housing. The court therein denied defendant's motion to strike the case from the equity calendar, and said: "It is to be noted that the dealings between the parties concerned primarily a contract of purchase and sale of a house. The reference therein to a six months' lease, while important, was but incidental and subordinate to such contract. By invoking the rent regulations, it seems to me that the defendant overlooks the fact that such regulations refer to situations where the owner of property desires to evict a tenant as such, so as to occupy the latter's apartment for his own use. It is my view that the rent regulations, however, do not refer to a situation of a purchaser and seller such as in the case at bar, where the seller agrees to vacate his own apartment at a specified time and deliver same to the purchaser as part of the bargain."

The case of Raguso v. Ferreira, Sup., 60 N.Y.S.2d 418, 419, was an action for specific performance of a contract to sell real property. The contract provided that the seller "will move from the premises as soon as he found rooms, but not to be later than three months from the date of closing." The deed therein was delivered and "title closed" on June 2, 1945. The seller did not move at the time agreed upon, that is September 2, 1945, and was still in possession when the action was tried in January, 1946. The defendant (seller) asserted that the relationship of landlord and tenant had been created and that he was willing to pay such rent as the Office of Price Administration should determine. The court therein held in favor of the buyer, and cited with approval the Montano case, above discussed.

The case of Reichbach v. Bonoff, Sup., 66 N.Y.S.2d 404, 405, was an action for specific performance and ejectment. In April, 1945, defendant therein agreed to sell a dwelling to plaintiff, and the contract provided that the seller might retain possession until October 1, 1945, upon paying his portion of the operating expenses, but if the seller was unable to obtain other quarters he might remain an additional period, in any event, not to extend beyond January 1, 1946. Plaintiff therein paid the purchase price, and title passed to him on January 7, 1945. The court said: "Over 10 months has gone by since the contract was signed," and that plaintiff's motion to strike out certain affirmative defenses "must be granted on the authority of Raguso v. Ferreira [supra] * * *."

The conclusion of the trial court that the relationship of landlord and tenant did not exist between the parties and that the Office of Price Administration had no jurisdiction herein was correct.

The action herein was tried on December 6, 1946, and at that time the defendants were still in possession of the property. According to a statement in appellant's brief, she voluntarily surrendered possession of the property on February 21, 1946 (apparently it was intended to state 1947). Appellant asserts that, accordingly, the only issue remaining on appeal is the propriety of judgment for treble or any damages. Respondent asserts that the act of appellant in surrendering possession was a compliance with the judgment, and that the effect thereof was to terminate the litigation and to render the question on appeal moot. Irrespective of whether the question of possession is moot, the issue as to the correctness of the judgment for damages remains for determination. Since it is also necessary under that issue as to damages to determine whether the relationship between the parties was that of vendor and vendee or that of landlord and tenant, it is not necessary to decide whether the issue as to possession is moot.

[2, 3] As to damages, the trial court found the amount thereof, up to the date of trial on December 6, 1946, to be $315, and then it ordered that plaintiff recover three times that amount or $945. "Judgment against the defendant guilty of * * * unlawful detainer may be entered in the discretion of the court either for the amount of the damages and the rent found due, or for three times the amount so found." (Code of Civ.Proc., sec. 1174.) In section 1161a of the Code of Civil Procedure, it is provided: "In either of the following cases, a person who holds over and continues in possession of real proper-

ty, after a three-day written notice to quit the same, shall have been served upon him, * * * may be removed therefrom as prescribed in this chapter. * * * 4. Where the property has been duly sold by him, or a person under whom he claims, and the title under the sale has been duly perfected." It therefore appears that unlawful detainer was a proper form of action here, and that the court was authorized to allow treble damages. The evidence was sufficient to support the finding and judgment of the trial court as to damages.

[4, 5] Appellant's alleged defense, above referred to, that the proper jurisdiction in which to try this action was the Justice's Court of Glendale Township, has not been presented on appeal. In an unlawful detainer action "The determination of the question of jurisdiction depends upon the amount claimed in the ad damnum clause of the complaint * * *." Wells Fargo Bank & Union Trust Co. v. Broad, 3 Cal.App.2d 45, 46, 39 P.2d 241. In the present case it was alleged, as above stated, that plaintiff sustained damages in the amount of $16,500 or $250 a month. The superior court had jurisdiction.

The judgment is affirmed.

SHINN, Acting P. J., and VALLÉE, J. pro tem., concur.

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85 Cal.App.2d 44

RICE v. WATKINS.

Civ. 15953.

District Court of Appeal, Second District, Division 3, California.

April 15, 1948.

1. Partnership 🔑53, 328(3)

Evidence authorized finding that partnership agreement for operation of delicatessen existed, and that partnership should be dissolved.

2. Appeal and error 🔑1011(1)

Trial court's finding upon conflicting evidence will not be disturbed if substantial evidence reasonably supports the judgment.

3. Partnership 🔑342

In suit for dissolution of partnership and accounting, express finding that defendant was entitled to $85 per week salary out of net profits for specified period, and finding by reference to auditor's report that defendant was entitled to sum apparently based on allowance of salary only for time actually spent by defendant, were conflicting and did not support judgment.

4. Partnership 🔑342

In suit for dissolution of partnership and accounting, express finding that defendant's contribution of capital had been repaid, and finding by reference to auditor's report which showed no amount opposite heading "Investment Returned," were inconsistent.

5. Partnership 🔑342

In suit for dissolution of partnership and accounting, findings as to division of profits, without finding as to division of losses, were incomplete where plaintiff testified that parties agreed to bear losses equally.

6. Partnership 🔑344

In suit for dissolution of partnership and accounting, order that if sum paid to plaintiff should be less than his partnership equity of specified amount, unpaid balance should be paid by defendant to plaintiff, was improper as granting a personal judgment against defendant. Civ.Code, § 2412.

7. Partnership 🔑333

In absence of agreement to contrary, each partner should be repaid his contributions on dissolution and accounting, and should share equally in proceeds remaining, after all liabilities, including those to partners, are satisfied, and must contribute towards losses according to his share in profits. Civ.Code, § 2412.

8. Partnership 🔑335

In suit for dissolution of partnership and accounting, it is ordinarily unnecessary to ascertain appraised value of partnership assets, since proceeds of sale of assets, irrespective of value, are divided in proportion to partners' respective interests.

9. Partnership 🔑344

In suit for dissolution of partnership and accounting, provision in judgment that if net proceeds should be insufficient to pay parties their "equities" in full, proportionate payments should be made to each upon pro rata of basis, and provision that if amount paid to plaintiff should be less than his "partnership equity" the unpaid balance should be paid to plaintiff by defendant were conflicting.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Gilman G. Rice against D. E. Watkins, also known as David Watkins, for dissolution of partnership and for accounting. From a judgment for plaintiff, defendant appeals.

Reversed in part and remanded, and affirmed in part.

George H. Pratt, of Los Angeles, for appellant.

Hanna & Morton and James M. McRoberts, all of Los Angeles, for respondent.

WOOD, Justice.

This is an action for dissolution of a partnership and for an accounting. Defendant denied that a partnership agreement had been made. The court, after orally announcing its decision that a partnership existed, continued the trial to a later date, ordered an accounting of the partnership affairs, and appointed an appraiser to make a written report of the value of the partnership assets. Thereafter an accounting was had, the cause was submitted, and the court rendered judgment that there should be a dissolution of the copartnership; that the partnership business and assets be sold; and that the net proceeds from such sale be paid to plaintiff and defendant in accordance with their equities, which it found to be in certain sums hereinafter referred to. Defendant appeals from the judgment.

[1] Appellant's contention that the evidence was insufficient to establish a partnership agreement is not sustainable. The evidence shows that about October 1, 1941, defendant told plaintiff that he intended to go into the delicatessen business and he needed some money; that plaintiff delivered five checks in the amounts of $1,000, $200, $100, $100, and $25 to defendant, and the total amount of money represented by those checks, $1,425, was a part of the money used in establishing the business; that the written lease, for the space in the general food market where the delicatessen was located, was obtained in the name of defendant as lessee, and the fixtures were also obtained in defendant's name; that all credit which was extended for the benefit of the business was extended in defendant's name; that defendant and his wife operated the business; that defendant was in the merchant marine from November, 1942, to July, 1944, and during his absence his wife operated the business; that at the time the business was started, and thereafter until plaintiff entered the navy, plaintiff was employed full time by a cheese company; that during the time he was not in the navy he went to the delicatessen at least once a week and remained there a few minutes; and that plaintiff was in the navy from November, 1942, to September, 1945. The plaintiff testified, in part, that defendant told him if he (plaintiff) would "put up $1,400" the defendant would give him a half interest in the business and it would be a "50-50 partnership deal"; that plaintiff stated that since he was selling the products of a cheese company to delicatessens, he thought it would not look well for him to be a competitor of those to whom he sold such products; that the defendant then suggested that plaintiff become a "silent partner," and stated that he (defendant) would put everything in his name and "operate the business" with plaintiff's cooperation; that plaintiff did not have the "cash" to invest in the business, but he borrowed the money on his home; that plaintiff and defendant discussed the salaries which defendant and his wife should receive for operating the busi-

ness, and defendant "agreed" that his salary should be $50 a week and his wife's salary $35 a week; that plaintiff's "understanding" was that the profits would be used first to repay plaintiff the amount of his investment, and then the profits would be used to repay defendant the amount of his investment, and thereafter the profits would be divided between plaintiff and defendant equally, and that both parties would bear any losses equally.

The testimony of plaintiff's wife, who was called as a witness in his behalf, corroborated in substance the testimony of plaintiff. Another witness, who was a fellow-employee of plaintiff, testified that when he was with plaintiff at the place of business he heard defendant ask plaintiff "if he had any money to give him to operate tomorrow because he did not have any change in the cash register"; and that plaintiff gave defendant a check for $25.

Defendant testified, in part, that a partnership was never agreed upon or discussed; that the plaintiff offered to lend him the money in return for "favors" defendant had done for plaintiff; that when he accepted plaintiff's check for $1,000 he told plaintiff he would give him 6 per cent straight interest on the total amount until the final payment; that when he accepted the additional $425 from plaintiff he offered plaintiff a note for it but plaintiff said he did not care for one at that time; that it was a personal loan and not a loan to the business; that there was no obligation on defendant's part to pay the money back at any certain time; that he was to pay it back in payments if he could afford it and at the most convenient times; that the $75 which plaintiff was paid, in addition to the $1,425 he had lent defendant, was sent to plaintiff by defendant's wife while defendant was in the merchant marine; that he supposed the said $75 should have been applied on the interest owed plaintiff; and that defendant had invested between $1,900 and $2,000 in the business.

Defendant's wife, called as a witness in his behalf, testified in substance the same as defendant had testified.

[2] As stated in the case of Fewel & Dawes, Inc. v. Pratt, 17 Cal.2d 85, at page 89, 109 P.2d 650, 652: "A finding of the trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment." The evidence was sufficient to support the finding that a partnership existed.

Plaintiff and defendant each appointed an auditor to examine the partnership accounts. At the time the trial was resumed the reports of both auditors and the statement of the appraiser were received in evidence. After hearing the testimony of the auditors the court made findings that the plaintiff and defendant, pursuant to an agreement, formed a partnership on December 19, 1941, for the purpose of carrying on a business known as "Watkin's Delicatessen"; that said agreement provided that plaintiff would contribute the sum of $1,425 and that defendant would contribute cash and property aggregating and having a value of $1,950; that said contributions were made; that said agreement also provided that "each party would receive back his capital contribution out of the net profits," and that "the defendant would be entitled to withdraw Eighty-five Dollars ($85) per week out of the net profits," and that the net profits thereafter should be divided equally; that the amount contributed by plaintiff was not a loan, and that said amount has been repaid to him; that defendant has made capital contributions aggregating $4,118.46, and that said sum has been repaid to him; that defendant wrongfully and maliciously applied a portion of the partnership money to his own use, and by reason thereof became indebted to the partnership and the plaintiff; that the report of the auditor (who was appointed by the defendant) was a true and correct statement and audit of the partnership business and accounts to and including August 3, 1946, and that said report was attached to and, by reference thereto, made a part of the findings; that it was true that the "equities" of the partners were in the amounts as set forth in such report, to wit, $3,719.52 as to the plaintiff, and $9,201.66 as to the defendant; that the interests of the said partners cannot be apportioned and distributed until liquidation of the partnership assets has been made; that the appraisal, made by the appraiser appointed by the court, is correct as to the value of the partnership assets as of August 12, 1946, and that said value is as follows: stock on hand $4,742.71, liquor license $4,500, fixtures $3,125, and lease $3,000.

[3] Appellant contends that the court made inconsistent findings as to the amount of salary defendant was entitled to receive. As shown above, the court made an express finding that defendant was entitled to withdraw $85 per week out of the net profits of the partnership, and that the partnership was formed on December 19, 1941. The number of weeks from the date the partnership was formed to the end of the accounting period (August 3, 1946) is approximately 239 weeks. On the basis that appellant was entitled to $85 a week for 239 weeks, his total salary would be $20,315. It appears, however, from the auditor's report, which was made a part of the findings, that the amount of salary to which defendant was entitled was $16,885. The accounting period covered by the auditor's report was also from the time the business was commenced to August 3, 1946. Obviously those findings are conflicting. The express finding that defendant was entitled to $85 a week (or $20,315) was an allowance for the full time covered by the accounting and did not provide for a deduction of the time defendant was in the merchant marine. The finding, by reference to the auditor's report, that defendant was entitled to $16,885 was apparently an allowance for the time defendant actually operated the business. At the time the trial judge announced orally that a partnership existed, and prior to the accounting, he stated that the defendant and his wife were entitled to $50 and $35 per week "for such times as he and she were there [at the delicatessen] respectively." The express finding that defendant was entitled to $85 a week did not include the qualification, which the judge had announced orally, that defendant was entitled to salary only for the time he was at the delicatessen. It cannot be determined from those findings whether the court intended that defendant should receive $85 per week for the full time of the accounting period or whether it intended that he should receive that amount only for the weeks he operated the business. Plaintiff asserts, in effect, that the amount of $16,885 was the correct amount of defendant's salary, and that since defendant gave plaintiff's auditor a written statement which showed $16,885 to be the amount of his salary, he should not now be permitted to claim more than that amount. Appellant asserts, in reply thereto, that in computing his salary to be $16,885 he was complying with the oral decision of the trial judge that he was entitled to salary only for the time he was at the delicatessen. The said findings are irreconcilable.

[4] Appellant asserts that the findings are also inconsistent as to the repayment of defendant's contribution. The express finding was that defendant's contribution of $4,118.46 had been repaid. The auditor's report, which was adopted as a finding, does not show that appellant's contribution had been returned. At a place in the report regarding defendant's account, opposite a heading "Investment Returned," no amount is shown, thereby indicating a finding that no part of defendant's contribution was returned. (There appears, however, in that report, regarding plaintiff's account, opposite the same heading, the sum of $1,500.) It appears that the express finding and the finding by reference, as to repayment of defendant's contribution, are inconsistent. The auditor's report does show, however, that defendant withdrew $14,570.32, and that he was also charged with a withdrawal of an additional $1,026.01 (which the report shows was unaccounted for), making a total of $15,595.33 withdrawn by defendant. The amount withdrawn by defendant was less than the total amount of his salary. It might be that the court, in finding that defendant's contribution of $4,118.46 had been repaid, considered that that amount was a part of the total amount withdrawn by defendant; however, the

express finding that defendant's contribution had been repaid and the finding by reference that it had not been repaid are conflicting.

[5] It also appears that the findings are incomplete, in that, there are findings as to the division of the profits of the partnership, but there is no finding as to the division of losses if any should occur. As stated above, the plaintiff testified that the parties agreed to bear the losses equally.

The court, by its judgment, appointed a commissioner and ordered that he sell the partnership business and assets to the highest bidder; and ordered that the proceeds remaining after payment of the partnership indebtedness be applied "in payment of the equity" of each partner and, in the event such proceeds were insufficient to pay the parties their "equities in full," that the proceeds should be prorated in proportion to the equities of the parties. It further ordered that in the event the sums paid to plaintiff should be "less than his partnership equity of $3,719.52, that the unpaid balance shall be paid by the defendant to plaintiff."

[6, 7] The effect of that order is to grant plaintiff a personal judgment against defendant. In the event the net assets of the partnership amount to less than $12,921.18, that is, less than the total amount of the interests of both partners—$9,201.66 for defendant, and $3,719.52 for plaintiff, the defendant will be required to pay plaintiff the difference between the amount plaintiff receives from the partnership assets and $3,719.52. In other words, according to the judgment, plaintiff is entitled to receive $3,719.52, regardless of the amount realized on a pro rata basis from the sale of the partnership assets. The judgment was erroneous in that respect. Furthermore, according to the judgment, there is no liability on plaintiff's part for losses of the partnership, if any. In the absence of an agreement to the contrary, each partner should be repaid his contributions, and should share equally in the proceeds remaining after all liabilities, including those to partners, are satisfied, and he must contribute towards the losses according to his share in the profits. (Civ.Code, sec. 2412.) In the present case there was no agreement that the parties should not share the profits, and bear the losses, equaly—on the contrary, plaintiff testified that they agreed to share the profits and bear the losses equally. There was no agreement that defendant would indemnify plaintiff for any losses or that he guaranteed him any profits. Plaintiff's wife testified that the parties had stated, in effect, they were "in it for better or worse"—that they might have a nice profit or a financial loss "to split between them." Under the findings herein, plaintiff was not entitled to recover a profit in excess of his proportionate share in any net profit which might be realized from the sale of the partnership assets.

[8] The reason for ordering an appraisal of the partnership assets is not clear. Ordinarily it is not necessary to ascertain the appraised value of partnership assets in order to make a proper distribution since the proceeds of a sale of the assets, irrespective of value, are divided in proportion to the respective interests of the partners. It is to be noted that the lease, which was in defendant's name as lessee, was not assignable without the consent of the lessor, and that the liquor license, which was in his name, was not transferable without the approval of the State Board of Equalization. Although the appraiser fixed the value of the lease at $3,000, and the value of the liquor license at $4,500, it would seem that those two assets would not be of value to anyone other than the defendant unless the lessor consented to an assignment of the lease and the Board of Equalization approved a transfer of the license. In other words, it would seem that the defendant is the only one who would be justified in purchasing the lease and the liquor license. It might be that the court considered the possibility that, under the circumstances here, the defendant might purchase the assets for such a small amount that there would be no net proceeds from which to pay the $3,719.52 to plaintiff, and therefore ordered an appraisal in order to fix a basis for adequately compensating plaintiff in the event de-

fendant acquired the property at the sale. The findings herein are not sufficient to justify a personal judgment against the defendant.

[9] It appears further that certain provisions of the judgment are conflicting. It is provided therein that in the event the net proceeds of the partnership are insufficient to pay the parties their "equities" in full, "then proportionate payment shall be made to each upon a pro rata basis as the said interests of each bears each to the other." It further provides that in the event the amount paid to plaintiff by the commissioner shall be less than his "partnership equity" of $3,719.52, then the unpaid balance shall be paid to plaintiff by defendant. The provision that the parties should be paid on a pro rata basis and the provision that plaintiff should be paid in full irrespective of the pro rata basis are conflicting.

By reason of the said conflicting and incomplete findings, the said error in awarding a personal judgment against defendant, and the said contradictory provisions in the judgment, the judgment must be reversed as to that portion thereof which determines the accounting as to the partnership affairs. The finding that a copartnership existed between plaintiff and defendant, and the judgment that there should be a dissolution of the copartnership, are adequately supported by the evidence.

The judgment is reversed as to that portion thereof which determines the accounting as to the partnership affairs, and the cause is remanded for retrial for the sole purpose of determining the accounting as to the partnership affairs. The portion of the judgment that there should be a dissolution of the copartnership between plaintiff and defendant is affirmed.

VALLÉE, J., pro tem., concurs.

SHINN, Acting Presiding Justice.

I concur in the reversal of a part of the judgment and affirmance of the remainder. It seems to me that in the effort to analyze and explain a simple case to the trial court nothing was developed except confusion. I do not understand the theory of the judgment. I cannot reconcile it with the findings or any rule of law or mathematics. The facts established by the findings are the following: Plaintiff contributed $1,500.00 of capital and defendant contributed $4,118.46; each partner was to have his capital investment returned to him; defendant was to receive a salary, payable out of net profits, and thereafter the profits were to be equally divided. Plaintiff's contribution of $1,500.00 has been returned to him, and the court found that defendant's contribution of $4,118.46 has been returned to him. Upon these facts any excess would be profit. Defendant earned salary of $16,885.00, and he was therefore entitled to draw from the profits of the business this amount, plus the amount of his contributions, or a total of $21,003.46. He has withdrawn $15,596.33, leaving a balance due him of $5,407.13. Defendant says that the court erred in finding that his capital had been returned to him, but the finding appears to be fully supported by the evidence. Defendant is entitled to receive $5,407.75 from the proceeds of the sale of the assets before there is any division of profits, whether this sum represents unpaid salary or part salary and part contributions which have not been returned to him. If the amount for distribution is less than the balance of defendant's unpaid salary he will have to lose the difference, since his salary is payable only out of profits. The results of any accounting for the period subsequent to the date of the original judgment should be treated on the same basis.

The judgment based on the accounting is erroneous. If a division "upon a pro rata basis as the said interests of each bears each to the other" means in the proportions which the share of each bears to the whole, and I suppose it does, it is inconsistent with the findings.

Defendant's entire salary of $16,885 is included in the total amount which forms the basis of his proportionate interest in the total assets which, roughly speaking, amounts to three-fourths thereof. This ignores his right to receive his total salary before there is any division of profits. The difference in the results reached by applying the true method and the method of the judgment would be of little consequence if the proceeds prove sufficient to pay the claims of both partners in full, but if, for example, the proceeds for distribution amounted to only $5,407.13, defendant, as we have shown, should receive all of it and there would be nothing to divide with plaintiff.

84 Cal.App.2d 827

LEVY v. CYTRON et ux.

Civ. 16210.

District Court of Appeal, Second District, Division 1, California.

April 13, 1948.

Rehearing Denied April 28, 1948.

Hearing Denied June 10, 1948.

1. Executors and administrators 🔑122(1)

The purpose of statute granting special administrator the same powers, duties and obligations as general administrator is to provide a general administration during the delay and uncertainty attendant upon a will contest or litigation over appointment, suspension or removal of an executor or administrator. Probate Code, § 465.

2. Executors and administrators 🔑22(3), 137

Order granting special administrator statutory powers of general administrator in effect made her letters general rather than special and special administrator had power to sell real property of the estate. Probate Code, § 465.

◆

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by Albert F. Levy against Jacob M. Cytron and wife to quiet title to realty. From an adverse judgment, plaintiff appeals.

Affirmed.

A. F. Levy, in pro. per.

Arch H. Vernon, Earl E. Johnson and Gilbert E. Harris, all of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal from a judgment of dismissal entered after a demurrer to plaintiff's complaint was sustained and plaintiff failed to amend within the time allowed.

Plaintiff alleges in his complaint:

"This plaintiff and his mother, Carrie F. Levi, were the ancient occupants of the following described property * * *.

"The said Carrie F. Levi died testate * * * on the 3rd day of October, 1942, * * * and by the terms of her will, duly admitted to probate in this court after contest, this plaintiff and Clarence Levi became the fee simple owners of the within said real property.

"* * * and the entire files and records (of said estate of Carrie F. Levi), by reference, are incorporated and made a part of this complaint.

"That prior to the admission of said will to probate and while said contest was pending and undetermined, or about November 12th, 1943, one Agnes Levi, in her personal descriptive title of 'Special Administratrix with General Powers' was claiming as a lone contestant against said will, some individual interest in said property and thereupon at the last said date deeded to the within named defendants all of her purported individual interest in said land * * *.

"Thereafter * * * this court then determined, that the said contestant, Agnes Levi take nothing by her contest and thereby the deed of the grantor to the within defendants conveyed no title, since the said Agnes Levi was not an heir of the decedent neither did she succeed to any part of the estate or have any interest whatsoever therein."

Up to this point it would appear that the deed given by Agnes Levi purported to transfer her individual interest in the property. However, the complaint continues as follows:

"On August 29th, 1945, a decree settling the final account and distribution was duly entered * * * and has long since become final. This plaintiff is the real owner of the within stated property * * * but * * * the within named defendants did wrongfully and unlawfully enter upon said premises * * * and unlawfully withhold this property from this plaintiff * * *.

"That prior to the hearing for the conformation of the sale of the within mentioned property, by this court the said defendant Kate Cytron, being fully informed in the law, orally agreed to abandon her purchase attempt of this property, but she appeared personally at the hearing and there urged its conformation. She held thereafter that some social advantage warranted her actions."

Plaintiff then alleged "as a further and collateral attack upon the utter want and lack of title", that a special administrator may not sell real property of a decedent's estate and that the probate court was without jurisdiction to confirm such a sale.

The complaint concluded with a prayer that it be adjudicated that defendants have no title to the property, that the property be restored to plaintiff, and for damages.

From the foregoing it is clear that the sale of which appellant complains was a sale by a special administratrix "with general powers", which sale was confirmed by the superior court sitting in probate. No charge was made of fraud or other irregularity. The sole possible ground upon which appellant could hope for relief is that the special administratrix with general powers was without authority to sell and the probate court without jurisdiction to confirm the sale. It is without merit.

Section 465 of the Probate Code provides:

"When a special administrator is appointed pending the determination of a contest of a will instituted prior to the probate thereof, or pending an appeal from an order appointing, suspending or removing an executor or administrator, the special administrator shall have the same powers, duties and obligations as a general administrator and the letters of administration issued to him shall recite that such special administrator is appointed with the powers of a general administrator. If a special administrator has been appointed, and thereafter a proceeding to contest a will prior to the probate thereof has been instituted, the court shall make an order providing that such special administrator shall thereafter have the additional powers, duties and obligation(s) of a general administrator, * * *."

[1, 2] The plain language of the above-quoted section leaves no room for construction. Its obvious purpose is to provide a general administration of the estate during the delay and uncertainty attendant upon a will contest or litigation over the appointment, suspension or removal of an executor or administrator. The order granting the special administratrix the additional powers authorized under section 465 of the Probate Code in effect made her letters general rather than special. (See Dodson v. Gruener, 28 Cal.App.2d 418, 421, 422, 82 P.2d 741.) Having all the powers of a general administratrix, she had the power to sell property of the estate.

The demurrer being properly sustained, and plaintiff having failed to amend within the time allowed, the judgment or order of dismissal was proper.

The judgment or order appealed from is affirmed.

DORAN, Acting P. J., and BARTLETT, J. pro tem., concur.

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SECOND SERIES

31 Cal.2d 689

OWINGS v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 17554.

Supreme Court of California, in Bank.
April 23, 1948.

1. Workmen's compensation 🔑1364

In order to recover compensation for disease contracted by employee it must affirmatively appear that disease is caused by the employment.

2. Workmen's compensation 🔑1001

In proceeding to review award denying compensation for expenses involved in claimant's treatment for diabetes on ground that it was not of industrial origin, only question for determination was whether evidence supported Commission's finding that diabetes was not of industrial origin.

3. Evidence 🔑570

An expert's opinion which is based on guess, surmise, or conjecture has little evidentiary value.

4. Workmen's compensation 🔑998

In proceeding to recover compensation for expenses involved in claimant's treatment for diabetes on ground that it was of industrial origin, Industrial Accident Commission could properly give the word "guess" as used by physician testifying for claimant its usual meaning and conclude that physician did not profess to give expert opinion conclusively establishing that disease was of industrial origin.

5. Evidence 🔑570

The value of an expert's opinion is dependent upon its factual basis.

6. Workmen's compensation 🔑1001

Where evidence was conflicting as to whether possible contributing factors indicated by physician testifying in support of employee's claim for compensation for expenses involved in treatment for diabetes on ground that it was of industrial origin were in fact present in employee's case, Supreme Court could not hold as a matter of law that evidence necessarily compelled conclusion that diabetes was of industrial origin.

◆

Proceeding by Jack Owings against Industrial Accident Commission and Associated Indemnity Corporation to review order of respondent Commission awarding petitioner 100% permanent disability but denying compensation for expenses involved in his treatment for diabetes mellitus on ground that it was not of industrial origin.

Award affirmed.

George Olshausen and John K. Hagopian, both of San Francisco, for petitioner.

Everett A. Corten, R. C. McKellips, Dan Murphy, Jr., T. Groezinger, Keith, Creede & Sedgwick and Frank J. Creede, all of San Francisco, for respondents.

GIBSON, Chief Justice.

The Industrial Accident Commission awarded petitioner 100% permanent disability but denied compensation for the expenses involved in his treatment for diabetes mellitus on the ground that it was not of industrial origin. In this proceeding to review the award petitioner contends that the evidence establishes without conflict that his diabetic condition was caused by his employment.

During the course of his employment in August, 1939, petitioner suffered severe head injuries when the parting of a chain under tension caused a heavy steel pulley and cable to strike him on the right temple.

He was a convalescent for a year, during which time he received compensation. In August, 1940, he returned to work for the same company and continued to be employed more or less regularly. On October 30, 1942, when petitioner underwent a medical examination for entry into the United States Army, there were no indications of diabetes, but, two months later, while on a trip to his former home in Georgia, he developed symptoms of the disease.

About February 1, 1943, petitioner resumed his employment, and in the following April filed an application with the commission for adjustment of claim. The commission made an award of 100% permanent disability, which included the disease of diabetes, but that award was annulled in J. G. Boswell Co. v. Industrial Accident Commission, 67 Cal.App.2d 347, 154 P.2d 13. Thereafter, new hearings were had, and petitioner was held to have sustained 100% permanent disability as a result of the 1939 injury. Compensation was awarded accordingly, but it was found that the diabetes was not of industrial origin and, therefore, noncompensable.

[1, 2] In order to receive compensation for a disease contracted by an employee it must affirmatively appear that the disease is caused by the employment (Bethlehem Steel Co. v. Industrial Accident Commission, 21 Cal.2d 742, 744, 135 P.2d 153), and the only question for determination here is whether the evidence supports the commission's finding that the diabetes was not of industrial origin.

There is a direct conflict in the evidence as to whether the disease was caused by the blow which petitioner received in the 1939 accident. Some of the doctors testified that the pitutary gland might have been injured when petitioner was hit on the head with the pulley and that this could have affected the pancreas gland, causing a deficiency of insulin and the resultant diabetes. Another doctor stated that the diabetes was "* * * not related to the accident of 1939 since the time interval was too long, [and] if the accident had been a contributing factor, it would have occurred at least one, two or three months following." Dr. Shepardson, a diabetes specialist called by the insurer, stated: "I can see no relationship between his head injury and his diabetes."

Petitioner concedes this conflict but relies on certain other testimony given by Dr. Shepardson which assertedly was not contradicted and which it is claimed related the disease to industrial causation on a different medical theory. Dr. Shepardson was asked on cross-examination whether he had any theory as to the cause of petitioner's diabetes, to which he replied, "* * * in the absence of certain precipitating factors, such as heredity or definite injections or sudden increase in weight * * * in a short period time, the guesses that I would have for the appearance of his diabetes would be a change from an active to an inactive life, the history of repeated alcoholism up to the time of his diabetes, and the change in habits of his eating when he was taken away from his regular work and regular income."

It is petitioner's contention that the possible factor of alcoholism as a cause of the disease was eliminated by later testimony of Dr. Shepardson, and that the evidence establishes without conflict that the other factors mentioned by him were present and resulted directly from the industrial injury.

There was evidence that petitioner drank more heavily before the accident than afterward, but it also appears that he consumed a great deal of alcohol during his trip to Georgia in 1943, shortly before the symptoms of diabetes first appeared. Dr. Shepardson testified that in his opinion the amount of alcohol petitioner consumed after the accident would not of itself have precipitated the disease without some previous damage to the liver from drinking or some other cause. There was no evidence that petitioner's liver had been examined for possible injury prior to the accident nor does the record show that anything was known about its true condition other than that the army medical report of October, 1942, indicated that it was normal at that time.

With respect to the other possible factors suggested by Dr. Shepardson, there was no evidence of any appreciable change in petitioner's diet as a result of the accident, and the evidence is conflicting as to the kind and extent of his activity after he returned to work. The employer was engaged in the manufacture of linseed and cottonseed oil, and, prior to the accident, petitioner had worked in the cotton gin and as an operator of machinery which extracted lint from cottonseed. Each spring and summer he had worked at Tulare Lake constructing levees and installing and repairing pumps used in pumping excess water from nearby lands owned by his employer. Although petitioner testified that he did nothing but light, "handyman" work when he returned to work following his injury, there was evidence that he assisted the mechanics in repairing machinery and, at times, repaired it himself, and that he worked "out in the lake bed on the pumps and in the fall returned to the plant and worked in the cotton gin and the linters." A fellow employee testified that after the accident petitioner did both light and heavy work and that in general he did the same type of work both before and after it occurred. The company work sheets indicated that petitioner usually averaged more than forty hours per week after he returned to work.

[3, 4] In this state of the record, we cannot say that the commission was required to accept the "guesses" of Dr. Shepardson as conclusively establishing that the disease was of industrial origin. A "Guess, in current best usage, implies a hitting upon (or attempt to hit upon), either at random or from insufficient, uncertain or ambiguous evidence." Webster's Dictionary of Synonyms 1942 Ed., p. 188. An opinion which is based on guess, surmise or conjecture has little, if any, evidentiary value. Brant v. Retirement Board of San Francisco, 57 Cal.App.2d 721, 135 P.2d 396; see Estate of Stone, 59 Cal.App.2d 263, 138 P.2d 710. Although it may be possible that the witness did not intend to indicate that his statement was merely surmise or conjecture, the commission nevertheless could properly give the word its usual meaning and conclude that the doctor did not profess to give an expert opinion on the matter.

[5, 6] In any event, the value of an expert's opinion is dependent upon its factual basis (Estate of Scott, 1 Cof. 271; Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933; Douglas v. Berlin Dye Works etc. Co., 169 Cal. 28, 145 P. 535; Gazzera v. City and County of San Francisco, 70 Cal.App.2d 833, 161 P.2d 806; Thoreau v. Industrial Accident Commission, 120 Cal.App. 67, 7 P.2d 767; Barnett v. Atchison T. & S. F. R. Co., 99 Cal.App. 310, 317, 278 P. 443), and where, as here, the evidence is conflicting as to whether the possible contributing factors indicated by Dr. Shepardson were in fact present in petitioner's case, we cannot hold as a matter of law that the evidence necessarily compelled the conclusion that the diabetes was of industrial origin.

The award is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

31 Cal.2d 693

Ex parte TEDFORD.

Cr. 4784.

Supreme Court of California, in Bank.

April 23, 1948.

1. Criminal law 🔑230

Failure of justice of the peace to inform accused of his legal rights affects only legality of commitment by magistrate, not subsequent proceedings in prosecution.

2. Criminal law 🔑245

In absence of motion in justice's court to set aside information, any invalidity in proceedings before accused's commitment by magistrate is deemed waived. Pen.Code, §§ 995, 996.

3. Criminal law 🔑264

Where transcript of proceedings on accused's arraignment in superior court on amended information after stating that he did not wish attorney and entry of his plea of guilty showed that he was responsive and fully aware of nature of proceedings, right to counsel was waived.

4. Criminal law ⚷1202(1)

Prior convictions of defendant in Oklahoma for second-degree burglary, based on acts which would have constituted burglary if committed in California, authorized determination that defendant was habitual criminal on his conviction of assault with deadly weapon. Pen.Code, §§ 459, 644.

◆

Proceeding by Robert Tedford for a writ of habeas corpus to obtain his release from imprisonment as an habitual criminal.

Writ discharged and petitioner remanded to custody.

James A. Toner, of San Francisco, for petitioner.

Fred N. Howser, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

Robert Tedford is endeavoring to obtain his release from imprisonment as an habitual criminal upon the general grounds that, at the time of his plea of guilty to the charge of assault with a deadly weapon and sentence thereon, he was denied due process and the equal protection of the laws. More specifically, by the allegations of his petition, upon which this court issued a writ of habeas corpus, he asserts that he was held to answer without sufficient or probable cause; that he was "wrongfully permitted to waive his preliminary examination without benefit of counsel"; that he was deprived of his right to have legal assistance; that he was denied the right to be tried by a jury; that he was physically and mentally unable to comprehend the nature of the proceedings; that no crime was ever proved; and that, as to his prior convictions, they are not a sufficient basis for the judgment that he is an habitual criminal.

In the brief, filed by counsel appointed to represent Tedford, it is contended that petitioner was illegally convicted because he was denied the right to counsel. It is argued that the "record of the preliminary hearing shows that the defendant was not represented by counsel and it further fails to show that he was advised as to his right to counsel at all stages of the proceedings, nor does it show that he was informed that he was entitled to a reasonable continuance to obtain counsel or to summon and subpoena witness." As to the hearing in the superior court, it is contended that Tedford was not represented by counsel and that "an illiterate person suffering from a serious malady", as was Tedford, cannot be said to have intelligently waived his right to counsel. All of the other contentions of the petitioner presumably have been abandoned.

[1, 2] The docket of the justice's court includes the statement that petitioner was "informed of his legal rights". But if the justice of the peace failed to instruct the petitioner to that effect, the omission to do so affects only the legality of the commitment by the magistrate. No motion was made to set aside the information and, in the absence of such a motion, any invalidity in the proceedings prior to the commitment is deemed waived. (Penal Code, secs. 995, 996; People v. Phillips, 12 Cal.App. 760, 108 P. 731; People v. Morley, 8 Cal. App. 372, 97 P. 84.)

[3] The minutes of the superior court show that when the petitioner was arraigned upon an amended information, he appeared without counsel and was instructed "as to his rights". From the transcript of the proceeding, it appears that he was not arraigned until after he had stated, in response to a question by the judge presiding, that he did not wish to procure an attorney. But the petitioner argues that, in order to fulfill the requirements of due process, a defendant must have an intelligent conception of the consequences of his act in declining the aid of counsel. The question in this regard is, therefore, narrowed to the claim that petitioner did not competently waive the assistance of counsel.

According to the record, at the time Tedford pleaded guilty, the court was informed that he was suffering from "active pulmonary tuberculosis" and he was given hospitalization for eighteen days. He was then returned into court and, following a hearing which included the consideration of the report of the probation officer, sentenced to imprisonment.

The transcript of the proceedings upon arraignment and the entry of the plea of guilty show that, although not verbose, the petitioner was responsive and fully aware of the nature of the proceedings. It affords substantial basis for the conclusion that the waiver of his right to counsel was made by one who had an intelligent conception of the consequences of his act. (In re Jingles, 27 Cal.2d 496, 498, 165 P.2d 12.)

[4] A question presented by the petition, but not by the brief, refers to the nature of the two prior convictions of the petitioner in Oklahoma, upon which he was adjudged to be an habitual criminal. The petition alleges that these convictions, which were of second degree burglary, are not a sufficient ground for the determination that Tedford is an habitual criminal. But the certified copies of the complaints and the commitments in the Oklahoma proceedings, which are included in the return to the writ, show that each of the prior convictions would constitute burglary if committed in California (Penal Code, sec. 459) and is a crime enumerated in the habitual criminal statute of this state. (Penal Code, sec. 644.)

The writ is discharged and the petitioner is remanded to custody.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., and NOURSE, Justice pro tem., concur.

31 Cal.2d 637

EISLEY et al. v. MOHAN.

S. F. 17534.

Supreme Court of California, in Bank.
April 3, 1948.

Rehearing Denied April 29, 1948.

1. Mandamus 🔑117

A county assessor not being a "state officer" within constitutional provision that no injunction or writ of mandate shall issue against state or a state officer to prevent or enjoin collection of tax, mandamus proceeding was maintainable against county assessor to compel him to exempt realty from taxation. Pol.Code, § 4013(9, 14); Const. art. 11, §§ 7½, 12, 13; art. 13, § 15.

See Words and Phrases, Permanent Edition, for all other definitions of "State Officer".

2. Taxation 🔑213

In determining the scope of exemption under constitutional provision that all property belonging to the state shall be exempt from taxation, ownership is the decisive factor. Const. art. 13, § 1.

3. Taxation 🔑213, 215

Generally, land sold to an individual by the federal government, or by a state, loses its tax exempt status though the government may retain the legal title as security for payment of part of the purchase price. Const. art. 13, § 1.

4. Taxation 🔑213

In determining whether there is an exemption under constitutional provision that property belonging to the state shall be exempt from taxation, the determinative question is whether private rights have supplanted those of the government in so far as the use of the property is concerned, and the form of the transfer is immaterial. Const. art. 13, § 1.

5. Taxation 🔑81

For tax purposes, security title is not considered property, so that the purchaser in possession of land under an executory contract, is for all purposes the owner, and the vendor retains mere legal title. Const. art. 13, § 1.

6. Army and navy 🔑51

Purpose of provisions of the Veterans Farm and Home Purchase Act authorizing Veterans Welfare Board to pay taxes and assessments which a veteran purchasing a home from the state has failed or neglected to satisfy, and providing that any amount paid by the board may be added to the selling price of the property, is to allow the board to protect land sold by it from sales for delinquent taxes while land is subject to an executory contract of sale. Military and Veterans Code, § 823.

7. Army and navy ⚿51

The primary purpose of the Veterans' Farm and Home Purchase Act is to finance the purchase of farms and homes for veterans. Military and Veterans Code, § 800 et seq.

8. Taxation ⚿37

Section of the Revenue and Taxation Code specifying a formula for determining cash value of possessory interest of a veteran who is a contract purchaser from Department of Veterans Affairs is invalid as being in conflict with constitutional provision that all property shall be taxed in proportion to its value. Revenue and Taxation Code, § 987; Const. art. 13, § 1.

9. Taxation ⚿193

Section of the Revenue and Taxation Code relating to a "possessory interest" in realty of the Veterans Welfare Board, in so far as it seeks to exempt realty purchased by a veteran under a contract of sale pursuant to the Veterans Farm and Home Purchase Act, violates constitutional provision that all property shall be taxed in proportion to its value. Revenue and Taxation Code, § 2190.1; Military and Veterans Code, § 800 et seq.; Const. art. 13, § 1.

10. Taxation ⚿81

House and lot purchased by veteran from the Veterans Welfare Board under a contract authorized by Farm and Home Purchase Act, and providing for payment of purchase price in monthly installments over period of 20 years, with title being retained by Department of Veterans Affairs as security, were properly assessable to veteran. Military and Veterans Code, § 800 et seq; Const. art. 13, § 1.

SCHAUER and CARTER, JJ., dissent.

Original proceeding for writ of mandate by Charles H. Eisley and the Department of Veterans Affairs (a public corporation), petitioners, against Lou P. Mohan, County Assessor of the County of Placer, State of California, respondent, to compel the respondent to assess to Charles H. Eisley his possessory interest in realty purchased by him from the Veterans Welfare Board, the predecessor of the Department of Veterans Affairs.

Alternative writ discharged and peremptory writ denied.

John A. Sinclair, of San Francisco, and Warren H. Atherton, of Stockton, for petitioners.

J. R. Klawans and Orville Pratt, both of San Francisco, amici curiae.

Clarence E. Tindall, Dist. Atty., Placer County, of Auburn, Frederick L. Felton, County Counsel of San Joaquin County, of Stockton, Fred N. Howser, Atty. Gen., James E. Sabine, and E. G. Benard, Deputy Attys. Gen., for respondent.

EDMONDS, Justice.

Charles H. Eisley and the Department of Veterans Affairs of this state joined as petitioners in an original proceeding, commenced in this court, to obtain a writ of mandate directed to the assessor of Placer county. The purpose of the litigation is to compel the respondent to assess to Eisley his possessory interest in real property purchased by him from the Veterans Welfare Board, the predecessor of the Department of Veterans Affairs.

The petition alleges the following facts: In 1930, Eisley purchased the property, consisting of a house and lot which he has since occupied, from the Veterans Welfare Board under a contract authorized by the Farm and Home Purchase Act enacted in 1921. (Stats.1921, ch. 519, p. 815; now incorporated in Military and Veterans Code, sec. 800 et seq.) This contract provides for the payment of the purchase price in monthly installments over a period of 20 years. From 1921 to 1946, inclusive, it was the practice of the taxing authorities of the state to tax veterans upon the value of their right of possession. In March, 1947, the respondent, for the first time, assessed the property to Eisley at a cash value of $2,100, and declared that he intended to place it upon the secured tax roll. This change of policy was pursuant to an opinion by the attorney general.

Following this action and declaration of policy, the petition continues, Eisley demanded that the possessory interest in the property be assessed upon the unsecured roll in the amount of $1,785, being 85% of its full cash value. He is entitled to a veteran's exemption of $1,000, and he tendered to the respondent $23.63, being the amount of the taxes due upon an assessment of $785 at the tax rate fixed for the year 1946-47. The respondent refused these demands and the tender and entered the property, assessed to Eisley, upon the secured tax roll.

Other allegations of the petition are that there is no plain, speedy, or adequate remedy in the ordinary course of law whereby the rights of the petitioners can be upheld, because if the assessment is not removed it will "* * * become delinquent, penalties will attach and a cloud will be created upon the title * * *." Furthermore, the refusal of the respondent and the other county assessors to assess to veterans only their possessory interest in property purchased from the Department of Veterans Affairs is interfering with the sale of property by that agency of the state.

Petitioners contend that mandamus is the appropriate remedy "to galvanize recalcitrant county officials who refuse to compute tax assessments pursuant to law"; and as to the merits, that the property "belongs to" the state, within the meaning of Article XIII, sec. 1, of the Constitution of California which exempts public property from taxation. Reliance is also placed upon the decision in State Land Settlement Board v. Henderson, 197 Cal. 470, 241 P. 560, as a rule of property which, it is said, has been followed for 25 years and should be continued as authority under the doctrine of stare decisis. It is vigorously asserted that the Constitution forbids the assessment here challenged and exempts from taxation property to which the government holds title not only as security but also to insure the execution and success of a public project or policy, such as land grants. The Veterans' Home Purchase Program in California, the argument concludes, is similar in structure and purpose to the governmental purpose of land grants, and the state agency holds the legal title to property sold by the Department of Veterans Affairs, not merely for security, but to enforce and guide the vast public project.

By way of return to the alternative writ issued upon this petition, the respondent demurred, asserting that the facts alleged do not state a cause of action. Considering the merits of the question of law as to the proper assessment basis for real property being purchased under a contract of conditional sale, the attorney general insists that as the veteran is the equitable owner of the property, it is assessable to him at its full value.

At the time of oral argument, the procedural question was raised as to the petitioners' right to the remedy of mandamus for the purpose of preventing the taxation of property and the parties have presented supplemental briefs upon that point. The petitioners claim that mandamus is an appropriate remedy because art. XIII, sec. 15, is not a bar to mandatory relief since the legal remedies are inadequate, and there is a certainty of multiplicity of suits; the writ sought does not involve "collection" of taxes, but is only directed at the illegal assessment of taxes; and the provision does not apply to counties or to county officers. The attorney general, on behalf of the assessor, also justifies the procedure upon the ground that the prohibition in the Constitution is as to suits against the state or its officers while in the present case the remedy of mandamus is sought against a county officer.

Section 15, Article XIII, of the California Constitution provides: "No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected."

This provision, based on section 14[g], Article XIII, adopted in 1910, has not before been construed by an appellate court of California. The petitioners rely upon decisions in other jurisdictions interpreting statutory provisions substantially identical with that of our Constitution. Generally speaking, these cases hold that such a statute may not be construed as depriving the courts of the powers conferred upon them by the state Constitution. Such statutes, it is said, are declaratory of the rule that the collection of a tax will not be restrained upon the ground of illegality alone; extraordinary and exceptional circumstances must be shown before relief by prerogative writ will be granted. Note 108 A.L.R. 184. It also has been held that a federal statute (26 U.S.C.A. Int.Rev.Code, sec. 3653[a]), which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court", is merely declaratory of the rule that a court of equity will not restrain the collection of a tax upon the sole ground of its illegality, but relief will be given where the remedy at law is inadequate. Miller v. Standard Nut Margarine Co., 284 U.S. 498, 52 S.Ct. 260, 76 L.Ed. 422; Hill v. Wallace, 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822; Lee v. Bickell, 292 U.S. 415, 54 S.Ct. 727, 78 L.Ed. 1337; Atlantic Coast Line R. Co. v. Doughton, Commissioner, 262 U.S. 413, 43 S.Ct. 620, 67 L.Ed. 1051; Wallace v. Hines, 253 U.S. 66; Union Pacific R. R. Co. v. Board of Com'rs. of Weld County, 247 U.S. 282, 38 S.Ct. 510, 62 L.Ed. 1110; Stewart Dry Goods Co. v. Lewis, 287 U.S. 9, 53 S.Ct. 68, 77 L.Ed. 135; Dows v. Chicago, 11 Wall. 108, 20 L.Ed. 65.

[1] The provision of the California Constitution is much more than a mere declaration of the rules generally applicable in proceedings for injunction, mandamus, or other legal equitable relief. However, the section applies only to an action against the state or an officer thereof with respect to his duties in assessing or collecting a state tax for state purposes. A county assessor and a member of a county board of equalization is a county officer. Const., art. XI, sec. 7½; Pol.Code, sec. 4013[9] and [14]. Under some circumstances, he may perform certain tax functions for a city, and also for the state, but when he either assesses or collects taxes for county purposes, he is the agent of the county. Los Angeles v. Superior Court, 17 Cal.2d 707, 714, 717, 112 P.2d 10. The taxes which occasioned the present controversy were assessed for local purposes; the state neither assesses nor collects ad valorem real property taxes. Art. XI, sec. 12 and 13; see Tulare County v. May, 118 Cal. 303, 308, 309, 5 P. 427. Banaz v. Smith, 133 Cal. 102, 103, 65 P. 309; Los Angeles v. Superior Court, supra at 712, of 17 Cal. 2d, 112 P.2d 10; Peppin, Municipal Home Rule in California, 34 Cal.L.Rev. 644, 676–690.

Prior to 1933, the constitutional provision in question concerned taxes levied under sections 14 and 15 of Article XIII. Each of these sections, as then in effect, authorized the levy of certain taxes by state officers for state purposes. See Arnold v. Hopkins, 203 Cal. 553, 558, 265 P. 223. In 1933, Article XIII was amended with respect to the assessment by the state of property of public utilities (sec. 14), and also in regard to the taxation of the franchise of banks and other corporations, (sec. 16). Also, the new provision, to some extent, shifted the burden of school support from the counties of the state. Sec. 15; see Crow v. Board of Supervisors, 135 Cal.App. 451, 461, 462, 27 P.2d 655, 28 P. 2d 906. The provisions with respect to injunction, previously stated in sections 14 and 15, were modified to include a writ of mandate and were made applicable to taxes levied under Article XIII. But in the light of the context and historical background, the substitution of the word "article" for "section" is not a sufficient basis for construing the constitutional prohibition in its amended form as applicable to counties and county officers. Section 15 of Article XIII does not, therefore, preclude the issuance of the writ in this case.

Article XIII, section 1, of the California Constitution provides that all property shall be taxed in proportion to its value except that "such as may belong to this State * * * shall be exempt from taxation". The underlying theory supporting tax exemption of public property is that the object of taxation is revenue and none would result from taxation by the state of property which it owns. Under such circumstances, the collection of taxes "would be merely taking money out of one pocket and putting it into another". People v. Doe, 36 Cal. 220, 222; People v. McCreery, 34 Cal. 432, 433. The exemption provided in section 1 of Article XIII is a declaration of this fundamental principle.

[2-4] In determining the scope of the constitutional exemption, ownership is the decisive factor and "it has been held or assumed in many instances that property sold under executory contract by a state or a political subdivision thereof was subject to assessment for taxes in the hands of the vendee." Annotation, Taxation—Property of Exempt Vendor, 166 A.L.R. 595, 613, and see cases collected under heading III, Property of state or political subdivision. [a]. Taxability generally. Generally speaking, land which has been sold to an individual by the federal government, or by a state, loses its tax exempt status although the government may retain the legal title as security for the payment of a part of the purchase price. S.R.A., Inc. v. Minnesota, 327 U.S. 558, 569, 66 S.Ct. 749, 90 L. Ed. 851; Irwin v. Wright, 258 U.S. 219, 229, 42 S.Ct. 293, 66 L.Ed. 573. The form of the transfer is immaterial; the determinative question is whether private rights have supplanted those of the government in so far as the use of the property is concerned. "Where beneficial interest has passed to a vendee, the retention of legal title does not give a significant difference from the situation of a deed with a lien retained or a mortgage back to secure the purchase money." S.R.A., Inc. v. Minnesota, supra, at page 569 of 327 U.S., page 756 of 66 S.Ct.

[5] The exemption of state owned property is given by section 1 of Article XIII which declares that "all property * * * except as otherwise in this Constitution provided, * * * shall be taxed in proportion to its value", but further provides that "a mortgage, deed of trust, contract, or other obligation by which a debt is secured when land is pledged as security for the payment thereof together with the money represented by such debt, shall not be considered property subject to taxation". For tax purposes, then, the security title is not considered to be property, and it necessarily follows that the "vendee * * * [in] possession of the land under an executory contract, is for all purposes the owner and the vendor retains mere legal title". Elliott v. McCombs, 17 Cal.2d 23, 31, 109 P.2d 329, 334.

[6] The plan whereby veterans may purchase homes from the state rests upon constitutional provisions approved at the general election in 1922. The argument presented to the voters in support of the proposed amendment, and the issuance of bonds to carry out its purposes, includes the following statement: "The title to the property will remain in the state as security until the purchase price has been paid in full." By later legislation the taxability of property sold to veterans in conformity with the authority granted by the people was clearly recognized. In 1923, the legislature amended the Veterans Farm and Home Purchase Act and authorized the board to pay taxes and assessments which the purchaser fails or neglects to satisfy. Any amount paid by the board may be added to the selling price of the property. Stats. 1923, ch. 405, sec. 7, p. 915, 916; now incorporated in sec. 823, Military and Veterans Code. Obviously the purpose of these provisions is to allow the board to protect land sold by it from sales for delinquent taxes while it is subject to an executory contract of sale.

By a recent decision, the United States Supreme Court held that a state may tax real property sold by the United States to an individual under an executory contract. S.R.A., Inc. v. Minnesota, 327 U.S. 558, 66 S.Ct. 749, 755, 90 L.Ed. 851. The rationale of the holding is that, under such circumstances, the retention of legal title by the federal government is for security purposes only and does not exempt such property from taxation. The purchaser from the government sought exemption from tax liability under the authority of the "land grant" cases, but the court refused to follow them. In reaching its conclusion, the court pointed out that the decision in Irwin v. Wright, 258 U.S. 219, 42 S.Ct. 293, 66 L.Ed. 573, concerned the taxation of land held by an entryman under the Reclamation and Homestead Acts who had not received his final certificate of land clearance. "The reason for the rule against state taxation until the equitable title passes from the United States to the entryman was there placed upon the policy of the Government to require those who sought government land to perform the required conditions of residence or improvement before beneficial title, subject to state taxation, passes from the United States to the locator. This transfer was said not to take place until the certificate was issued. * * * The prohibition of state taxation until the certificate was issued was one of the means by which the Government furthered its public policy of land settlement. After compliance with the condition and before the patent, the state could tax." S.R.A., Inc. v. Minnesota, supra.

[7] The primary purpose of the Veterans' Farm and Home Purchase Act is to finance the purchase of farms and homes for veterans. Under the terms of the statute and contract with Eisley, equitable title and right to possession passed to him when he entered into the conditional sale transaction. Military and Veterans Code, secs. 821–830; cf. secs. 987.1–987.10. The basic procedure is quite different from that of the statutes permitting entry on public lands. It is not the social policy of the federal government in disposing of the public land which precludes a state from taxing real property acquired by an entryman under a land grant statute. The controlling factor is the status of the title, and upon the vesting of the equitable title, the land may be taxed to the entryman.

In the few jurisdictions in which the question has arisen since the decision of the S.R.A. case, the state courts have followed its reasoning and held that the vendee in possession under an executory contract of sale is liable as the owner for the taxes. Ken Realty Co., Inc. v. State, 247 Ala. 610, 25 So.2d 675, 166 A.L.R. 588; Bancroft Inv. Corporation v. City of Jacksonville, 157 Fla. 546, 27 So.2d 162; Norbet Corporation v. City of Newark, 135 N.J.L. 314, 51 A.2d 541. The Ken Realty Co. case antedates the S.R.A. decision. An application for rehearing, considered after the S.R.A. decision, was denied, the court referring to the S.R.A. case and stating that its "decision is in accord with the principles therein stated." 25 So.2d 679.

Originally the Florida supreme court held that property sold to a private purchaser under an executory contract from the United States is immune from state taxation under federal law and is also exempt from taxation under the state statutes. Upon a rehearing, after the decision in the S.R.A. case, the court receded from this position, stating that a review of the question, in the light of the S.R.A. case, leads to a conclusion that the vendee is the owner of the taxable interest in the property, "that the United States has abandoned such use of it as gave it an exemption status, and that it is now amenable to taxation under the law of Florida." Bancroft Inv. Corporation v. City of Jacksonville, on Rehearing, 157 Fla. 546, 27 So.2d 162, 171.

[8, 9] Petitioners rely upon sections 987, 2190.1 and 4986.4 of the Revenue and Taxation Code as indicating the legislative intent to provide that property purchased under a contract of sale pursuant to the Veterans Farm and Home Purchase Act is assessable merely on a "possessory interest" basis. Sections 987 and 2190.1, enacted in 1945, relate to "a possessory interest in real estate of the Veterans Welfare Board" and section 987 specifies a formula for determining the cash value of the possessory interest of the contract purchaser from the Department of Veterans Affairs. But the legislature cannot set aside the constitutional provision declaring that "all property * * * shall be taxed in proportion to its value". (Article XIII, sec. 1) by requiring the assessment of property at less than its full cash value. Section 987 is, therefore, invalid as being in conflict with the constitutional provision. The reference in section 2190.1 of the Revenue and Taxation Code to the "possessory interest" must be disregarded for the same reasons. Section 4986.4 of the same code is a procedural statute applying to land which has been acquired by the Veterans Welfare Board, providing for the cancellation of prior taxes upon such land, but it makes no provision for taxes after

the conditional sale contract has been made.

Petitioners also rely upon Anderson-Cottonwood Irrigation Dist. v. Klukkert, 13 Cal.2d 191, 88 P.2d 685, and State Land Settlement Board v. Henderson, 197 Cal. 470, 241 P. 560. In the first of them an irrigation district levied an assessment on certain land within the district and the assessment not having been paid, the lands were sold to the district. This court held that these lands, after their sale to the irrigation district, were not subject to county taxes for county government purposes, even though the lands were held for re-sale rather than for use for irrigation district purposes, on the ground that the "tax exemption provisions are directed solely to the 'ownership' of public property, [and] the use to which such property is put becomes immaterial." Supra at page 194 of 13 Cal.2d, page 687 of 88 P.2d. But the property involved in that case was held by the district absolutely with full and complete right to use and enjoy it and there was no conditional sale contract outstanding. In the second case, this court, by writ of mandate, compelled the cancellation of assessments in the name of the State Land Settlement Board against land which had been sold to individuals by that agency. State Land Settlement Board v. Henderson, supra. As to that property, the court quoted with approval from San Pedro etc. R. R. Co. v. Los Angeles, 180 Cal. 18, 179 P. 393, as follows: "When an interest in land, whether freehold or for years, is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property and therefore is subject to being taxed." [197 Cal. 470, 241 P. 565.] The earlier decision concerned the tax status of land leased to the railroad company, and as to such an interest, the court observed: "The principle that a possessory right in public land is private property, and that it may be assessed for purposes of taxation to the person in possession, although in point of law he may have no right as against the state or government owning the land, has long been settled in this state." but this statement, also quoted in reaching the conclusion that the real property to which the Land Settlement Board held title was not assessable to it, had no application to the facts then before the court, and even from a literal reading of that portion of the opinion, out of context, it is difficult to extract the principle, as have petitioners, that "the court held that the purchaser should be taxed only upon his possessory interest". The question presented for decision in the Land Settlement Board case did not concern the taxability to the purchaser of property sold by a state agency to an individual under an executory contract giving a present right to possession, and the statements in regard to the assessability of a lessee's interest in real property are not in point in the present litigation. The decision did not establish a rule of property, but held that the state agency was not properly taxable on its reversionary interest, and the assessment and levy made against the state agency were ordered canceled.

[10] The property here in controversy is properly assessable to the vendee in possession under an executory contract of sale. The alternative writ, therefore, is discharged and a peremptory writ of mandate is denied.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the judgment and agree that the property is properly assessed to the conditional vendee, petitioner Eisley, and that the proceeding in mandamus is a proper vehicle for testing the claims here asserted.

It is my view, however, that whether or not the county assessor be regarded as a state officer the provisions of section 15 of Article XIII of the California Constitution that "No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected," do not prohibit the issuance of mandamus here. It should be noted that in sections 1 through 10½, Article XIII of the constitution does provide for the levying of the tax involved.

Power to issue writs of mandamus is expressly confirmed in the courts of California by the state constitution (Constitution, Art. VI, sections 4, 4b, 5), and statutory or other constitutional provisions which purport to deprive courts (or limit them in the exercise) of jurisdictional powers expressly confirmed in them by the constitution are not to be extended by implication. The legislature may not, ordinarily, even curtail constitutional jurisdiction or judicial powers. (Miller v. Lux v. Board of Supervisors (1922), 189 Cal. 254, 274, 208 P. 304; In re Sutter-Butte By-Pass Assessment (1923), 190 Cal. 532, 536, 213 P. 974; Gallagher v. Campodonico (1931), 121 Cal.App.(Supp.) 765, 774, 5 P. 2d 486; 35 C.J.S., Federal Courts, § 4. And special-subject constitutional provisions which do limit general jurisdiction elsewhere in the constitution expressly confirmed, or which purport to curtail inherent judicial powers, should not be construed to extend the special limitation beyond the clear import of the language used.

A similar federal statute (26 U.S.C.A. Int.Rev.Code, § 3653(a), formerly R.S. 3224) provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." It will be noted that the quoted statute is in a degree broader than our constitutional limitation in that it is made expressly applicable to the "assessment" as well as to the "collection" of "any tax." It will also be remembered that, generally speaking, federal statutes have force and effect on the jurisdiction of federal courts, other than the Supreme Court, equal to the force and effect of state constitutional provisions on the jurisdiction of state courts. As set forth in 35 C.J.S., Federal Courts, § 4, et seq., "All federal courts, other than the supreme court, derive their jurisdiction wholly from the authority of congress; and, apart from such incidental powers as necessarily inhere in a lawfully created court, they have such jurisdiction only as, within constitutional limits, is conferred on them by acts of congress, either acts creating them or subsequent acts.

"Congress has power to prescribe and define the jurisdiction of inferior courts of the United States; and it may, in its discretion, give, grant, withhold, control, regulate, enlarge, limit, restrict, curtail, withdraw, or take away, the jurisdiction of such courts, even with respect to pending suits, provided it does not extend jurisdiction beyond constitutional limits, and provided, also, according to some authorities, it does not take away or abridge the inherent rights of ordained and established courts or limit judicial power, as distinguished from jurisdiction."

In respect to the operation of the limiting federal statute above quoted, A.L.R. (vol. 108, p. 201) declares the rule to be as follows: "The Federal statute [quoted hereinabove] * * * does not prohibit a suit in equity to restrain the collection of a tax where the tax is illegally exacted and where the taxpayer has no adequate remedy at law for its recovery if it is paid by him; and such remedy must be not only adequate, but also clear and unquestioned. [Citations.]

"The statute, being merely declaratory of the prior rule in equity, is not absolute; and it is inapplicable in extraordinary and exceptional circumstances. The absence of a plain, adequate, and complete remedy at law, to pay the illegal tax and sue to recover it, raises an independent ground to support injunctive relief in equity. Such ancient equitable jurisdiction was not abrogated by the statute, which is construed in harmony with the former equitable doctrine. [Citations.] * * *

"[P. 205] The general rule in equity, irrespective of statute, is that where, in addition to the illegality of an exaction in the guise of a tax, there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, an injunction suit may be maintained. Where such circumstances exist, statutory provisions are rendered inapplicable unless specific language discloses beyond a doubt the purpose to abrogate the salutary and well-established rule of equity."

It seems important in appraising the reasoning which underlies the cases construing jurisdictional or procedural limitation statutes as being merely declaratory of the prior rule in equity to emphasize that such "prior rule in equity" is given effect so scrupulously that the rule itself often affords more protection to the State than could the statute. Under the equity rule, mere illegality of an assessment does not constitute a ground for the intervention of equity. (See 108 A.L.R. 186, 203–204, and cases there cited.) An unconstitutional tax will not be restrained unless other ground for equity intervention exists. (See Bailey v. George (1922), 259 U.S. 16, 42 S.Ct. 419, 66 L.Ed. 816; and cases collected at page 192 of 108 A.L.R.) Even where the statute specifically recognizes a right to injunction when the tax sought to be enjoined is illegal, courts of equity will deny relief except in clear cases showing unmistakably that equitable grounds exist. (See 108 A.L.R. 201.) But where adequate grounds exist then the rule has been stated as follows: "If it be true, as contended by the defendant, that a tax may be collected, although it has been judicially determined to be illegal, the result will be that the taxing authorities are entirely above and beyond the law. * * * [W]here there is no adequate remedy at law, the court should have power to grant relief; otherwise, the citizen will be more at the mercy of the departments of the national government than is consistent with life in a free country." (Higgins Mfg. Co. v. Page (1927; D.C.), 20 F.2d 948, 949.)

In Miller v. Nut Margarine Co., 1931, 284 U.S. 498, 509–510 [52 S.Ct. 260, 263, 76 L.Ed. 422], the United States Supreme Court stated its position on the matter in the following words: "Independently of, and in cases arising prior to, the enactment of the provision (Act of March 2, 1867, 14 Stat. 475) which became R.S., § 3224 (26 U.S.C.A. § 154), this court, in harmony with the rule generally followed in courts of equity, held that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. The principal reason is that, as courts are without authority to apportion or equalize taxes or make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden, and so to interfere with and thwart the collection of revenues for the support of the government. And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. [Citations.] Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. [Citations.] The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well-established rule. This court has given effect to section 3224 in a number of cases. [Citations.] It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. [Citations.]" (See, also, Hill v. Wallace (1921), 259 U.S. 44, 62 [42 S.Ct. 453, 66 L.Ed. 822].)

Again, in the annotation in North American Diocese v. Havens, 164 Miss. 119, 144 So. 473, 84 A.L.R., at p. 1315, in reference to injunction being ordinarily an appropriate remedy, at least in the absence of a controlling statute, it is declared that "The rule has been stated without qualification in many cases, that injunction is a proper remedy against a tax on property which is by law exempt from taxation," citing Osborn v. Bank of United States (1824), 9 Wheat. 738 [6 L.Ed. 204]; Tomlinson v. Branch (1872), 15 Wall. 460 [21 L.Ed. 189]; Allen v. Baltimore & O. R. Co. (1884), 114 U.S. 311 [5 S.Ct. 925, 962, 29 L.Ed. 200]; United States v. Rickert (1903), 188 U.S. 432 [23 S.Ct.

478, 47 L.Ed. 532]; Bailey v. Atlantic & P. R. Co. (1874; C.C.), 3 Dill. 22, Fed. Cas.No.732; and state court cases from Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, New York, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and West Virginia. The note continues (p. 1316), "There are numerous cases in which injunction has been sought to restrain the collection of taxes on property alleged to be exempt from taxation, which have been disposed of on the ground that the property was or was not exempt, or on some other ground, without adverting to the question of whether injunction was the proper remedy. No attempt has been made to collect such cases in this annotation, although they have a slight weight as inferential authority for the proposition that injunction is a proper remedy." Many California cases fall in this latter category.

In Pomeroy's Equity Jurisprudence (5th Ed., vol. 1, pp. 529–534) it is said, "In a large number of the states the rule has been settled in well-considered and often-repeated adjudications by courts of the highest character for ability and learning, that a suit in equity will be sustained when brought by any number of taxpayers joined as co-plaintiffs, or by one or more plaintiffs suing on behalf of all taxpayers similarly situated, or sometimes even by a single taxpayer suing on his own account, to enjoin the enforcement and collection, and to set aside and annul, any and every kind of tax or assessment laid by governmental authorities, either for general or special purposes, whether it be entirely personal in its nature and liability, or whether it be made a lien on the property of each taxpayer, whenever such tax is illegal. * * * In the face of every sort of objection urged against a judicial interference with the governmental and executive function of taxation, these courts have uniformly held that the legal remedy of the individual taxpayer against an illegal tax, either by action for damages, or perhaps by certiorari, was wholly inadequate; and that to restrict him to such imperfect remedy would, in most instances, be a substantial denial of justice, which conclusion is, in my opinion, unquestionably true. The courts have therefore sustained those equitable suits, and have granted the relief, and have uniformly placed their decision upon the inherent jurisdiction of equity to interfere for the prevention of a multiplicity of suits. The result has demonstrated the fact that complete and final relief may be given to an entire community by means of one judicial decree, which would otherwise require an indefinite amount of separate litigation by individuals even if it were attainable by any means." It is also to be noted that Mr. Pomeroy (at p. 675) declares that "if recognized equitable grounds for exercising jurisdiction appear, the federal courts, in the exercise of their equity jurisdiction, are not bound by state statutes which forbid the issuance of injunctions to prevent the collection of taxes." To the same effect, see note, 108 A.L.R. 218.

It is in the light of the above noted general rules that we should examine the exact language of our constitutional provision. Immediately it becomes apparent that our limitation, in that it relates solely to *collection* of a levied tax, is not so broad as the federal statute, and, given full effect but not extension, admits of such control of the assessment procedures as is necessary for the entertainment and disposition of the subject case. It reads: "No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, *to prevent or enjoin the collection* of any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected." (Italics added.) It seems not insignificant that the special circumscription of powers is limited to process "to prevent or enjoin the *collection* of any tax *levied*," etc. In other words, this court possesses general jurisdiction to issue mandate; that jurisdiction endures in relation to this and similar cases except as it, or judicial power in the exercise thereof, may be specifically limited by the language above quoted. The limitation at most is only on its jurisdiction or power to issue its process "to prevent or enjoin the *collection* of any tax *levied*." In Briscoe v. McMillan (1907), 117 Tenn. 115, 100 S.W. 111, the Supreme Court of Tennessee dealt with a similar problem. It said (page 114 of 100 S.W.),

"The first question we shall notice, arising on the demurrer, goes to the jurisdiction of the court. It is insisted on behalf of the defendants that the present bill is in effect a suit against the state, and is in contravention of section 1064 et seq. of Shannon's Code, embodying the act of 1873, to the effect that no preventive writ of any kind shall be granted by any court to prohibit, or to hinder or delay, the collection of any revenue claimed by the state; but, if the taxpayer considers the tax 'unjust or illegal or against any statute or clause of the Constitution,' he must pay the same under protest and may then within 30 days sue the collecting officer to recover it back.

"Section 1063 further provides that there shall be no other remedy 'in any case of the collection of revenue or attempt to collect revenue illegally.'

"We are of opinion the sections of the Code invoked herein are inapplicable in the present case. The statute in question by its express provisions only applies to the collection of taxes. There is no effort here to prevent the collection of taxes, but the object of the bill is to enjoin the state board of equalization against the alleged illegal exercise of its jurisdiction in the assessment of said county and municipal taxes."

In California that there is substantial distinction between the assessment process and the collection procedures has heretofore seemed obvious; indeed, traditionally in this state the offices and functions of assessor and tax collector have been separate. (Political Code, §§ 4013, 4017, 4125, 4126.)

The purpose of the litigation in this case is to "compel the county assessor to assess to Eisley his *possessory interest* in real property purchased by him from the Veterans Welfare Board." (Italics added.) Even if this court does not see fit to follow the federal rule of construction, hereinbefore set forth, nevertheless this proceeding can be maintained and its pendency not interfere with the *collection* of any tax already assessed and *levied*. To make the collection, when a tax has been assessed and levied, various steps are provided to be taken by the taxing authorities. (See generally, Rev. & Tax.Code, §§ 2501–3112.) I perceive in section 15 of the constitution no divestiture of jurisdiction or abrogation of judicial power of the courts of this state to entertain mandamus looking toward requiring any taxing officer or body, in making an assessment, to comply with the law, or, in case of an illegal assessment, to comply with the mandatory provisions of applicable statutes. (See Rev. & Tax.Code, Part 9, Division 1.) If a taxing authority should arbitrarily refuse to perform its duty—to levy any taxes whatsoever—would not mandamus be the appropriate remedy to compel the performance of official duty? And would not such official duty consist in assessing a tax in accordance with law? Is not the performance of that duty exactly what the petitioner here assertedly demands? If the court has power to compel the performance of official duty does it not necessarily have the power to determine, within limits, the acts which would constitute "official duty?"

In McClelland v. Board of Supervisors (May, 1947), 180 P.2d 676, 679, we held that "Where, as here, it is substantially contended that fraud or 'something equivalent to fraud' results from arbitrary action of the board in declining to equalize the assessed valuations of property, the proceedings before the board are subject to review." See also cases there cited. Certiorari to annul the action of a board of equalization in respect to determining values for assessment purposes certainly comes as close to "process * * * to prevent or enjoin the collection of any tax levied under the provisions of" Article XIII as does mandamus to compel assessment of property to a certain person or to compel allowance of a constitutional exemption in making an assessment. But again, technically, the process is not issued to "prevent or enjoin the *collection*" of a levied tax. Any levied tax may be collected, during the pendency of the mandamus or certiorari proceeding or at any time as the law may provide (in the McClelland case it appeared that the tax was paid during the pendency of the proceedings), but in the meantime the taxpayer is pursuing the extraordinary remedy which may be the only substantially adequate and convenient remedy available to him. It may be the only means by which the pertinent statutory provisions can be practically enforced. The prompt determination of correct assessment procedure may well be even more important to the state than to the suing taxpayers themselves. I therefore would hold this proceeding to be without the scope of section 15 of Article XIII whether or not the assessor be regarded as a state officer.

I think the orderly processes of government and the expeditious and economical assessment and resulting collection of taxes are more likely to be thwarted than served by any broader application of the section, and that this court should take such a position and make it known for the guidance of other taxing authorities and taxpayers. It seems sounder procedure to me, and better constitutional law, to follow the general rule of the federal (and many other jurisdictions), as we tacitly have been doing, or at least to hold the limitation to the scope of its own language, to give it effect to the extent of the clear import of its language but no further, and to maintain the extraordinary remedies as available, when otherwise proper, for the prompt determination of assessment problems. We can do this, as above suggested, in respect to assessment procedure, without issuing the process "to prevent or enjoin the collection of any tax levied under the provisions of" Article XIII, and by so doing we can expeditiously require assessing authorities and other state as well as county officers to perform their official duties in accord with law. The fact that a decision we may render in respect to assessment procedure may cause a tax to be levied different from that threatened or may ultimately form the basis for repayment of a tax paid does not bring us into conflict with the limitation against enjoining or preventing the collection of a levied tax. Even though mandamus may ultimately cause the cancellation of an illegal assessment it need not prevent or enjoin any *collection process* in respect to a tax levied as a result of the illegal assessment. If mandamus is eventually denied the assessment stands and, the collection of the tax not having been prevented, obviously the constitutional limitation has not been breached. If mandamus is finally granted, a legal assessment made and the illegal assessment cancelled, then payments made pursuant to the illegal assessment may be refunded in accordance with applicable law. (See Rev. & Tax.Code, Div. 1, Pt. 9, Ch. 5, Art. 1.)

It is important to note that the Revenue and Taxation Code, as above indicated, expressly provides for situations in which it becomes the duty of public officers to cancel an uncollected tax. Section 4986 declares that "All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be cancelled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged * * * (b) Erroneously or illegally." Section 4986.4 provides for the cancellation of taxes "Whenever any property has been deeded to the Veterans' Welfare Board pursuant to Division 4 of the Military and Veterans Code." Section 4991, in mandatory language, ordains that "If the tax collector erroneously sells or deeds to the State property for the taxes which were a lien on the property for any year and the taxes for that year have been paid or were not legally a lien on the property, the auditor and the tax collector shall certify the facts to the board of supervisors. The board of supervisors shall then order: (a) The county recorder to cancel the erroneous certificate or deed. (b) The auditor to cancel the sale and enter the fact and date of the cancellation on the margin of the delinquent roll opposite the description of the property." We should also observe that section 4990 mandatorily provides for cancellation in the event of dual assessment: "On discovery that any property is assessed by the same taxing agency more than once for the same year, after payment of all charges justly due on the property the person having custody of the rolls shall certify the facts to the board of supervisors. The board of supervisors shall then order the auditor to cancel the other charges and assessments by an entry on the margin of the roll and, if carried there, the delinquent and current roll."

Availability of the extraordinary writs may well prevent a multiplicity of suits and furnish a prompt and solely adequate remedy. A man who did not possess the money to pay a tax and thereby qualify to sue for its refund, could let his property be sold to the state pursuant to the collection process, but, by prevailing in mandamus to compel the assessor or auditor or supervisors to perform official duty, could establish the basis for cancellation of the sale under the mentioned provisions of the Revenue and Taxation Code. The use of mandamus to compel the performance of official duty in substantially similar cases is not new in California. (See People v. Bd. of Supervisors (1932), 126 Cal. App. 670, 672, 674, 15 P.2d 209 (mandamus to compel board of supervisors to cancel taxes); State Land Settlement Board v. Henderson (1925), 197 Cal. 470, 241 P. 560 (to compel cancellation of tax liens); see also Anderson-Cottonwood Irrigation District v. Klukkert (1939), 13 Cal.2d 191, 88 P.2d 685 (to prohibit assessment); Glenn Colusa Irrigation District v. Ohrt (1939), 31 Cal.App.2d 619, 88 P.2d 763 (mandamus to compel board of supervisors to cancel an assessment of taxes).)

For the reasons above delineated I would hold that section 15 of Article XIII of the California Constitution does not divest this court of jurisdiction or judicial power to issue mandate, in cases otherwise proper, to compel performance of official duty, including the making of assessments in the manner and the amounts provided by law, whether the taxing authority be regarded as a state officer or as a county officer.

CARTER, J., concurs.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

31 Cal.2d 661

SHERMAN et ux. v. QUINN et al.

L. A. 20218.

Supreme Court of California, in Bank.

April 3, 1948.

1. Taxation 🔑219

Veteran who was in possession of realty under contract of conditional sale, was entitled to exemption allowed by constitutional provision that "property" of an honorably discharged veteran to amount of $1,000 shall be exempt from taxation if he does not own property of value of $5,000 or more. Const. art. 13, § 1¼.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

2. Mandamus 🔑12

A writ of mandamus will issue only where a legal duty is established and no other sufficient means exist for its enforcement.

3. Mandamus 🔑12

The legal duty sought to be compelled by a writ of mandamus must be one which the law specially enjoins. Code Civ.Proc. § 1085.

4. Mandamus 🔑3(8)

Veteran who was wrongfully denied his constitutional tax exemption by assessor had a plain, speedy and adequate remedy under statute providing that taxes erroneously levied and collected may be refunded, together with interest thereon, on a claim therefor, and therefore was not entitled to maintain mandamus against assessor. Revenue and Taxation Code, § 5096 et seq.; Code Civ.Proc. § 1086; Const. art. 13, § 1¼.

SCHAUER and CARTER, JJ., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Mandamus proceeding by Arthur W. Sherman and Audrey R. Sherman, his wife, against John R. Quinn, County Tax Assessor, County of Los Angeles and others, respondents, to compel the assessor to assess to them realty being purchased by them under a contract of conditional sale in order that petitioners might claim tax exemption because of the fact that Arthur W. Sherman was a veteran. From a judgment, entered on an order sustaining the assessor's demurrer to the petition without leave to amend, the plaintiffs appeal.

Judgment affirmed.

Prior opinion, 179 P.2d 24.

Zuckerman & Edmunds, Edward K. Zuckerman, Arthur E. Edmunds and William E. James, all of Los Angeles, for appellants.

Harold W. Kennedy, County Counsel and Gordon Boller, Deputy County Counsel, both of Los Angeles, for respondents.

EDMONDS, Justice.

Arthur W. Sherman and his wife are seeking a writ of mandamus to compel the assessor of Los Angeles county to assess to them real property being purchased by them under a contract of conditional sale in order that he may claim his tax exemption as a veteran. The appeal from the judgment, entered upon an order sustaining the assessor's demurrer to the petition without leave to amend, presents for decision a question different from that determined in Eisley v. Mohan, Cal.Sup., 192 P.2d 5, as here the vendor is a private party and not a state agency.

The amended petition alleges that Sherman is a veteran of World War II and was honorably discharged from the service. He and his wife, both residents of California, have purchased from Witmer Building Company, a corporation, under a contract of conditional sale, a lot, improved with a residence, for a total purchase price of $8,850. Approximately $3,000 was paid in cash and the contract provides for monthly payments of $40 on account of principal and interest.

The petitioners further plead that the property is assessed to the vendor who holds the legal title. Sherman demanded of the assessor that the assessment to the vendor be canceled and the property assessed to him and his wife in order that he might claim his veteran's exemption from taxation under section 1¼ of Article XIII of the Constitution. This demand was rejected upon the ground that it is the policy of the assessor to assess real property being purchased under a conditional sales contract, to the vendor. There is no plain, speedy or adequate remedy in the ordinary course of law, the petitioner concludes, and any other procedure would involve a multiplicity of suits.

The assessor demurred to the petition upon the ground that it does not state facts sufficient to constitute a cause of action. One of the points relied upon in support of his position was that mandamus is not the proper remedy.

Section 1¼ of Article XIII of the Constitution reads: "The property to the amount of one thousand dollars ($1,000) of every resident of this State who has served in the Army [and other branches of the service] * * * and * * * has received an honorable discharge therefrom, * * * shall be exempt from taxation; provided, this exemption shall not apply to any person named herein owning property of the value of five thousand dollars ($5,000) or more, * * *." The allegations of the petition bring Sherman within this provision. It is alleged that he and his wife are residents of California, that he is "a veteran of World War II and was on active duty with the United States Army Air Forces prior to and on March 1, 1946, and was honorably released from active duty on or about March 23, 1946." Neither Sherman nor his wife, nor the two together, own property greater than $5,000 in value. It is also alleged that the affidavit required by section 252 of the Revenue and Taxation Code was timely filed.

The principal question for decision is whether the quoted provision of the Constitution exempts only property of a veteran to which he holds the legal title. Certainly it must be construed to give full effect to the purpose of the enactment, which is to minimize the burden of taxation upon those persons who honorably served our country, and do not own property of a value greater than that specified. There is nothing in the language of the provision which indicates an intention to restrict its application to those who hold the full legal title to their property. On the contrary, Article XIII, section 1, relating to taxation, defines property as used in its provisions, to exclude the security title of a contract vendor. (Eisley v. Mohan, Cal.Sup., 192 P.2d 5.) The vendee in possession under a conditional sale contract, or one who holds the land subject to a deed of trust, is as much entitled to the exemption as a veteran who has title in fee simple. "In a conditional sale, the title in the seller is for security only, to assure the payment of the purchase price. It carries with it none of the ordinary incidents of ownership. The buyer has the possession and use of the property to the complete exclusion of the seller, subject only to the seller's remedies in case of default. Both in a practical and a legal sense the buyer is the beneficial owner." (County of San Diego v. Davis, 1 Cal.2d 145, 147, 33 P.2d 827; Elliott v. McCombs, 17 Cal.2d 23, 109 P.2d 329; and see Walker v. Houston, 215 Cal. 742, 12 P.2d 952, 87 A.L.R. 937.)

[1-3] Petitioner Arthur Sherman is therefore entitled to the exemption allowed by section 1¼ of Article XIII of the Constitution. But the writ of mandamus will issue only where a legal duty is established and no other sufficient means exist for its enforcement. (Potomac Oil Co. v. Dye, 10 Cal.App. 534, 537, 102 P. 677.) The legal duty sought to be compelled must be one which the law specially enjoins. (Code Civ.Proc. sec. 1085; City of Napa v. Rainey, 59 Cal. 275, 278; Albori v. Smith, 18 Cal.App.2d 615, 618, 65 P.2d 81; see 16 Cal.Jur. 808.)

The assessor, annually, "shall assess all the taxable property in his county * * * to the persons owning, claiming, possessing, or controlling it * * *." (Rev. and Tax Code, sec. 405.) Ordinarily, the legal title and ownership is in the same person and in such case the duty of paying taxes rests upon the person who holds legal title. (Three G. Distillery Corp. v. Los Angeles County, 46 Cal.App.2d 498, 116 P.2d 143), but where security title and ownership are in different parties, as in a conditional sale transaction, the one who actually is to pay the taxes is determined by the contract. In the case of personal property it has been held that the assessment is not invalid if assessed to a conditional vendee (Houser etc. Mfg. Co. v. Hargrove, 129 Cal. 90, 61 P. 660), nor to a consignee for sale. (S. & G. Gump Co. v. San Francisco, 18 Cal.2d 129, 114 P.2d 346, 135 A.L.R. 595.) Section 405 of the Revenue and Taxation Code applies to real and to personal property, and the assessment to either the vendee or the vendor under a conditional sale contract of land is not invalid. (Cf. County of San Diego v. Davis, supra, wherein it was held that the legal owner of an automobile, registered in the name of a conditional vendee, was not personally liable for the tax imposed on the automobile.) Moreover, assessment to the veteran is not a prerequisite to the application of the constitutional provision. It is the property of the veteran to the specified amount which is exempted from taxation, and the form of the assessment is of no consequence.

[4] On the basis of the allegations of their petition, it is clear that the Shermans are entitled to the benefit of the exemption provided by the Constitution. Clarification of this point should suffice to assure petitioners and other veterans in similar circumstances that the exemption will be allowed. However, should an assessor deny the exemption to a veteran, an adequate procedure is provided by statute whereby taxes erroneously levied and collected may be refunded, together with interest thereon, upon a claim therefor. (See, Rev. & Tax. Code, sec. 5096 et seq.) This form of procedure, widely used in the tax field, is based upon the principle that "delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." (Dows v. City of Chicago, 11 Wall. 108, 110, 20 L.Ed. 65.) The veteran, therefore, has a plain, speedy and adequate remedy in the ordinary course of law, and mandamus is not available. (Code Civ. Proc. sec. 1086.) "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every tax-payer

is entitled to the delays of litigation is unreason." (Springer v. United States, 102 U.S. 586, 594, 26 L.Ed. 253; cited with approval in People v. Skinner, 18 Cal.2d 349, 355, 115 P.2d 488, 149 A.L.R. 299.)

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. I agree that petitioner Arthur Sherman is entitled to a veteran's exemption to be applied against the property here involved, but it is my view that he is also entitled to mandamus to compel the assessment of the property to him in order that the exemption may be claimed. Such action will but compel the defendant to perform that which as a matter of law appears to be his official duty and it will give to petitioner the benefit of a specific constitutional right.

Petitioner's right to a veteran's exemption derives directly from section 1¼ of Article XIII of the California Constitution. The immediate purpose of the proceeding is not to cancel or prevent collection of a tax; it is to compel a lawful assessment. When the lawful assessment has once been made the law itself will require all public officials concerned, whether named in this proceeding or not, to take all appropriate actions necessary to cancel any duality of assessment and to relieve petitioner of the unjust charge against his property; all this may be accomplished without the necessity for further and additional judicial proceedings by petitioner if the writ now sought is granted. The Revenue and Taxation Code expressly provides for situations in which it becomes the duty of public officers to cancel an uncollected tax. Section 4986 declares that "All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged * * * (b) Erroneously or illegally." Section 4991, in mandatory language, ordains that "If the tax collector erroneously sells or deeds to the State property for the taxes which were a lien on the property for any year and the taxes for that year have been paid or were not legally a lien on the property, the auditor and the tax collector shall certify the facts to the board of supervisors. The board of supervisors shall then order: (a) The county recorder to cancel the erroneous certificate or deed. (b) The auditor to cancel the sale and enter the fact and date of the cancellation on the margin of the delinquent roll opposite the description of the property." It should also be observed that section 4990 mandatorily provides for cancellation in the event of dual assessment: "On discovery that any property is assessed by the same taxing agency more than once for the same year, after payment of all charges justly due on the property the person having custody of the rolls shall certify the facts to the board of supervisors. The board of supervisors shall then order the auditor to cancel the other charges and assessments by an entry on the margin of the roll and, if carried there, the delinquent and current roll."

The significance of the above quoted sections, as to the procedural and equitable aspects of this case, lies in the fact that they contemplate and provide a substantially complete remedial scheme in situations which encompass that which the petitioners (the veteran's wife joins in the petition here) here claim and such as appeared in Lockhart v. Wolden (1941), 17 Cal.2d 628, 111 P.2d 319. Perhaps the most important part of the remedial scheme, to persons in the position of petitioners here, is that the only act they need to directly compel appears to be the making of the lawful assessment; then, no matter how many other unlawful assessments may have been made on the same property, nor how far the collection process may have proceeded, the duties of the public officers concerned are specifically prescribed. Surely mandamus should be available in such situations to compel the performance of official duty in the making of the lawful assessment.

As emphasized in Dufton v. Daniels (1923), 190 Cal. 577, 581-582, 213 P. 949, 951, " 'It has been held in this state that, to supersede the remedy by mandamus, the party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject-matter of his application, and one which is equally convenient, beneficial, and effective as the proceeding by mandamus.' [Citations.]" In the Dufton case petitioner sought a writ of mandate to compel the state board of control to audit and allow petitioner's claim for his necessary traveling expenses as a state agent in returning to the state of California a fugitive from justice, under the provisions of section 1557 of the Penal Code. Although a statutory remedy was provided this court granted the writ, with the holding that "The remedy afforded by the statutes above cited is manifestly not equally convenient, because the action therein provided for *must be transferred to Sacramento County upon* demand of the Attorney General, regradless of the residence of the plaintiff, and it is not equally beneficial or effective, because the plaintiff therein, though successful, *cannot recover his costs* * * * ." (Italics added.)

In accord with and relying upon the views expressed in the Dufton case is the more recent decision in Lockhart v. Wolden (1941), supra, 17 Cal.2d 628, 111 P.2d 319. In the latter case petitioner sought by mandamus to compel respondent, as assessor of the City and County of San Francisco, to grant petitioner as a veteran exemption of certain property from taxation and thereupon to cancel the assessment which had been made. Although petitioner had not pursued the statutory remedy of payment of the tax assessed against her property followed by suit to recover the payment, this court granted the relief sought and stated (page 633 of 17 Cal.2d, page 322 of 111 P.2d): "No remedy other than mandamus would afford petitioner the remedy to which she is entitled, namely, cancellation of the assessment. Babcock v. Goodrich, 47 Cal. 488, 508. The well-settled rule that a plaintiff who recovers wrongfully collected taxes cannot recover interest prior to judgment (Engebretson v. City of San Diego, 185 Cal. 475, 479, 480, 197 P. 651) is a further reason why any remedy at law by payment of the tax and suit to recover would not be adequate, and it was so held in the case of Birch v. Board of Supervisors, 191 Cal. 235, 237, 215 P. 903, in a proceeding to review the action of the board of supervisors in raising the assessment upon property belonging to plaintiffs. Though we recognize that the interest item upon this particular assessment is small, it becomes very substantial when the rights of taxpayers situated similarly to petitioner are taken into consideration. Any other procedure would involve a multiplicity of suits, for the question as to the right to the exemption here claimed by petitioner applies to other women veterans in California—petitioner alleges there are approximately two thousand —in the same way as to petitioner. Thus this situation appears to be of considerable public importance, and the fact that complete and final relief may be given to this group of taxpayers by the issuance of a single writ further fortifies petitioner's argument supporting the property of this particular proceeding." (For comparable holdings in substantially similar cases see Alexander v. Superior Court (1928), 91 Cal.App. 312, 316, 266 P. 993; People v. Board of Supervisors (1932), 126 Cal.App. 670, 672, 674, 15 P.2d 209 (mandamus to compel board of supervisors to cancel taxes); State Land Settlement Board v. Henderson (1925), 197 Cal. 470, 241 P. 560 (to compel cancellation of tax liens); see also Anderson-Cottonwood Irrigation District v. Klukkert (1939), 13 Cal.2d 191, 88 P.2d 685 (to prohibit assessment); Glenn Colusa Irrigation District v. Ohrt (1939), 31 Cal.App.2d 619, 88 P.2d 763 (mandamus to compel board of supervisors to cancel an assessment of taxes).)

Petitioners here seek to compel public officers to perform official duty and I am of the opinion that no other remedy than mandamus is available and adequate for that purpose. It seems reasonably certain that issuance of the writ will avoid a multiplicity of suits. If the writ is granted here it should accomplish for petitioners everything which otherwise might well necessitate a multiplicity of actions and proceedings before all their rights were secured and their property freed from erroneous charges, liens and clouds. Furthermore, it is a matter of common knowledge that many veterans are purchasing homes upon conditional sales contracts. Must each veteran in petitioner's position pay the tax in full and then sue to recover in order to secure the advantage of his exemption? And if he does not have the money to pay the illegal tax and thereby establish the basis for recovery must he lose his property by tax sale because the court is impotent to afford him the only relief which would be truly adequate?

I would issue the writ, directing the respondent assessor to assess the property to petitioner, thereby performing his official duty.

CARTER, J., concurs.

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31 Cal.2d 657

DEPARTMENT OF VETERANS AFFAIRS OF CALIFORNIA v. BOARD OF SUP'RS OF SAN JOAQUIN COUNTY et al.

S. F. 17535.

Supreme Court of California, in Bank.

April 3, 1948.

Rehearing Denied April 29, 1948.

1. Taxation 🔑213

Where realty was assessed for fiscal year 1946-47 to holder of legal title on March 1, 1946, and Veterans Welfare Board acquired land by deed dated March 2, 1946, and three weeks later Board contracted to sell realty to veteran who went into possession, Department of Veterans Affairs, as successor of the Veterans Welfare Board, was not thereafter entitled to have realty exempted from taxation under constitutional provision that property belonging to the state is exempt from taxation, since department held naked legal title only for purposes of security, and purchaser in possession was the owner for all other purposes. Revenue and Taxation Code, §§ 4986, 4986.4; Const. art. 13, § 1.

2. Taxation 🔑251

The Department of Veterans Affairs, as to such property as it owns absolutely, may protect it from sale for delinquent taxes by applying for cancellation of taxes which have become a lien on it prior to date of acquisition by the department. Revenue and Taxation Code, §§ 4986, 4986.4; Const. art. 13, § 1.

3. Taxation 🔑251

Section of Revenue and Taxation Code providing that when any property has been deeded to Veterans Welfare Board and petition has been filed with any county or city for cancellation of taxes, district attorney or city attorney, if he finds facts in petition true, shall approve petition and recommend cancellation of taxes, does not enlarge authority to cancel taxes granted under section providing the uncollected tax may be cancelled if levied or charged on property acquired after lien date by the state or other political subdivision. Revenue and Taxation Code, §§ 4986, 4986.4; Const. art. 13, § 1.

Original proceeding for writ of mandate by the Department of Veterans Affairs of the State of California (a public corporation), petitioner, against the Board of Supervisors of the County of San Joaquin, State of California and others, respondents, to compel respondents to cancel an assessment on realty owned by the petitioner subject to a contract of conditional sale made with a veteran entitled to tax exemption.

Alternative writ discharged and peremptory writ denied.

John A. Sinclair, of San Francisco, and Warren H. Atherton, of Stockton, for petitioner.

J. R. Klawans and Orville Pratt, both of San Francisco, amici curiae.

Frederick L. Felton, County Counsel of San Joaquin County, of Stockton, for respondents.

EDMONDS, Justice.

By the present original proceeding, the Department of Veterans Affairs of California, one of the petitioners in Eisley v. Mohan, Cal.Sup., 192 P.2d 5, has presented substantially the same question as was decided in that case. The department here seeks a writ of mandate to compel the board of supervisors to cancel an assessment on real property owned by it subject to a contract of conditional sale made with Murray Hill, a veteran entitled to tax exemption.

The petition alleges that certain real property was assessed for the fiscal year 1946-47 to one Sven Meyer, the holder of the legal title on March 1, 1946. The Veterans Welfare Board acquired the land by deed dated March 2, 1946. Three weeks later the board contracted to sell the property to Hill and his wife, who now occupy the premises. On August 5, 1946, the Department of Veterans Affairs, the successor of the Veterans Welfare Board, filed with the Board of Supervisors of San Joaquin County a petition which included detailed information concerning the title to the property. Upon the ground of ownership by a state agency, the department demanded that the realty taxes for 1946-47 be canceled pursuant to sections 4986 and 4986.4 of the Revenue and Taxation Code. After the respondent board refused to comply with the demand and to cancel the tax, the department instituted the present proceeding.

The department contends that, under the facts pleaded, the applicable statutes require the cancellation of the assessment upon the property for taxes of the fiscal year 1946-47, although the land was acquired by the public agency after the tax lien attached. Mandamus is the proper remedy, says the petitioner, because the courts have become more liberal in allowing that remedy to be invoked when the question is of statewide concern and the controversy concerns the construction of a general state statute. It is also asserted that the remedy at law is inadequate and not "capable of directly affording and enforcing the relief sought."

By way of return to the alternative writ issued in response to the department's petition, the respondent board demurred upon the ground that the facts pleaded are not "sufficient to constitute a cause of action nor to authorize the issuance of either an alternative or peremptory writ of mandate".

The statutes relied upon by the petitioner reads as follows:

"4986. All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged: * * * (e) On property acquired after the lien date by the State or by any county, city, school district or other political subdivision and because of this public ownership not subject to sale for delinquent taxes."

"4986.4. Whenever any property has been deeded to the Veterans' Welfare Board * * * and a petition has been filed with any county or city for the cancellation of taxes pursuant to this article, the district attorney or city attorney, as the case may be, shall investigate the facts stated in the petition, and if he finds them to be true, shall approve the petition and recommend to the legislative body that the taxes described in the petition be canceled."

By the provisions of section 1, Article XIII of the Constitution, property belonging to the state is exempt from taxation. Under section 4986 of the Revenue and Taxation Code, where the state acquired land after the lien for taxes has attached, such taxes may, under certain conditions, cease to become a charge upon the land. People v. Board of Supervisors of Calaveras County, 126 Cal.App. 670, 15 P.2d 209. The purpose, as stated in the code section is that the property "because of this public ownership" should not be subjected to sale for delinquent taxes.

[1] Had the state agency been the owner of the property at the time the application for the cancellation of taxes was made, it would have been entitled to the relief sought. People v. Board of Supervisors of Calaveras County, supra. But a state agency is not required to apply for the cancellation of an assessment (City of Pasadena v. Chamberlin, 1 Cal.App.2d 125, 134, 36 P.2d 387, 392), and in the present case, be-

fore the application was made, the department had sold the property under a contract of conditional sale. Under these circumstances, as was held in the Eisley case, the vendee in possession of the property is the owner of it for all purposes here relevant; the department holds the naked legal title only for the purposes of security. Eisley v. Mohan, Cal.Sup., 192 P.2d 5; Elliott v. McCombs, 17 Cal.2d 23, 109 P.2d 329. Upon the execution of the conditional sale contract made with the veteran-vendee, the property was subject to taxation to the same extent as it would have been had the sale been made to him by Sven Meyer. There should be no different tax consequences because the department held the full legal title to the land for a few weeks, during which it took no action to have the assessment canceled.

[2, 3] Section 4986.4 of the Revenue and Taxation Code was added in 1945. (Stats. 1945, Ch. 323, sec. 1.) In 1932, this court held that a state agency which had acquired property, could obtain cancellation of the taxes which were a lien on the property only if the property was impressed with a public use. La Mesa Lemon Grove and Spring Valley Irr. Dist. v. Hornbeck, 216 Cal. 730, 17 P.2d 143. Property acquired by the Department of Veterans Affairs, prior to the enactment of section 4986.4 would not be subject to cancellation of taxes, because it was not impressed with a public use, but was merely acquired for re-sale to veterans. Since 1945, however, the department, as to such property as it owns absolutely, may protect it from sale for delinquent taxes by applying for cancellation of the taxes which have become a lien upon it prior to the date of acquisition by the state agency. But the new statute does not otherwise enlarge the authority to cancel taxes granted under section 4986 of the Revenue and Taxation Code.

For the reasons stated, the board of supervisors had no duty to cancel the taxes as requested, the alternative writ is discharged, and a peremptory writ is denied.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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85 Cal.App.2d 77

PITT v. MALLALIEU.

Civ. 16184.

District Court of Appeal, Second District, Division 2, California.
April 19, 1948.

1. Specific performance 🔑87

Suit for specific performance cannot be enforced in favor of one who has not fully and fairly performed all conditions precedent on his part to be performed, except where failure is only partial and either immaterial or capable of being fully compensated. Civ.Code, § 3392.

2. Specific performance 🔑63

Presumably breach of agreement to transfer realty cannot be adequately relieved by pecuniary compensation, and therefore specific performance will lie. Civ.Code, § 3392.

3. Vendor and purchaser 🔑46

In suit for specific performance of contract for sale of realty, contract cannot be rewritten, and none of the terms can be ignored. Civ.Code, § 3392.

4. Specific performance 🔑99

Where purchaser failed to comply with obligation to deposit purchase price for realty within 90 days as required by contract making time of the essence, purchaser had no right to specific performance of the contract. Civ.Code, § 3392.

5. Specific performance 🔑99

On purchaser's failure to make payment of purchase price within 90 days as required by contract, purchaser committed a breach and no affirmative act by vendor was necessary to terminate purchaser's right of enforcement by suit for specific performance. Civ.Code, § 3392.

6. Specific performance 🔑91, 97(1)

Fact that there was an incumbrance against vendor's title to realty, that vendor was unable to remove within time fixed for performance, did not relieve purchaser from making a tender of purchase price within 90 days as required by contract, and demanding performance as a condition for institution of suit for specific performance. Civ.Code, § 3392.

7. Vendor and purchaser ⚷170

A tender to vendor's agent by purchaser of balance due under contract for purchase of realty was no compliance with requirement that balance should be paid to escrow agent, since an offer of performance by a party to a transaction must be made to the person or entity designated in the agreement within the time fixed for performance, and in good faith and in a manner most likely to benefit the creditor. Civ.Code, §§ 1488, 1490, 1493.

8. Vendor and purchaser ⚷186

Where escrow instructions, which were signed by purchaser, and which required vendor to waive provision in contract requiring payment of balance of purchase price within 90 days, were neither signed nor accepted by vendor, they constituted a mere counter proposal and did not excuse purchaser's failure to deposit balance of purchase price within 90 days.

9. Contracts ⚷279(2)

Before an offer to do an act of fulfillment of an agreement can bind the offeree, it must conform to the terms of the agreement or its new conditions must be first accepted by the other party.

10. Specific performance ⚷97(1)
Vendor and purchaser ⚷186

Alleged fact that vendor refused to sign a grant deed and preferred to convey by quitclaim deed, that it was discovered that vendor's title was clouded, and that vendor was not diligent in the prosecution of action to quiet title, did not excuse purchaser for failure to deposit balance of purchase price as required by contract and did not entitle purchaser to specific performance, notwithstanding his failure to deposit balance of purchase price.

11. Pleading ⚷8(3)

In suit for specific performance of contract for sale of realty, wherein vendor set up defense that contract was terminated because of purchaser's failure to deposit purchase money within 90 days as required by contract, purchaser's allegations that he was induced by vendor's acts not to comply with requirement for deposit of purchase money were mere conclusions. Civ.Code, § 3392.

12. Vendor and purchaser ⚷187

Purchaser's default in making deposit of balance of purchase price within 90 days was not waived by vendor's declared intention to carry out the contract notwithstanding purchaser's default, where purchaser's default was not based on any pledge or promise of vendor with or without consideration.

13. Contracts ⚷335(2)

Where time is made of the essence of an agreement to pay money, an allegation that promisor was at all times ready, and willing to make payment, is not the equivalent of payment.

14. Vendor and purchaser ⚷186

Vendor's refusal to convey realty to purchaser, after time for purchaser's performance of requirement that balance of purchase price be deposited within 90 days had elapsed without such deposit having been made, did not excuse purchaser's failure.

15. Estoppel ⚷54

To constitute a waiver of a legal right, holder of the right must have intentionally relinquished such right after having knowledge of facts, and such waiver implies intentional forbearance to enforce the right.

16. Estoppel ⚷92(2)

In absence of an expressed waiver, the only situation in which an implied waiver is found is that in which the party, for whom act in question was to be done, permitted his contractee to perform contrary to the contract and accepted benefits of such performance after default and with knowledge thereof.

17. Specific performance ⚷101

In suit by purchaser for specific performance of contract for sale of realty, purchaser could not, in absence of an appropriate allegation that vendor waived requirement that purchaser deposit balance of purchase price within 90 days, urge that vendor had waived nonperformance, in face of purchaser's allegation that from date of contract until date about 22 months later, vendor indicated in writing her intention to carry out her obligation. Civ. Code, § 1490.

18. Vendor and purchaser 🔑78

Where a purchaser of realty fails to make payment of purchase price within time specified, and time is of the essence of the sale agreement, equity follows the law and does not disregard such provisions but holds purchaser strictly to his obligation.

19. Specific performance 🔑114(4)

In suit by purchaser for specific performance of contract for sale of realty that required deposit of $9,500 into escrow within 90 days, purchaser's allegations that he deposited $2,000 in 90 days and that he "tenders" payment to vendor of $7,500 and "will pay" it in court when required, was not compliance with the requirement that the $9,500 be paid into escrow within 90 days.

20. Specific performance 🔑99

Purchaser's failure to deposit balance of purchase price in escrow within 90 days, as required by contract, precluded purchaser from prevailing in suit for specific performance. Civ.Code, §§ 1434, 1661.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Suit by Kenneth N. Pitt against Mabel W. Mallalieu to enforce specific performance of agreement by plaintiff to purchase two lots. From a judgment of dismissal, the plaintiff appeals.

Judgment affirmed.

Crawford & Browne, of Pasadena, for appellant.

A. A. Rotberg, of Los Angeles, for respondent.

MOORE, Presiding Justice.

By his second amended complaint, herein referred to as the "complaint," plaintiff sought to enforce specific performance of his agreement dated April 14, 1944, to purchase two lots in the city of Pasadena. The price was $9,500, of which $250 was paid at the time he signed the agreement, the balance payable within 90 days "into escrow with the Pasadena Escrow & Safe Deposit Company * * * for the benefit of the seller together with the above deposit" of $250. Six conventional conditions followed the last quoted language and they are printed on the margin hereof.* Plaintiff paid no money into the escrow prior to March 15, 1946, when he deposited "an additional $1750 * * * as evidence of his good faith." Prior thereto, on February 12, 1946, defendant gave plaintiff written notice that she did not intend to perform the agreement. This action was instituted on July 1, 1946. After the third attempt to plead a valid cause to enforce the agreement the court below sustained a general demurrer without leave to amend and entered its judgment of dismissal from which comes this appeal.

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* "First—That in the event said purchaser shall fail to pay the balance of said purchase price or complete said purchase as herein provided, the amounts paid hereon shall, at the option of the seller, be retained as liquidated and agreed damages.

"Second—That in the event the title to said property shall not prove merchantable and said seller shall not perfect, or [be] able to perfect, the same within a reasonable time from this date, the purchaser shall have the option of demanding and receiving back said deposit and shall be released from all obligation hereunder.

"Third—That the evidence of title is to be in the form of Policy of Title Insurance issued by a responsible title company and to be furnished and paid for by the Seller.

"Fourth—That in the event the improvements on said described premises should be destroyed or materially damaged between the date hereof and consumation or settlement of this purchase, this contract shall at purchaser's election immediately become null and void and said deposit shall be returned to said purchaser on demand.

"Fifth—That the taxes for the current fiscal year ending June 30th, following this date, and the insurance, rents and other expenses of said property shall be pro-rated from date of delivery of deed or final contract of sale, and that the property is sold subject to approval of owner.

"Sixth—Time is the essence of this contract but the time for any act required to be done may be extended not longer than thirty days by Baynham-Bunnell Company"

[1-5] That the complaint does not state facts sufficient to constitute a cause of action is palpably clear. A suit for specific performance cannot be enforced in favor of one who has not fully and fairly performed all conditions precedent on his part to be performed except where his failure is only partial and either immaterial or capable of being fully compensated. Civ. Code, sec. 3392. It is a presumption that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. The contract cannot be rewritten in any of its terms; nor can one of them be ignored. Plaintiff's obligation to deposit the purchase price within 90 days and the provision that time is of the essence are as binding as the promise to convey the land. Failure to pay the money within the specified time deprives the vendee of his right of action to enforce performance of the vendor who holds the privilege of terminating the agreement of sale. Milton Kauffman, Inc., v. Smith, 82 Cal.App.2d 302, 186 P.2d 11; Cleary v. Folger, 84 Cal. 316, 319, 24 P. 280, 18 Am.St.Rep. 187; Grey v. Tubbs, 43 Cal. 359, 363. Upon his failure to make payment the vendee committed a breach, and no affirmative act by the vendor was necessary to terminate the vendee's right of enforcement. Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 173, 159 P. 420.

[6] Plaintiff contends that he was excused from nonperformance by reason of the clouded condition of defendant's title. But while the agreement implies that defendant's title might not prove merchantable and she might not perfect it within a reasonable time, the remedy for plaintiff in such event is provided by the agreement's provision "that the purchaser shall have the option of demanding back said deposit and shall be released from all obligation hereunder." The requirement that plaintiff deposit the total purchase price in escrow was not conditional but was absolute. His failure to make the deposit within the 90 days after the agreement was a breach of it and terminated his rights. Lloyd v. Locke-Paddon Land Co., 5 Cal.App.2d 211, 214, 42 P.2d 367. Unless the complaint alleges full performance or an offer to perform plaintiff's part of the contract he is not entitled to maintain his action to enforce performance. Peckham v. Stewart, 97 Cal. 147, 150, 31 P. 928. The fact that there was an encumbrance against defendant's title which she was not able to remove within the time fixed for performance did not relieve the vendee from making a tender of the purchase price and demand of performance as a condition for his action. Peckham v. Stewart, supra; Griesemer v. Hammond, 18 Cal.App. 535, 539, 123 P. 818.

But plaintiff attempts by his pleading to obviate the specific requirement of the agreement. He contends that his failure to tender the full amount required by the contract was excused by the conduct of defendant. The conduct which he claims was sufficient to excuse his nonperformance was: (1) The discovery that defendant's title was clouded; (2) defendant's failure to give instructions to the escrow agent although plaintiff had done so; (3) since an action to quiet title would involve indeterminate delay, plaintiff logically concluded that defendant's failure to give escrow instructions within 90 days indicated her intention not to require deposit of the purchase price within that period; (4) to have deposited the balance under such circumstance would have been an idle act, not required by law (Civ.Code, sec. 3532); (5) deposit of the balance of $9,250 would not have advanced the consummation of the transaction.

[7] But the language of the agreement was definite and positive in requiring plaintiff to deposit the balance within 90 days after date of the writing. Also, it made provision for the probable contingency, to wit, "in the event the title to said property shall not prove merchantable and seller shall not [be] able to perfect the same within a reasonable time, the purchaser shall have the option of demanding and receiving back said deposit and shall be released from all obligation hereunder." Likewise, the pleading makes no allegation that plaintiff was induced by defendant's word or act not to deposit the balance

within the 90-day period. The complaint alleges that plaintiff prepared and signed escrow instructions on June 2, 1944, requiring defendant to waive the 90-day provision of the agreement and to extend the time for plaintiff to deposit the balance of the $9,250 for three months; that plaintiff tendered the balance to defendant's agent on July 10, 1944, and that it was refused because of the defective title. While the agreement designated an escrow agent which should receive the balance within 90 days after its date, no provision for the extension of time for any act in excess of 30 days was included. Of course, the tender of the balance to defendant's agent instead of the designated escrow agent was no compliance at all. An offer of performance by a party to a transaction must be made to the person or entity designated in the agreement within the time fixed for performance, and in good faith and in a manner most likely to benefit the creditor. Civ.Code, secs. 1488, 1490, 1493.

[8, 9] Although the agreement made no provision for plaintiff alone to open the escrow, the plaintiff alleges that he prepared and signed instructions on June 21, 1944, and that defendant by failing to sign instructions caused him to withhold the $9,250 balance from escrow. The complaint then alleges that subsequent to her refusal to sign instructions plaintiff made no tender of the balance because on February 19, 1946, almost two years after the date he was required to deposit the $9,250, defendant advised plaintiff that she did not intend to convey the property as agreed. The instructions of plaintiff contribute nothing to the completion of the purchase but constitute a mere counterproposal. Not having been accepted it became neither license nor excuse for plaintiff's failure to deposit the money within the 90 days. Before an offer to do an act in fulfillment of an agreement can bind the offeree it must conform to the terms of the very agreement or its new conditions must be first accepted by the other party. Bullock v. McKeon, 104 Cal.App. 72, 79, 285 P. 392.

[10, 11] Plaintiff contends that his complaint pleads a justifiable excuse for his noncompliance with his promise by alleging (1) that defendant refused to sign a grant deed and preferred to convey by quitclaim; (2) that it was discovered that her title was clouded; (3) that defendant was not diligent in the prosecution of the action to quiet her title; (4) that from April 14, 1944, to February 19, 1946, by writing defendant indicated her intention to perform the agreement. Neither one nor all such allegations constitute an excuse for his failure to deposit his money as he was obligated to do. The form of deed was immaterial since either a grant or quitclaim conveyed title. The policy of title insurance would have protected him against loss. It is not pleaded that defendant ever granted additional time to make the deposit, and his reliance upon defendant's desire to perform the agreement is no excuse for his failure to perform his distinct covenant to deposit the purchase money within 90 days. His allegations that he was induced by the acts of defendant not to comply implicitly with the agreement are meaningless conclusions of the pleader. They state no facts done by defendant, tender no issue and in no respect add vitality or symmetry to the pleading. Monahan v. Department of Water and Power, 48 Cal.App.2d 746, 753, 120 P.2d 730; Thayer v. Magill, 13 Cal.App.2d 21, 26, 55 P.2d 1272; Callahan v. Broderick, 124 Cal. 80, 82, 56 P. 782; Wall v. State of California, 73 Cal.App.2d 838, 842, 167 P. 2d 740. Since the escrow instructions prepared by plaintiff did not supplant the agreement (Keelan v. Belmont Co., 73 Cal. App.2d 6, 12, 165 P.2d 930), defendant's refusal to sign them was no excuse for plaintiff's failure to proceed with his performance of an obligation as to which time was of the essence. The requirement for his deposit of the balance within 90 days was not conditioned upon either defendant's signing escrow instructions at a definite time, upon the form of deed she would use or upon her failure to consent to a modification of the agreement. With a speculative market to reckon with plaintiff kept himself in a position to do or not to do, as advantage might dictate: to withdraw and forfeit the $250 if prices fell, or to demand performance if they should rise.

[12-14] Plaintiff contends that after he was in default as to his deposit defendant waived the default by her declared intention to carry out the agreement. There is no allegation that she ever agreed to sell the property on any terms other than those contained in the agreement. That instrument imposed upon plaintiff the sole requirement that he deposit in escrow the $9,250 within 90 days. His failure was not based upon any pledge or promise of defendant, with or without consideration. Where time is made of the essence of an agreement to pay money an allegation that the promisor was at all times ready, willing and able to make the payment is not the equivalent of payment. Not only was plaintiff obliged by the agreement to make the deposit as provided, but defendant's refusal to convey after the time for his performance had elapsed did not excuse his failure. Heine v. Treadwell, 72 Cal. 217, 220, 13 P. 503.

Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am.St.Rep. 126, does not support plaintiff's contention that defendant waived his default. By his contract Boone agreed to buy Templeman's land for $2,750.00 with a down payment of $600, the balance in monthly installments of $50 on the 5th of each month commencing November 5, 1901. Although time was made of the essence Boone paid only the first installment on time. While 64 months had passed before the action was filed to enforce the conveyance, Boone had made but five payments aggregating only $700, and no protest was ever made by the seller concerning such contempt for the obligation to pay on the 5th day of each month. In July 1906 without previous notice Templeman served notice of rescission. The court held that plaintiff's offer to pay the entire balance must be accepted for the reason that the vendor had waived all breaches which had occurred at or prior to the time such payments were actually made and for that reason was estopped to insist upon a forfeiture of the contract. Other authorities cited by appellant herein (Flagler v. Kroonen, 61 Cal.App. 359, 214 P. 1006; Elrod-Oas Home Bldg. Co. v. Mensor, 120 Cal.App. 485, 8 P.2d 171; Lifton v. Harshman, 80 Cal.App.2d 422, 182 P.2d 222; Daly v. Ruddell, 137 Cal. 671, 70 P. 784) on the proposition that defendant waived plaintiff's default are as readily distinguishable.

There is no allegation that defendant ever consented to extend plaintiff's time for performance, or that she knew of plaintiff's failure to make the deposit, or that plaintiff was injured by anything done by defendant. Despite the absence of such allegations plaintiff argues now that after he had failed to make the deposit defendant could have either declared a forfeiture or treated the agreement as in force. There were many things that defendant could have done but they are irrelevant here as proof of her waiver of plaintiff's compliance with the agreement. The backbone of this controversy is plaintiff's behavior toward his written obligation to deposit the $9,250. In lieu of performance he now regales the court with his argument that defendant's nonaction is the equivalent of his actual compliance.

[15, 16] Defendant was entitled to the deposit of the money as agreed. Concededly she did not expressly waive it. The facts alleged are not such as to justify an inference (a) that she knew the deposit had not been made; (b) that after gaining such knowledge she did some act that resulted in a prejudice to the rights of plaintiff; or (c) that such prejudice was caused by plaintiff's honest belief that a waiver of the deposit was intended. To constitute a waiver of a legal right the holder thereof must have intentionally relinquished such right after having knowledge of the facts. Roesch v. De Mota, 24 Cal.2d 563, 572, 150 P.2d 422. Such waiver implies "the intentional forbearance to enforce a right." Wienke v. Smith, 179 Cal. 220, 226, 176 P. 42, 44. In the absence of an express waiver the only situation in which an implied waiver is found is that in which the party for whom the act in question was to be done permitted his contractee to perform contrary to the contract and accepted the benefits of such performance after default and with knowledge thereof. Nothing of the sort appears in the complaint here. After learning of the cloud on her title defendant proceeded at her own expense to clear it. Having done so she discovered that nothing had been done by

plaintiff in fulfillment of his one obligation. Thereupon she cancelled the unperformed agreement.

Parry v. Campbell, 72 Cal.App. 748, 752, 238 P. 127, is not pertinent. There the escrow instructions provided that if the terms of the escrow had not been complied with at the expiration of the time specified the agent should complete the same as soon as possible unless the defendant had made written demand for the return of his money. The plaintiff had fully complied with the instructions prior to such demand.

[17, 18] Plaintiff's contention that a tender of the money was unnecessary because defendant had excused it and thereafter repudiated the agreement is without merit. There is no allegation that defendant excused nonperformance. Instead, according to the complaint, she refused to sign instructions designed to extend plaintiff's time for depositing the money. In view of her constant reluctance to be governed by plaintiff's wishes he had no good reason to deem himself excused and she was within her rights to rescind the agreement. In the absence of an appropriate allegation that defendant waived the 90-day period for plaintiff's deposit of the money he cannot urge that she waived his nonperformance in the face of his allegation that between April 14, 1944, and February 19, 1946, "defendant indicated in writing her intention to carry out and fulfill her obligation." Civ.Code, sec. 1490. If she had waived his nonpayment of the money into the escrow, in language plaintiff would have alleged her words; if she had waived it by conduct he would have declared the series of acts constituting such conduct. Where a purchaser of land has failed to make payment of the purchase price within the time specified and time is of the essence of the sale agreement, equity follows the law and does not disregard such provisions but holds the buyer strictly to his obligation. Glock v. Howard, 123 Cal. 1, 14, 55 P. 713, 43 L.R.A. 199, 69 Am.St. Rep. 17.

Sheplar v. Green, 96 Cal. 218, 31 P. 42, and Thomas v. Cowan, 99 Cal.App. 140, 277 P. 1086, are not apropos to the point of defendant's alleged waiver. In neither of them was time made of the essence of the contract in dispute. Also, in the one case, Sheplar had received more than half of the purchase money and had permitted Green to occupy the land and to make valuable improvements. In the other, Mrs. Cowan prevented service of Thomas's notice of the exercise of his option to buy the land. She could not take advantage of her own wrong.

[19] Plaintiff's allegation that he had deposited $2,000 in the escrow and tenders payment to defendant of $7,500, "and will pay the same in court when required," is not the equivalent of alleging that he had paid $9,500 into the escrow within the 90 days. The only appropriate and effective offer to be made by a defaulting vendee is one accompanied by a tender of all the moneys payable under the contract of purchase. Kelso v. Ulrich, 67 Cal.App.2d 698, 702, 155 P.2d 407.

[20] Plaintiff contends that if he was in default in not having paid the purchase money within the time limit the default was immaterial. There is no lawful basis for such a claim. Contracts for the sale and purchase of property constitute an efficient means of commercial and trading intercourse. They are an indispensable device for the conduct of daily business and dealings in every modern state. Their value is enhanced by the universality of their use and by the uniformity of their interpretation. Unless the covenant of one party to pay money or deliver a deed to property within a time specified is deemed sacrosanct, then such contract becomes as sounding brass and the use of it as an aid to the expedition and safety of business transactions is at an end. Plaintiff's compliance with his obligation was the first act to be done. The Civil Code makes wise provision for such an instrument and for its interpretation. Secs. 1434, 1661.

The authorities (Brown v. Roberts, 121 Cal.App. 654, 9 P.2d 517, and Furtinata v. Butterfield, 14 Cal.App. 25, 110 P. 962) cited in support of the immateriality of plaintiff's default are readily distinguishable.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

85 Cal.App.2d 127

PEOPLE v. ARCIA.

Cr. 710.

District Court of Appeal, Fourth District,
California.
April 20, 1948.

1. Criminal law 🔑534(2)

In prosecution of accused for having committed a lewd and lascivious act upon six year old boy, testimony relating to immediate complaint made by boy to his aunt and condition of boy's body at that time was corroboration of defendant's confession. Pen.Code, § 288.

2. Witnesses 🔑40(1)

Under statute, if child under 10 years of age appears to trial judge to be "competent" that is, to have capacity to receive impressions and to relate them truthfully, he becomes a competent witness. Code Civ. Proc. §§ 1879, 1880.

See Words and Phrases, Permanent Edition, for all other definitions of "Competent".

3. Criminal law 🔑1153(2)

After trial court has heard a child under 10 years of age give his testimony and has determined that child is a competent witness, the determination is not a matter of review. Code Civ.Proc. §§ 1879, 1880.

4. Criminal law 🔑1134(2)

In determining whether trial judge has abused his discretion in passing upon competency of a witness under ten years of age, entire record will be reviewed. Code Civ.Proc. §§ 1879, 1880.

5. Witnesses 🔑45(2)

Permitting six year old boy to testify as complaining witness in sex perversion prosecution was not abuse of discretion, though boy, in response to leading questions and under implied promise to give him an electric train, made statements which standing alone would indicate that he was willing to say anything that he was told to say, where other portions of voir dire examinations clearly showed that boy knew what he was doing and that while he wanted an electric train he would not tell a lie to get one. Code Civ.Proc. §§ 1879, 1880.

◆

Appeal from Superior Court, San Diego County; Joe L. Shell, Judge.

Fred Arcia was convicted of violation of Section 288 of the Penal Code, and he appeals.

Affirmed.

William F. Reed, of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of section 288 of the Penal Code. He was found guilty by a jury and has appealed from the judgment.

The offense is alleged to have occurred on June 6, 1947, and the victim is a boy who became six years old on July 2, 1947. The boy's mother had left for Indiana on June 3, 1947, and he was living with his aunt in a small hotel in San Diego of which she was the manager. The defendant also lived at this hotel and the acts in question occurred while he was giving this boy a bath. The boy immediately reported the matter to his aunt, and she examined his body and later testified as to what she saw. The aunt wrote about the matter to the boy's mother, who was having an operation at the time, and nothing further was done until the mother's return to San Diego about the middle of August. She at once took the matter up with the officers and an investigation was started which resulted in the bringing of this action.

When interviewed by an investigator for the district attorney's office the defendant at first denied he had done these acts but said that he was guilty. Later, at the district attorney's office in presence of various officers and the boy, he made a statement which was taken down in shorthand in which he confessed to the acts in detail, telling a story which is practically identical with that told by the boy. Shortly thereafter he was taken into the municipal court where, under oath, he made a similar statement. Both of these statements were received in evidence. At the trial the defendant took the stand and in reply to the only material question asked him, which was as to whether or not he had done the acts with which he was here charged, he replied: "I did not." On cross-examination, he admitted having made previous statements, said that he was not telling the truth when he testified at the preliminary hearing, and stated that his only reason for having so testified at that time was that he was confused, that he was not familiar with the courts or the laws, and that he did not know what to say or "how to better myself for it." During this cross-examination he fully confirmed the boy's story of what had occurred in all respects with the exception that he denied having committed the particular acts constituting this offense.

[1] The only question here raised is whether the trial court erred, as a matter of law, in determining that this six-year-old boy was a competent witness. Incidentally, it is contended that there was no corroboration of the confession of the defendant except the testimony of this boy. This is not quite true as such corroboration appears in the testimony relating to the immediate complaint made by the boy to his aunt, and of the condition of his body at that time.

[2-4] All persons capable of perception and communication may be witnesses. Code Civ.Proc. sec. 1879. Section 1880 of that code further provides that children under ten years of age cannot be witnesses where they appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. In commenting on section 1880, the court in People v. Harrison, 46 Cal.App. 2d 779, 117 P.2d 19, 22, said: "The last cited section means nothing more than that if a child under ten years of age appears to the trial judge to be competent, i.e., to have the capacity to receive impressions and to relate them truthfully, he becomes a competent witness. People v. Gasser, 34 Cal.App. 541, 543, 168 P. 157. After the judge has heard the child give his testimony and has determined that he was a competent witness, such determination is not a matter of review any more than his ruling upon the capacity of any other witness." It is well settled that, in determining whether the trial judge has abused his discretion in passing upon the competency of such a witness, the entire record will be reviewed and considered. People v. Harrison, 46 Cal.App.2d 779, 117 P.2d 19; People v. Morcumb, 28 Cal.App.2d 465, 82 P.2d 714; People v. Freeman, 24 Cal.App.2d 619, 75 P.2d 640; People v. Walker, 112 Cal. App. 146, 296 P. 692.

[5] The defendant relies upon a part of the evidence wherein this boy, in response to leading questions and under an implied promise to give him an electric train, made statements which standing alone would indicate that he was willing to say anything that he was told to say. However, the matter was gone into very fully and after several examinations by counsel on both sides and by the court the boy was allowed to testify. We are in accord with the trial judge's conclusions in this regard, and think the other portions of the voir dire examination very clearly show that this boy knew what he was doing, and that while he wanted an electric train pretty badly he would not tell a lie to get one. The court's conclusion is fully supported by the boy's testimony as it appears in the record, which clearly indicates that he was intelligent and fully able to receive impressions and relate things as they had occurred. His testimony is clear and definite and, on essential matters, is very much like the story told by the defendant on the two previous occasions. It cannot be said, as a matter of law, that this boy was not a competent witness or that the court erred in permitting him to testify. People v. Carpenter, 3 Cal.App.2d 746, 40 P.2d 524; People v. Gibbons, Cal.App., 189 P.2d 37.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

85 Cal.App.2d 155

ESPINOZA v. ESPINOZA.

Civ. 16351.

District Court of Appeal, Second District,
Division 2, California.
April 23, 1948.

1. Divorce 🔑296, 312

The amount of allowance for maintenance of minor children of divorced couple rests in trial judge's discretion, and in absence of abuse thereof such award will not be set aside on appeal.

2. Divorce 🔑291

In fixing amount necessary for support of minor children, trial judge is not limited in contested divorce action to amount not exceeding that prayed for in complaint, but he may award a sum less or in excess of amount sought in prayer if such award is sustained by evidence.

3. Divorce 🔑308

Order requiring divorced husband to pay to wife $110 monthly for support of two minor children of parties was not an abuse of discretion, where evidence disclosed that husband was earning a minimum of $240 per month, and that in excess of $110 a month was necessary for care and maintenance of the children.

4. Divorce 🔑291

Order requiring divorced husband to pay to wife $110 monthly for support of two minor children of parties was not improper because in prayer of wife's cross-complaint she asked for such sum for support of children and herself, since trial court was not limited in fixing award to an amount not in excess of that prayed for in cross-complaint.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by John R. Espinoza against Mary Grace Espinoza for a divorce, wherein the defendant filed a cross-complaint. From that portion of decree of divorce granted defendant on her cross-complaint ordering plaintiff to pay $110 monthly for support of two minor children of the parties, the plaintiff appeals.

Affirmed.

Arthur E. Schifferman, of Los Angeles, for appellant.

Alex F. Sample and Robert M. Porter, both of Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from that portion of a decree of divorce granted defendant on her cross-complaint ordering him to pay $110.00 monthly for the support of the two minor children of the parties aged 3½ and 5½ respectively.

Viewing the evidence in the light most favorable to defendant (respondent) the essential facts are:

Plaintiff is earning a minimum of $240.00 per month. In defendant's cross-complaint for a divorce her prayer requested $110.00 per month for the support of the minor children and herself. Defendant testified as to items of expense necessary for the support of her children which amounted to a sum in excess of $110.00 per month.

This is the sole question necessary for us to determine:

Did the trial court abuse its discretion in awarding defendant $110.00 a month for the support of the parties' minor children?

[1,2] This question must be answered in the negative and is governed by these pertinent rules:

First: The amount of an allowance for the maintenance of the minor children of a divorced couple rests in the sound discretion of the trial judge, and in the absence of an abuse thereof such an award will not be set aside on appeal. (Sawyer v. Sawyer, 57 Cal.App.2d 582, 584, 134 P.2d 868.)

Second: In fixing the amount necessary for the support of minor children the trial judge is not limited in a contested action to an amount not exceeding that prayed for in the complaint, but he may award a sum less or in excess of the amount sought in the prayer if such award is sustained by the evidence. (Karlslyst v. Frazier, 213 Cal. 377, 381, 2 P.2d 362.)

[3, 4] Under rule 1, supra, in the instant case it is clear that the trial court did not abuse its discretion in fixing the amount necessary for the support of the two minor children of the parties since, as set forth above, the evidence discloses that plaintiff was earning a minimum of $240.00 per month and that in excess of $110.00 a month was necessary for their care and maintenance. Likewise, under rule 2, supra, there is no merit in plaintiff's contention that the trial court erred in allowing defendant $110.00 per month for the support of the children alone because in the prayer of her cross-complaint she asked for this sum for the support of the children and herself. As hereinbefore stated the trial court was not limited in fixing the award to an amount not in excess of that prayed for in the cross-complaint.

The judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

85 Cal.App.2d 96

SMITH et al. v. SCHULER-KNOX CO. et al.

Civ. 7442.

Sac. 5875.

District Court of Appeal, Third District, California.

April 19, 1948.

Hearing Denied June 10, 1948.

1. Judgment 🔑713(2)

"Res judicata" applies not only to the issues which were actually pleaded and determined by former judgment, but also to all issues which could have been properly tendered and determined thereby.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Judgment 🔑713(2)

Where plaintiffs' realty was purchased at execution sale in satisfaction of a judgment, and judgment was rendered against plaintiffs in purchaser's quiet title suit, plaintiffs' right of redemption and to any moneys previously expended for improvements while plaintiffs retained possession were interests in the realty which should have been alleged and proved, and failure to do so, constituted a waiver of the issues and judgment was res judicata as to such issues. Code Civ.Proc. §§ 701, 702, 705.

3. Judgment 🔑713(2)

Where plaintiffs' realty was purchased at execution sale in satisfaction of judgment, and judgment was rendered against plaintiffs in purchaser's quiet title suit, brought after statute of limitations had run against plaintiffs' right of redemption, failure of plaintiffs to allege in quiet title suit fraud preventing redemption barred plaintiffs from asserting fraud in separate subsequent equitable action to redeem. Code Civ.Proc. §§ 701, 702, 705.

4. Execution 🔑295

An equitable action may lie to permit judgment debtors to redeem their realty from execution sale upon equitable terms to be imposed after statute of limitations therefore has expired, when it appears they were prevented from exercising that remedy by fraud of judgment creditors or their agents, or by mutual mistake of both parties with respect to statutory time for redemption. Code Civ.Proc. §§ 701, 702, 705.

5. Execution 🔑301

Where plaintiffs' realty was sold at execution sale in satisfaction of judgment, and judgment in purchaser's quiet title suit was rendered against plaintiffs, pleadings in plaintiffs' subsequent suit alleged no fraud or mutual mistake entitling plaintiffs to be relieved from their failure to redeem within statutory period. Code Civ.Proc. §§ 701, 702, 705.

◆

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Action by Anna Clo Smith and Frank C. Smith against Schuler-Knox Company, a corporation, and others, to quiet title to realty. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

H. R. Whiting, Morgan V. Spicer and W. W. Sanderson, all of San Francisco, for appellants.

Carlton & Shadwell, of Redding, for respondents.

THOMPSON, Justice.

The plaintiffs have appealed from a judgment which was rendered against them pursuant to an order sustaining a demurrer to their amended complaint without leave to amend the pleading.

The complaint is couched in two counts. Primarily both causes of action seek to quiet title in plaintiffs to real property in Siskiyou County. Incidentally, the first cause alleges that "plaintiffs desire to redeem said property" from an execution sale thereof which took place in September, 1933, to Schuler-Knox Company, a corporation, pursuant to Section 701 of the Code of Civil Procedure. The conditions upon which such redemption may be enforced, as provided by Sections 702 and 705 of that code, are not alleged to have been performed. The execution sale was made by a constable, in satisfaction of a previous judgment against these plaintiffs in a justice's court of that county. The amended complaint in this case alleges that a prior suit to quiet title to said land, between the successors in interest of Schuler-Knox Company and these plaintiffs, was decided adversely to Mr. and Mrs. Smith and affirmed by this court. (Crenshaw v. Smith, 74 Cal.App.2d 255, 168 P.2d 752). The title to said real property and the regularity of the proceedings in the Justice's Court trial, and upon execution sale of the land have been twice before this court. (See, also, Schuler-Knox Company v. Smith, 62 Cal. App.2d 86, 144 P.2d 47.) For a more detailed statement of the facts involved reference is made to those decisions.

A general and special demurrer to the amended complaint in this case was sustained without leave to amend the pleading. Judgment was accordingly rendered against the plaintiffs to the effect that they are entitled to recover nothing by this action. From that judgment this appeal was perfected.

The respondents contend that the former judgment quieting title to the real property is res judicata of the issues in this case, and that plaintiffs are barred by laches and by the statute of limitations from maintaining this suit. They assert that: 1. Since the complaint alleged the necessary elements constituting res judicata, the demurrer on the ground that the pleading fails to state a cause of action was properly sustained on that ground; 2. Since these plaintiffs had the opportunity of litigating their alleged right of redemption from the execution sale of the property in the former suit to quiet title thereto, and failed to do so, that judgment is also res judicata of that issue in this case; 3. This action is barred by the statute of limitations, which was specifically pleaded in the demurrer, and that the demurrer was properly sustained on that ground.

The appellants concede that they "do not seek by this action 'to defeat' the former judgment," but assert that "The matter of appellants' equity *to redeem* or other equitable relief on the ground of fraud, mistake and other circumstances was never in any way in issue or considered by the court," in the former action to quiet title.

We are of the opinion the former judgment in the suit to quiet title is res judicata of the issues in this case, including the alleged right of redemption from the execution sale of the property, and that the last mentioned right is barred by the statute of limitations.

Litigation over the title to the land which is involved in this case has been pending for over fifteen years. Suit to quiet title to the land in question was commenced by Schuler-Knox Company against these plaintiffs July 29, 1937. It was founded on a judgment by default recovered against these plaintiffs in the Justice's Court, July 30, 1930. An abstract of that judgment was duly recorded October 28, 1931, creating a lien on the property. The judgment was not paid. In September, 1933, after due notice, the constable sold said property on execution sale to Schuler-Knox Company November 22, 1934, in satisfaction of the judgment, after the statutory time for redemption (C.C.P. Sec. 702) had expired, no effort having been made to redeem the property, and a deed of conveyance was then executed to the purchaser. The suit to quiet title to the land in Schuler-Knox Company was not brought against these plaintiffs until July 29, 1937, as we have previously stated. Mr. and Mrs. Smith appeared and answered the complaint in the last mentioned suit to quiet title, denying the material allegations of the complaint, and affirmatively setting up as a defense alleged irregularities of proceedings in the Justice's Court, and its lack of jurisdiction. These plaintiffs also alleged that, for a valuable consideration, they sold and conveyed the property to Nora Kathleen Trapp, August 11, 1937. She was also made a party defendant in that suit. Mrs. Trapp answered the complaint, claiming that she was the owner of the land, and setting up the same defenses urged by Mr. and Mrs. Smith. Neither of the defendants pleaded, as an interest in said property, a right of redemption from the sale of the property, or any excuse for failure to exercise that right within the statutory time prescribed by law. No alleged fraud or misrepresentations of the Schuler-Knox Company were alleged in that regard. That right, if any then existed, was not mentioned in their pleadings, or at all. After trial, in which all the interested parties participated, the court adopted findings favorable to the Schuler-Knox Company in every essential particular, and rendered judgment against each of the defendants to the effect that neither of them had any right, title, interest or claim to any part of said real property, and enjoined them and each of them from thereafter asserting any such right. The judgment awarded the plaintiff immediate possession of the property. From that judgment the defendants appealed.

This court reversed that judgment on the ground that plaintiff failed to sustain the burden of proving that the Justice's Court had jurisdiction to render the original judgment therein. (Schuler-Knox Company v. Smith, supra.) The cause was retried on the same issues and pleadings, but in the meantime Orville E. Crenshaw and Loren A. Davis succeeded, on June 14, 1941, to Schuler-Knox Company's interest in the property. Again the trial court adopted findings against these plaintiffs in every essential respect, including the issue of the jurisdiction of the Justice's Court, and quieted title in said successors in interest, determining that neither the Smiths nor Mrs. Trapp had any right, title or interest in the property. From that second judgment the defendants again appealed. That judgment was affirmed by this court in April, 1946. (Crenshaw v. Smith, supra.) A hearing was denied by the Supreme Court.

This suit was then commenced by Mr. and Mrs. Smith in September, 1946. The complaint reasserts in detail many of the alleged irregularities of procedure in the trial and sale of property in the Justice's Court case, which were determined against these plaintiffs in the prior suit quieting title. But, in view of the concession of appellants that they are bound by the judgment in that case as to all issues therein actually pleaded and determined, we shall not discuss that feature of the appeal.

The real issue upon which the appellants rely is the assertion that the amended complaint alleges a cause of action based on their right to redeem the property from the constable's sale in 1933, which they claim was not an issue in the subsequent suit quieting title against them, the judgment of which was rendered in 1937, and that it therefore is not res judicata as to that undetermined issue. But we are of the opinion that issue of the right to redeem the property was based on their interest in the property which could and should have been determined in that suit to quiet title, and that the judgment therein must therefore be deemed to be res judicata of that issue. Moreover, Section 702 of the Code of Civil Procedure provides that the judgment debtor may redeem the property from sale "within twelve months after the sale", upon specified conditions mentioned. That section prescribes a limitation of time within which the property must be redeemed. It was not so redeemed, and no effort was made to comply with the statute in that regard.

[1] It has been repeatedly determined that res judicata applies not only to the is-

sues which were actually pleaded and determined by the former judgment, but also to all issues which could have been properly tendered and determined thereby. (Slater v. Shell Oil Co., 58 Cal.App.2d 864, 868, 137 P.2d 713; De Hart v. Allen, 26 Cal.2d 829, 161 P.2d 453; Krier v. Krier, 28 Cal.2d 841, 172 P.2d 681; Brunswig Drug Co. v. Springer, 55 Cal.App.2d 444, 450, 130 P.2d 758.)

In the case last cited it is said, 55 Cal. App.2d at page 450, 130 P.2d at page 762, that:

"* * * Since it was within the scope of Springer's action and related to the subject matter thereof and relevant to the issue raised by Springer's complaint so that it could have been raised, 'the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged.'"

[2, 3] Applying the foregoing language to the present action, it is apparent that these plaintiffs were called upon to assert any and all claims of rights or title which they had in the property as defenses to the prior suit to quiet title thereto. They were then definitely informed that the Schuler-Knox Company claimed title thereto by virtue of the execution sale and conveyance growing out of the Justice's Court suit. Their right of redemption and to any moneys which they might have previously expended while they retained possession, for improvements, if any such existed, constituted interests in the property which could and should have been alleged and proved by them in the suit to quiet title. We therefore think those issues were waived, and that the judgment quieting title is res judicata as to such issues. By reference to the former opinions of this court it is apparent that these appellants had knowledge of the pendency of the Justice's Court action. They were served with process therein and an abstract of judgment which was rendered was duly recorded in 1931, thereby creating a lien on the property. Certainly they were charged with that knowledge at the time the pleadings were served upon them in the suit to quiet title. Yet they saw fit to rest their claim on the asserted lack of jurisdiction of the Justice's Court and upon certain specified alleged irregularities in those proceedings and sale, including the sale of the property in gross and not by parcels, all of which issues were determined against them. If there was any fraud which prevented them from exercising their right of redemption, the statute of limitations having then expired, it should have been alleged in that suit to quiet title. By their failure to do so, they are now barred from asserting those issues at this late date in this separate subsequent equitable action. In Bank of America Nat. Trust & Savings Ass'n v. McLaughlin Land & Livestock Co., 40 Cal.App.2d 620, at page 632, 105 P.2d 607, 614, it is said quoting from Price v. Sixth District, 201 Cal. 502, 511, 258 P. 387:

"'This principle also operates to demand of a defendant that all of its defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them.' (Citing authorities.)"

The appellants further sought to defeat the Justice's Court judgment by subsequently declaring a homestead on the property, and by means of bankruptcy proceedings. But the homestead and adjudication of bankruptcy were held to be ineffectual because of the prior lien which was created by duly recording the abstract of judgment of the Justice's Court.

The only issue in this case is whether the complaint alleges fraud or other valid reason which might excuse appellants from attempting to redeem their property within the time limited therefor by the statute. It is conceded they never did attempt to redeem the property or to perform any of the statutory prerequisites therefor. We have carefully read the pleading and find nothing to indicate that Schuler-Knox Company did anything which would tend to deter or prevent the appellants from redeeming their property. Indeed, just the contrary conclusion may reasonably be drawn from the proceedings. The Justice's Court judgment was obtained in July, 1931. The property was not conveyed on execution sale until more than two years thereafter. The deed of conveyance was not made until November 22, 1934, which was more than one year after the sale occurred. The suit to quiet title was not commenced until July 29, 1937, more than two and a half years after the deed was executed. In the meantime Mr. and Mrs. Smith retained possession of the property. It is not alleged or claimed that the judgment creditor, who purchased the land at the sale, ever mentioned the right of redemption to the former owners.

[4] It is true that an equitable action may lie to permit judgment debtors to redeem their real property from execution sale upon equitable terms to be imposed after the statute of limitations therefor has expired, when it appears they were prevented from exercising that remedy by the fraud or deceit of the judgment creditors or their agents or by *mutual mistake* of the parties. (Benson v. Bunting, 127 Cal. 532, 536, 59 P. 991, 78 Am.St.Rep. 81; 11 Cal. Jur. 108, sec. 56.) That exception to the general rule is based on the assumption that the purchaser should be estopped from enforcing strict compliance with the statute of limitations on account of his fraudulent statements or conduct which misled the former owner and caused him to rely thereon and to fail to exercise his right within the statutory time prescribed. The mistake which may warrant such relief apparently must be a *mutual mistake* of both parties with respect to the statutory time for redemption. In the text of 11 California Jurisprudence, previously cited, it is said in that regard:

> "Under this rule relief may be granted where there was *a mutual mistake* of law as to the time allowed for redemption."

[5] It is apparent that no mutual mistake of the respective parties in this case existed. There was no discussion between them of the statutory right of redemption. It was merely the appellants' mistake in assuming that they were not required to set up their right of redemption in the suit to quiet title, and their reliance upon being able to defeat the Justice's Court judgment as previously stated.

The cases cited and relied upon by appellants in support of their contention that this separate suit in equity lies to enforce their right of redemption, in spite of their failure to redeem the property and their failure to raise that issue in the suit to quiet title, are not in conflict with what we have previously said in that regard. In the Benson case, supra, there was no subsequent judgment to bar the equitable action. Likewise, in the case of Graffam v. Burgess, 117 U.S. 180, 6 S.Ct. 686, 29 L.Ed. 839, upon which appellants chiefly rely, there was no question, as there is in the present action, of an intervening judgment relied upon as res judicata and as a bar to the independent equitable action. That fact clearly distinguishes those cases from the present suit. In the Graffam case the doctrine of estoppel or bar by a former judgment of court was not involved. The court therefore properly held, under the facts of that case, that the lapse of statutory time to redeem property sold on execution did not prevent the trial court from granting equitable relief. In that case the Supreme Court recites evidence definitely showing that the judgment creditor deliberately deceived and defrauded the judgment debtor by conduct and statements upon which she relied, which were intended to and did prevent her from redeeming the property within the statutory time prescribed. The syllabus correctly states the ground upon which the Supreme Court affirmed the judgment rendered by the trial court. It says:

> "Upon an examination of the entire case this court holds that there was a design on the part of the defendant to mislead the complainant and lull her into security, and thus to prevent her from redeeming the property, within the time prescribed by law; and sustains the decree of the court below allowing further time for redemption."

For the reason that the appellants are barred by the statute of limitations and by the former judgment in the suit to quiet title, from maintaining this equitable action to be relieved from their failure to redeem the property within the time prescribed by statute, and because the amended complaint fails to state a cause of action justifying such extraordinary relief, the judgment should be affirmed. It is so ordered.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., not participating.

85 Cal.App.2d 30

DOWNING et al. v. CALIFORNIA STATE BOARD OF PHARMACY et al.

Civ. 13680.

District Court of Appeal, First District, Division 2, California.

April 15, 1948.

1. Druggists ⇨2

Any substance used as a medicine or in composition of medicines for internal or external use is a "drug" within meaning of Code sections prohibiting the manufacture, sale, or advertising of any "drug" which is adulterated, mislabeled, or misbranded. Health and Safety Code, §§ 26280, 26286, 26295; Pen.Code, § 383.

See Words and Phrases, Permanent Edition, for all other definitions of "Drug".

2. Druggists ⇨2

A solution used to alleviate pain caused by disease was a "drug" within meaning of Code sections prohibiting the manufacture, sale or advertisement of any drug that is adulterated, mislabeled, or misbranded. Health and Safety Code, §§ 26280, 26286, 26295; Pen.Code, § 383.

3. Injunction ⇨85(1)

Generally, an injunction should not be granted to prevent execution of a public statute by officers of the law for the public benefit. Civ.Code, § 3423, subd. 4.

4. Injunction ⇨85(1)

Manufacturers of drug which was not labeled as required by Code sections were not entitled to an injunction to restrain State Board of Pharmacy and others from interfering with the manufacture and distribution of the drug. Health and Safety Codes, §§ 26200, 26211, 26280, 26286, 26295; Civ. Code, § 3423, subd. 4.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Suit by William J. Downing, Jean Edwards and Eugene Short against the California State Board of Pharmacy and others, to restrain defendants from molesting or interfering with plaintiffs in the manufacture of a certain solution used in treatment of diseases. From an order granting a preliminary injunction, the defendants appeal.

Order reversed and preliminary injunction discharged.

Fred N. Howser, Atty. Gen., J. Albert Hutchinson and Leo Englert, Deputy Attys. Gen., Edmund G. Brown, Dist. Atty., John Rudden, Deputy Dist. Atty., John J. O'Toole, City Atty., and C. Wesley Davis, Deputy City Atty., all of San Francisco, for appellants.

Leslie C. Gillen and John R. Golden, both of San Francisco, for respondents.

WARD, Justice.

This is an appeal from a preliminary injunction ordering the California State Board of Pharmacy, the State Board of Public Health, the Director of Public Health, the Board of Medical Examiners of the State of California, the Police Department of the City and County of San Francisco, the Municipal Court of the City and County of San Francisco and the District Attorney of the City and County of San Francisco, their agents, servants and employees and anyone "acting through their direction or control or with their knowledge or the direction or control or knowledge of any of them, be and hereby they are and each of them is, pending the trial of the above-entitled action and until the further order of this court, restrained and enjoined from arresting, prosecuting or directly or indirectly in any way molesting or interfering with plaintiffs above-named or any of them, or threatening so to do, for manufacturing, producing, preparing, compounding, packaging or supplying Downing Solution, described in the complaint on file herein, to licensed physicians and surgeons for the purpose of administering said solution to such persons suffering from diseases and pathological conditions, including cancer, and in such manner as said physicians and surgeons may select and determine, in order that said physicians and surgeons may conduct a series of controlled clinical tests to ascertain the efficacy and merits of said solution."

The complaint for injunction alleges that for a number of years William J. Downing has produced a new article known as "Downing Solution" and "has supplied such article in unbranded containers to duly licensed therapeutists"; that recently under the name of Desco Laboratory the article has been "produced and sold * * * in unbranded containers to duly licensed therapeutists" and that plaintiffs have enjoyed a "substantial business in the supply of such article." It is further alleged that the solution is administered to known and unknown persons suffering from certain diseases and pathological conditions and that such persons have been relieved from pain and discomfort without harm to the person.

The complaint alleges that the State Board of Public Health caused the arrest of plaintiffs upon a charge of conspiracy to violate the provisions of Health and Safety Code, secs. 26280, 26286. "The manufacture, production, preparation, compounding, packing, selling, offering for sale, advertising or keeping for sale within the State of California * * * of any drug or device which is adulterated, mislabeled or misbranded is prohibited." Health and Safety Code, sec. 26280. Section 26286 provides "The dissemination of any false advertisement of a drug or device is prohibited." Section 26295 of the same code provides the punishment for the commission of such offense.

The complaint alleges that the article "is neither a drug nor a device within the meaning of said Health and Safety Code, nor has it been * * * adulterated or misbranded." Plaintiffs further allege that defendants are using the criminal law to take and injure plaintiffs' property, to-wit: their business and "to deprive * * * said persons suffering from said diseases and pathological conditions of a supply of such article to the greatly increased suffering of said afflicted persons." The prayer sets forth "Wherefore, plaintiffs pray that this court restrain and enjoin defendants and each of them, their agents, servants and employees and anyone acting under their direction or control or with their knowledge or the direction or control or knowledge of any of them, from prosecuting plaintiffs upon said charges and from rearresting and/or prosecuting plaintiffs, or threatening so to do, for producing and/or supplying such article to duly licensed therapeutics, both permanently and during the pendency of this action, and that for such purposes this court issue its order to show cause to defendants and each of them requiring them to show cause at a time and place to be set by this court why a preliminary injunction should not issue as aforesaid, and for such further and other relief as may be just in the premises." The superior court issued the preliminary injunction as heretofore quoted.

It may be noted that in the complaint, and in many instances in the evidence, the word "therapeutist" is used. However, the preliminary injunction uses the term "licensed physicians and surgeons." It may be assumed from the statements of the judge of the superior court that the preliminary injunction was intended only to protect plaintiffs in the manufacture, production, preparation, compounding, supplying, giving away or selling of the solution to "licensed physicians and surgeons." All of the offers made by plaintiffs to have the court or courts appoint a panel of therapeutists or physicians and surgeons, licensed or otherwise, to test the efficacy of the solution may be disregarded. The results of the deliberation of such a panel would not add to or subtract from the legal right to use the "solution" or to determine its medicinal value. The procedure might be used as part of an advertising medium to gain the good will of the public. However, the courts and judges do not sanction nor would they participate in such a course of action.

There was considerable confusion when this petition was first called for hearing in the superior court as to whether certain parties had been served with process and regarding the status of others who evidently appeared voluntarily. The purpose of the attempted hearing was to restrain all of the parties from "proceeding on the criminal matter" until a hearing could be obtained on the injunction proceeding. Counsel for plaintiffs stated: "The only contention made for this article is that this article had proved—for a period of over 20 years has proved to be an article that has given alleviation from pain to certain pathological conditions including cancer." At a subsequent hearing it was stated that the motion to restrain the pending "criminal prosecution" was withdrawn but that plaintiffs desired an injunction against further interference by the district attorney. Counsel for plaintiffs testified that the purpose of the petition was a test "under proper medical supervision, made at our expense with 50 patients * * * to determine whether or not this fluid alleviated pain in pathological cases, including cancer."

Plaintiff Downing filed an affidavit in support of the application for injunctive relief in which he averred: "'That said solution is not a drug or medical preparation; that said solution does not sever or penetrate the tissues of human beings; that said solution is not a method in the treatment of disease, injuries, deformities, or other physical or mental conditions, but on the contrary, is a substance that alleviates pain caused by disease from physical conditions.'"

[1] The term "drug" includes all medicines for internal or external use. Penal Code, sec. 383. Irrespective of the language used in the preliminary injunction, that is, whether it merely restrains plaintiffs from selling or giving away this unbranded solution to licensed physicians and surgeons, without designated number, to be selected by plaintiffs for an indefinite period of time and for the purpose of administering the solution to persons suffering from diseases, including cancer, or whether the preliminary injunction enjoins the law officers from interfering, arresting or prosecuting in the event the officers reach the conclusion that the sale or gratuitous presentation to persons is not with the purpose of conducting a series of controlled clinical tests, the question arises, is the "solution" a drug? "* * * articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals; (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals" are within the scope of the term "drug." Health and Safety Code, sec. 26200. The use of a substance determines its classification. If a substance is used for medicinal purposes, it is a drug. Town of Selma v. Brewer, 9 Cal.App. 70, 98 P. 61. "'Any substance used as a medicine or in the composition of medicines for internal or external use,'" may be classified as a drug. People v. Garcia, 1 Cal.App.2d Supp. 761, 765, 32 P.2d 445, 447; see, also, Stewart v. Robertson, 45 Ariz. 143, 40 P.2d 979; Goodwin v. United States, 6 Cir., 2 F.2d 200; 28 C.J.S., Drug, page 496; 17 Am.Jur. 839.

[2] In determining the purpose of the manufacture, sale or giving away of the solution, the court is limited to the evidence introduced. Plaintiffs contend that it is not a drug. The evidence shows that a spectrographic analysis was made at one time of the percentage of solids contained in the solution, but the exhibit was introduced only for identification. The contents of "Downing Solution" is a mystery to the public and particularly the law enforcement officers. Eliminating the numerous statements of counsel for plaintiffs, the evidence introduced by them, in spite of the claim that the solution is not a drug preponderates that it is used for medicinal purposes. The complaint alleges that the article relieves pain and discomfort in "certain diseases." One affidavit on file sets forth that the solution cured "prostate gland" trouble. A second affidavit shows that a patient took the "solution" internally for cancer and "had less and less pain." The patient eventually died, presumably from pneumonia. A third patient was cured of dysentery. Another affidavit sets forth that a cancer patient is taking 75 drops a day and has improved in health, whereas another person suffering from cancer has improved on seven drops three times a day. Several physicians appeared as witnesses, one who had administered the drug internally or externally to patients. Counsel for plaintiffs admit that the solution is in effect a "substitute for narcotics." It is a drug when used for tests that plaintiffs desire.

William J. Downing's affidavit sets forth "that said physicians and surgeons, upon the completion of said test to their professional satisfaction, report to the court whether or not in their opinion said solution has merit; that if said report be unfavorable to plaintiffs herein, they hereby undertake to dismiss this action, but that if said report be favorable, then defendants, their agents, servants and employees, be restrained and enjoined permanently from arresting, prosecuting or molesting plaintiffs or interfering with the producing and supplying of said solution." In a word, plaintiffs desire that if "their experts" report favorably, that the state be enjoined from carrying out the mandate of a statute. Plaintiffs seek to use the judicial authority of the court, in the selection of three or more physicians by the court or by plaintiffs, to determine a question which the Legislature has provided rules of statutory provision to govern.

[3, 4] According to plaintiffs the drug has been manufactured, sold or given away and subsequently used for twenty years. However, it is not labeled except as "Downing Solution." A "'New drug' means (1) any drug the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of drugs, as safe for use under the conditions prescribed, recommended, or suggested in the labeling thereof; or (2) any drug the composition of which is such that such drug, as a result of investigations to determine its safety for use under such conditions, has become recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions." Health and Safety Code, sec. 26211. *"A drug or device shall be deemed to be misbranded* unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users." (Emphasis added.) Health and Safety Code, sec. 26244. Section 26288 of the same code provides the legal prerequisites before selling or giving away a "new drug." It must be shown that the Federal act sec. 505, 21 U.S.C.A. § 355, is effective or, if not subject to such act, that compliance with the labeling provisions has occurred and that prior thereto there has been filed with the board an application setting forth "(a) Full reports of investigations which have been made to show whether or not such drug is safe for use; (b) A full list of the articles used as components of such drug; (c) A full statement of the composition of such drug; (d) A full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug; (e) Such samples of such drug and of the articles used as components thereof as the board may require; and (f) Specimens of the labeling proposed to be used for such drug." Health and Safety Code, sec. 26288. The complaint for injunction and the record submitted, evidentiary and otherwise, fail to show a compliance with the above provisions. The general rule is that an injunction should not be granted to prevent the execution of a public statute, by officers of the law, for the public benefit. Civil Code, sec. 3423, subd. 4. The statute requires a drug to be labeled properly and prohibits the sale or giving away of a drug unless the statute has been complied with. The injunction here, in legal effect, permitted and authorized a limited violation of those statutes. The trial court has no power to permit even the limited violation of a criminal statute.

Plaintiffs argue that the execution of a constitutional statute sought to be unconstitutionally applied may be prevented by injunction. It was so held in Brock v. Superior Court, 12 Cal.2d 605, 86 P.2d 805. This court does not dispute the correctness of that rule. If law enforcement officers attempt to enforce a criminal statute arbitrarily and in a discriminatory manner, such action may be restrained by the courts. But that is not this case. It is further argued: "Respondents have been indicted for conspiring to commit certain misdemeanors, viz.: to adulterate, misbrand and falsely advertise a drug, and if the solution is not a drug an injunction is proper because a constitutional issue is tendered, viz.: whether in fact respondents' solution is a drug." The answer to that part of the argument is that plaintiffs waived the request for an injunction against the trial of the criminal proceeding. Plaintiffs state: "Thus, even if it can be said that the injunction prevents the execution of a public statute, still the injunction is proper until such time as the trial Court, upon issues joined, determines that the solution is a drug." The preliminary injunction does not purport to restrain anyone from performing any act until it is determined by the superior court that "Downing Solution" is a "drug." The purpose of the preliminary injunction according to its terms, is to hold "tests to ascertain the efficacy and merits of said solution." It is true that Downing's affidavit denies that it is a drug, but the complaint, the accompanying affidavits, and the arguments submitted on appeal demonstrate that it is a "drug" that may be administered internally or externally as a substitute for narcotics.

The purported issues in the present case are entirely alien and extraneous to the issues raised in the Brock case, supra. At page 612 of 12 Cal.2d, at page 808 of 86 P.2d the court there stated: "The allegations of the plaintiffs' complaint tender as an issue of fact the question whether the marketing of desert grapefruit is an agricultural trade or industry distinctly different from that of marketing other products, and, also, whether the producers of grapefruit are being discriminated against to the profit and advantage of the orange growers and their property taken without due process of law. The plaintiffs are entitled to the findings of a trial court upon those issues." At page 615 of 12 Cal.2d, at page 810 of 86 P.2d, the court elaborated as follows: "This principle is particularly applicable to the facts alleged by the complaint of the respondents which show that the Director of Agriculture asserts the right to say that only such amount of oranges and grapefruit may be shipped within the state as can be sold for a certain price, although the balance of the crop must spoil on the trees or be destroyed, no matter how great the need for food may be. Certainly such a novel exercise of power should be sustained only after a full showing of facts upon which such a decision upholding it may be based."

One of the objections raised by the defendant state authorities is the failure to comply with the law in labeling the "solution." It is claimed that this is in violation of the law of the state. It appears that this product has been manufactured and sold or given away for approximately twenty years. Plaintiff Downing claims that he has a product which will assist in alleviating pain. In Neslen v. Board of Health, 70 Cal.App.2d 202, 206, 207, 160 P.2d 862, 864, the court used language which may be appropriate herein: "If he has achieved an advance in medical science within the meaning of section 26273, and we would judge that he thinks he has, he should make application to the Board for permission to advertise the truth about it. * * * If he should do so he would have to prove that his drug has a curative or therapeutic effect upon one or more of the enumerated diseases. It is to be presumed that the Board would allow him to advertise what it determined to be the facts with reference to such curative or therapeutic effects."

The order appealed from is reversed and the preliminary injunction is discharged.

PETERS, P. J., and BRAY, J., concur.

AYNES v. WINANS et al. *

Civ. 16319.

District Court of Appeal, Second District, Division 2, California.

April 12, 1948.

Rehearing Denied April 28, 1948.

Hearing Granted June 10, 1948.

1. Appeal and error 🔑1033(1)

Appellants cannot complain on appeal of error in their favor.

2. Appeal and error 🔑1033(8)

Fact that two judgments on two separate verdicts against defendant lessor and defendant lessee of truck were awarded in sum of $5,000, on account of injuries caused by lessee's operation of truck, rather than one judgment against defendants in solido, was not prejudicial as to defendants. Vehicle Code, § 402.

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* Subsequent opinion 200 P.2d 533.

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Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Wesley Gordon Aynes against Walter S. Winans and the Crossley Transportation Company, a corporation, for injuries sustained by plaintiff in collision between trucks. From two judgments on two separate verdicts against the two defendants, the defendants appeal.

Judgment affirmed.

Charles H. Goebel, of Los Angeles, for appellant Walter S. Winans.

LeRoy Donkin, of Los Angeles, for appellant Crossley Transp. Co.

Stewart & Stewart, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff was awarded two judgments on two separate verdicts against the two defendants, each in the sum of $5,000 on accounts of injuries suffered in a collision of plaintiff's truck with a tank truck of the corporate defendant operated by an employee of defendant Winans, lessee of the latter truck. As grounds for reversal appellants contend (1) that in an action against two or more parties for the same tort a separate verdict against each defendant is improper; (2) that after the jury has found plaintiff's damages were $5,000 as against the operator, the court must enter judgment against the owner and operator in solido for $5,000 only.

[1, 2] Such contentions are not predicated upon prejudice suffered by appellants. While one judgment would have been a more felicitous and practical form, no detriment to appellants is shown to have resulted from the two judgments as entered. Since the judgment against Winans is for the portion of the total liability remaining after the owner of the truck shall have paid his statutory share of the liability, Winans is in no position to complain. Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 273, 83 P.2d 503. He cannot be compelled to pay more than the $5,000. Since the Crossley Company is liable to the extent of $5,000, its complaint is unavailing because it was by statute liable to the extent of $5,000. Hence if there was error in favor of appellants they are without grounds of appeal. James v. E. G. Lyons Company, 147 Cal. 69, 76, 81 P. 275; In re Estate of Lewis, 126 Cal.App. 90, 94, 14 P.2d 357.

Respondent only is in position to complain of the judgment. Should it develop that the undertaking on appeal is valueless, that the Crossley Company is insolvent and that Winans is financially responsible to the extent of $10,000 under the judgment as entered, respondent would nevertheless be unable to collect more than one half of the amount intended by the jury. He would under that circumstance be prejudiced by the Siamese judgment.

In support of their contention that there should have been but one judgment appellants cite Marriott v. Williams, 152 Cal. 705, 711, 93 P. 875, 125 Am.St.Rep. 87; Sparks v. Berntsen, 19 Cal.2d 308, 312, 121 P.2d 497, and Bradford v. Brock, 140 Cal.App. 47, 34 P.2d 1048. Not one is pertinent. (1) Marriott sued two men for assaulting him. The jury returned a verdict against Williams and exonerated his codefendant Beale who had pleaded self-defense. In support of such verdict the court declared that there can be but one verdict for a single sum against all who are found guilty of the tort. Only one was guilty. Moreover, the statutory limitation (Vehicle Code, sec. 402) upon the amount of a judgment against the owner of an offending motor car operated by a lessee had not been heard of at that time (1908). (2) Sparks sued Enge the owner of an automobile and Berntsen its operator. The verdict against Berntsen was $8,000; against Enge, $3,000. The court there emphasized the rule that there should be but one verdict for a single sum against all defendants jointly liable, and declared that [19 Cal.2d 308, 121 P.2d 499] "any statutory limitation of liability applicable to any defendant as distinguished from the full liability of other defendants * * * should be incorporated in the judgment entered on the verdict." (3) In Bradford v. Brock the court merely expressed the rule in another way, viz., where a verdict is against the operator of an automobile for a sum less than $5,000 the verdict against the owner must be in the same sum.

In the instant case the trial court, having heard the evidence and instructed the jury, was in the best position to construe the verdict. Snodgrass v. Hand, 220 Cal. 446, 31 P.2d 198. The jury were told that if the damage exceeded $5,000 their verdict should be against both defendants, jointly and severally, in the sum of $5,000 and against the defendant Winans only for the amount in excess of $5,000.

The court denied plaintiff's motion to correct the judgments because it was "understood by the court and counsel that the judgment is for $5,000 against each defendant."

Judgments affirmed.

McCOMB and WILSON, JJ., concur.

84 Cal.App.2d 308

HOUSMAN v. BOARD OF MEDICAL EXAMINERS et al.

No. 13432.

District Court of Appeal, First District, Division 1, California.

April 10, 1948.

Hearing Denied May 6, 1948.

Appeal and error 🔑644(1)

Appellant, by expressly requesting the court to examine record and pass upon the questions raised which could only be determined by examination thereof, waived any informality in the presentation of record to court pursuant to respondents' petition for augmentation of record.

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

On petition for rehearing.

Petition denied.

Prior opinion 190 P.2d 653.

Booth B. Goodman and Lionel Browne, both of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondent.

PER CURIAM.

In appellant's Petition for a Rehearing it is contended that the transcript of the hearing by the Board of petitioner's application for reinstatement is not properly before this court. In respondents' Petition for a Rehearing and Petition for Augmentation of the Record Pursuant to Rules on Appeal, filed November 12, 1947, the respondents requested permission to file such transcript, and such permission was granted by the order of this court, dated November 26, 1947: "The petition to augment the record is granted." The reporter's transcript of the proceedings before the board is properly authenticated by the reporter. While this record does not bear the filing marks of either this court or the trial court, appellant, by expressly requesting in his Reply Brief to Respondents' Argument On Rehearing, filed January 9, 1948, that this court examine such record and pass upon the questions raised by him, which could only be determined by an examination thereof, has waived any informality in the presentation of the record to this court. Petition for a Rehearing is denied.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

84 Cal.App.2d 787

PEOPLE v. TORRES et al.

Cr. 2494.

District Court of Appeal, First District, Division 2, California.

April 12, 1948.

Hearing Denied May 10, 1948.

1. Criminal law 🔑747

Defendants' evidence in conflict with that of prosecution presented issues solely for jury, which was entitled to accept or reject it in whole or part.

2. Conspiracy 🔑47
Poisons 🔑9

Evidence supported convictions of two nightclub waiters and bartender for conspiring to mingle poison with a whiskey highball and a cognac drink and serve them to orchestra leader and of mingling poison with highball. Pen.Code, § 347.

3. Conspiracy ⚷40

Nightclub waiters and bartender, actively participating in mixing and serving poisoned whiskey drink, with full knowledge of others' actions, pursuant to common agreement to commit such crime, became equally responsible for all acts completing offense. Pen.Code, § 347.

4. Conspiracy ⚷28

An unlawful agreement need not be formal or express to constitute conspiracy to commit crime.

5. Conspiracy ⚷28

A conspiracy to commit crime need not be entered into at any particular time nor have any particular duration.

6. Conspiracy ⚷28

A tacit mutual understanding, in any manner, to commit crime, is sufficient to constitute "conspiracy".

See Words and Phrases, Permanent Edition, for all other definitions of "Conspiracy".

7. Conspiracy ⚷25

A "conspiracy" may result from parties' actions in carrying out common purpose to achieve unlawful end.

8. Conspiracy ⚷47

Evidence supported conviction of nightclub manager for conspiring with waiters and bartender to mix and serve poison whiskey and cognac drinks to orchestra leader. Pen.Code, § 347.

9. Criminal law ⚷1134(2)

In determining sufficiency of evidence to establish participation of one of several defendants in alleged conspiracy to commit crime, appellate court must consider his actions alone and may consider all of his conduct both before and after commission of crime.

10. Criminal law ⚷673(4)

Admission of testimony as to three defendants' admissions of their parts in furtherance of alleged conspiracy to commit crime was not error, nor prejudicial to fourth defendant or to other defendants as to statements made in their absence by codefendants, in view of trial court's limitation of effect thereof to defendants making them or present at times thereof and admonitions and instructions to jury not to consider statements in determining guilt of defendants not present. Pen.Code, § 347.

11. Criminal law ⚷342

In prosecution of nightclub manager, waiters and bartender for conspiring to mix and serve and mixing and serving poisoned drinks to orchestra leader, prosecuting witness' testimony as to his many disputes and controversies with nightclub owner and manager was admissible against both manager and his co-conspirators to show motive for crime. Pen.Code, § 347.

12. Criminal law ⚷741(3)

The weight of state's witness' testimony as to defendants' statements admitting their participation in alleged conspiracy was solely within jury's province to determine.

13. Criminal law ⚷404(4), 472

In prosecution of nightclub manager, waiters and bartender for conspiring to mix and serve and mixing and serving poisoned whiskey drink to orchestra leader, testimony of bartender's helper that one of waiters poured some of contents of bottle, handed him by bartender at such waiter's request, into glass containing orchestra leader's drink, and that bartender subsequently gave bottle to manager, constituted adequate foundation for admission of bottle in evidence and admission of chemist's testimony that it contained poison. Pen.Code, § 347.

14. Criminal law ⚷1170½(1)

Permission of police inspector to read transcription from stenographer's shorthand notes of statement made to inspector by one of defendants was not prejudicial to defendants, in absence of even suggestion that transcription was incorrect.

15. Criminal law ⚷720(6)

The district attorney was entitled to state to jury and argue his opinions and deductions based on evidence adduced.

16. Criminal law 🔑721½(1)

The district attorney's constitutional and statutory right to comment, in argument to jury, on defendants' failure to deny or explain by their testimony any accusations against them, is not limited to cases wherein defendants are witnesses. Pen.Code, § 1323; Const. art. 1, § 13.

17. Criminal law 🔑720(1)

In conspiracy prosecution, district attorney was not guilty of misconduct in referring to and quoting from three defendants' incriminatory admissions, received in evidence as against them, but excluded as to fourth defendant, in argument to jury, as portions incriminating fourth defendant were also competent evidence of guilt of defendants making admissions.

18. Criminal law 🔑720(5)

The district attorney, in argument to jury, properly attacked credibility of defense witnesses' testimony by directing jury's attention to inconsistencies between such testimony and defendants' admissions received in evidence.

19. Criminal law 🔑720(1)

The fact that three defendants' admissions, properly received in evidence as against them, were not evidence of fourth defendant's guilt in conspiracy prosecution, did not preclude district attorney from arguing to jury full effect of such admissions within limits of their competency, in absence of any suggestion in argument that admissions should be considered in determining fourth defendant's guilt.

20. Criminal law 🔑779

An instruction to jury, in ruling on objection to district attorney's argument, that evidence of admissions of guilt by three of four defendants in conspiracy prosecution could not be used against any defendant not present at time of or party to admissions, nor used to prove guilt of fourth defendant not present at time of or participating in conversations wherein admissions were made, but could be considered only against defendants making admissions, was adequate, though only general reference was made to admissions and their limited effect in formal instructions to jury, particularly in view of many more specific instructions given during trial.

21. Criminal law 🔑829(1)

Refusal of defendants' proposed instructions, adequately covered by instructions given jury, so far as applicable and correct, was not error.

DOOLING, J., dissenting in part.

◆

Appeal from Superior Court, San Francisco County; Melvyn I. Cronin, Judge.

Henry Torres, Louis Coloretti, Mike Silvers, and Rudolph Ruby were convicted of conspiracy to mingle poison with a whisky highball and a cognac drink and serve them to prosecuting witness, all of such defendants except Torres were convicted of mingling poison with the highball, and all defendants appeal.

Affirmed.

See also 182 P.2d 573.

Marvin E. Lewis, of San Francisco (James A. Himmel, of San Francisco, of counsel), for Torres.

Leslie C. Gillen, of San Francisco, for Silvers, Coloretti and Ruby.

Fred N. Howser, Atty. Gen., and Clarence A. Linn and Leo T. Englert, Deputy Attys. Gen., for respondent.

OGDEN, Justice pro tem.

Appellants were jointly charged and tried before a jury upon two counts, the first charging them with the crime of conspiracy to violate Section 347 of the Penal Code and the second charging the completed offense denounced in the same code section. Penal Code Section 347 provides, in so far as it is applicable here, "Every person who willfully mingles any poison with any food, drink, or medicine, with the intent that the same shall be taken by any human being, to his injury, * * * is punishable by imprisonment in the state prison for a term not less than one year nor more than ten years." Under the conspiracy count two overt acts were alleged; first the mingling of a poison, to-wit, a preparation of antimony and potassium tartrate with a highball, consisting of whiskey and soda, with the intent that the same should be taken by one Noel De Selva and the serving thereof to the latter by Coloretti; secondly, the mingling of the same poison with a cognac drink with the intent that the same should be taken by said De Selva and the serving thereof to him by Torres. The completed offense alleged in the second count was predicated upon the same acts alleged as constituting the first overt act, that of mingling said poison with the whiskey and soda highball. All four appellants were convicted upon the conspiracy count. Upon the second count, Torres was acquitted, but the other three appellants were convicted. All four join in this appeal from the judgment of conviction and from an order denying their motions for a new trial. Torres, who was represented by separate counsel at the trial, is also separately represented and filed separate briefs upon this appeal.

The series of events leading up to and culminating in the offenses charged took place in a San Francisco night club known as the "Copacabana", owned and operated by one Joaquin Garay. The appellants were all employed therein; Torres as manager, Coloretti and Silvers as waiters and Ruby as a bartender at the service bar. The complaining witness, Noel De Selva, was the leader of the orchestra under engagement by contract to furnish the music for the nightclub.

The record discloses that during the few months of the engagement of the orchestra, several disputes and controversies arose between De Selva and members of his orchestra on the one hand and Garay and Torres upon the other. Shortly before the close of the engagement, Garay and Torres requested De Selva to remain two additional nights until the orchestra which was to relieve his was available. De Selva, after conferring with his musicians, refused to do so unless they were paid double the union scale. Garay and Torres refused to accede to this and replied that De Selva was going to be very sorry for his attitude.

On the last night of his engagement, De Selva was invited by some patrons to sit at their table and to have a drink. An inquiry was addressed to Coloretti, the waiter assigned to that table, as to the availability of scotch whiskey. Silvers, who was passing by, said, "Certainly we have the scotch for Noel", and accompanied Coloretti to the service bar which was located between the dining room and the kitchen. One Cadena, who was employed as a helper or bar boy to the bartender Ruby, testified for the prosecution as to what took place there. When the drinks ordered by Coloretti had been placed upon the bar by Ruby, Silvers asked Coloretti which drink belonged to De Selva and Coloretti pointed to one of them. Silvers then pointed to a small bottle which was kept in the champagne rack behind the bar and in response to his request Ruby handed it to him. Silvers poured some of its contents into the glass which had been indicated as containing De Selva's drink. Coloretti took the drinks to the dining room and served them to De Selva and the patrons at the table where he was sitting. Upon Coloretti's return to the service bar, Ruby asked him who the "Mickey Finn" was intended for. Coloretti replied that it was for De Selva because Silvers didn't like him. Cadena thereupon picked up the small bottle from the champagne rack and said to Coloretti, "I am going to put you in jail because you gave that 'Mickey Finn' to Noel". Ruby took the bottle from Cadena and put it back in the rack. About twenty minutes later Torres called Cadena aside and said to him, "You saw them give a 'Mickey Finn' to Noel?" Cadena replied in the affirmative and Torres asked him if he could be a witness. Cadena said, "Yes, I can be a witness any time you want." Torres replied, "No, you cannot accuse any people, you better shut your mouth." After Torres left the vicinity of the bar, Ruby said to Cadena, "You see, all the trouble don't come from Mike Silvers, the trouble comes from the bosses, so keep quiet." Torres returned to the bar shortly thereafter and said to Ruby, "Give me the 'mequilleto'" (meaning little Mike). The bartender gave him the bottle previously referred to. Torres put it in his pocket and returned to the dining room.

Within a few minutes after taking what he described as just a "sip" of the scotch and soda, De Selva commenced to feel ill, so did not drink more. When he left the table to direct the orchestra, Silvers insisted that he take the drink with him but he refused. After finishing a short period of directing the orchestra De Selva complained to Torres that he felt very sick. Torres suggested that a drink of cognac would be good for him and ordered Silvers to get one for him. A glass of cognac was brought and when De Selva intimated that he didn't know whether he could drink it Torres said, "Come on, drink it and you are going to feel pretty good." De Selva took a "sip" of the cognac and gave it to a member of his orchestra who drank some and passed it on to two other musicians who likewise drank of it. Shortly thereafter De Selva and the three members of the orchestra who had partaken of the cognac became violently ill, each suffering from the same symptoms of acute pains in the stomach, nausea and diarrhea.

In the presence of a police officer, whom De Selva had summoned, and Torres, De Selva complained that he had been served a "Mickey Finn" by Silvers. Torres told the officer that De Selva had complained to him earlier of feeling ill from eating a hamburger sandwich and had told him that he believed he was suffering from ulcers. De Selva denied that he had made any such earlier complaint to Torres.

When Cadena returned for work the following Monday (the above having occurred on a Saturday night) Torres discharged him, saying, "I'm going to punish you, because you make trouble." He returned to his employment, however, on Thursday night (apparently upon the insistence of his union). He discovered the bottle previously referred to in the garbage can and took it home, later turning it over to an investigator of the office of the District Attorney.

The contents of this bottle were analyzed by a chemist and toxicologist who testified that it contained a poison, to wit, antimony and potassium tartrate, also known under the name of tartar emetic and commonly known as "Mickey Finn". He described the effects of this poison as being the same as those experienced by De Selva and the three musicians who drank of the cognac.

Coloretti, Silvers and Ruby voluntarily appeared together at a hearing before the board of directors of the musicians' union and they each freely admitted their part in the serving of the "Mickey Finn" in the scotch and soda drink substantially as narrated above. They disclaimed responsibility, however, for the serving of the cognac drink. Silvers there related how he had protested to Torres as the latter poured the "Mickey Finn" into the cognac drink, and that he refused to serve it, saying, "* * * stop or you will kill them * * * that is enough to kill a mule". Ruby also stated that after Torres had poured part of its contents into the cognac drink he, Ruby, had thrown the bottle into the ash can.

In a statement made to a police inspector, Coloretti admitted that he had served the drink of scotch and soda to De Selva into which Silvers had previously poured some of the contents of the small bottle. He denied, however, any knowledge of the nature of its contents.

[1] None of the appellants testified in their own defense. They did, however, produce the testimony of other employees who were engaged at the service bar on the night of the occurrence to the effect that they had not seen or heard any of the events as related by the witness Cadena. The service cashier testified as to the manner in which the cognac drink was ordered and served and the lack of opportunity for Torres to have contaminated it. Testimony by the janitor and garbage collector as to the daily collection of garbage was produced, apparently for the purpose of showing the improbability of the bottle being in the garbage can four days later as testified by Cadena. Evidence was offered to the effect that De Selva had complained of feeling ill earlier in the evening and before he partook of either drink. Apparently for the purpose of discrediting

the witness Cadena, another bar boy formerly employed at the night club testified that he had been, at some time previously, served a "Mickey Finn" by Cadena. In those particulars in which the evidence offered by the defense was in conflict with that of the prosecution it presented issues solely for the determination of the jury, which was entitled to accept or reject it in whole or in part.

[2-7] That the evidence is sufficient to support the judgment of conviction as to appellants Coloretti, Silvers and Ruby, is so apparent from the above narration thereof as to require but little comment here. Each actively participated in the mixing and serving of the poisoned scotch and soda drink; Ruby by handing the poison to Silvers, Silvers by pouring it into the drink and Coloretti by serving it to De Selva knowing it to have been so poisoned. By so doing with full knowledge of the action of the others, each became equally responsible for all of those acts which in their entirety completed the offense denounced in Penal Code Section 347. That each did what he did in pursuance of a common agreement between them that the crime be committed is apparent. An unlawful agreement need not be a formal or express one. The law fixes no time at which a conspiracy must have been entered into and it does not provide that it have any particular duration. People v. Yeager, 194 Cal. 452, 229 P. 40. If in any manner the conspirators tacitly come to a mutual understanding to commit a crime, it is sufficient to constitute a conspiracy. People v. Yeager, supra; People v. Sisson, 31 Cal.App.2d 92, 87 P.2d 420. It may result from the actions of the defendants in carrying out a common purpose to achieve an unlawful end. People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437.

[8, 9] We can not agree with the contention of appellant Torres that "there is not one word in the entire transcript that connects him either directly or by circumstantial evidence with any conspiracy or that there was any understanding between this appellant and the other defendants to put any poison, or anything else, in the scotch and soda, and later, the cognac." On the contrary we find ample evidence to support the verdict of the jury as to him. In determining the sufficiency of the evidence to establish his membership in the conspiracy we confine ourselves, as we must, to a consideration of his actions alone. In this we are, as was the jury, entitled to consider all of his conduct both before and after the commission of the crime. We find none of it compatible with his protestation here of innocence but rather find it all supporting a strong inference of guilt. From some source, not disclosed by the record, he learned of Cadena's protestations because of the serving of the "Mickey Finn". He took action, not against the waiter, but against Cadena, admonishing him "to shut your mouth", and discharged him "to punish you, because you make trouble". He asked Ruby for the bottle containing the "mequilleto" and put it in his pocket. He ordered the cognac drink for De Selva and urged that the latter drink it. That that drink contained the same poison as did the scotch and soda is apparent from its effect upon all those who drank it. He gave a false explanation of De Selva's illness to the police officer to whom De Selva complained. From these circumstances the jury was well entitled to infer and believe that Torres was a party to the unlawful agreement.

[10] Appellants complain of prejudice resulting from the admission in evidence of statements made by one or more defendants containing matters incriminating others not present. Torres cites as error the admission of the statements made by his codefendants before the officers of the musicians' union. Although in his brief he states that those statements were admitted as evidence against him, an examination of the transcript shows that not to be the case. The record discloses that in every instance where evidence was received of subsequent statements made by one or more of the defendants out of the presence of any of the others, the trial court limited the effect of such evidence to the defendant or defendants present and participating therein. In every

such instance the jury was clearly and adequately admonished that it was not to consider such evidence in determining the guilt or innocence of any defendant as against whom such evidence was excluded. In instructing the jury at the conclusion of the case the learned trial judge again correctly and adequately stated the law with respect to the limited effect of such evidence and repeated his admonition against improper consideration of it. There was no error in permitting the admission of such statements since each constituted an admission on the part of the defendant making it and tended, at least to some degree, to connect him with the commission of the offenses charged. The trial judge performed his full duty in protecting the rights of the other defendants with respect thereto.

[11-14] We find no prejudicial error in the rulings of the trial court upon the admissibility of evidence. The testimony of De Selva as to his many disputes and controversies with Garay and Torres was admissible for the purpose of indicating a motive for the crime. People v. Willis, 70 Cal.App. 465, 233 P. 812; People v. Fitzgerald, 14 Cal.App.2d 180, 58 P.2d 718; People v. Hall, 27 Cal.App.2d 440, 81 P.2d 248. Torres was present and participated in all of the controversies referred to in the testimony. Its effect was to indicate a motive on the part of Torres and was admissible against all those who later joined with him in the unlawful conspiracy which, the jury was entitled to believe, was actuated by that motive. The testimony of the members of the board of directors of the musicians' union as to the statements made by Coloretti, Silvers and Ruby can not be said to be, as contended by appellants, so conflicting and contradictory as to be incredible. We find no discrepancies therein which can not be reasonably attributed to the usual variance found in the honest recollections of different individuals. The weight to be attached to the testimony of these witnesses was solely within the province of the jury to determine. An adequate foundation was laid for the admission in evidence of the small bottle as the one used and for the testimony of the chemist as to its contents. No showing of prejudice is made resulting from the permitting of the police inspector to read a transcription from shorthand notes made by a stenographer of the statement made to him by Coloretti. In the absence of even the suggestion that the transcription was not correct, the ruling, if erroneous, can not be said to be prejudicial.

[15, 16] Prejudicial misconduct of the district attorney, in his opening statement, during the course of the trial and in his argument, is claimed. It is contended that many of his remarks fall within the category of those which required a reversal in the case of People v. Hidalgo, 78 Cal.App.2d 926, 179 P.2d 102. The assistant district attorney and one of the attorneys for the defense engaged in the trial of the case before us were the same counsel as in the Hidalgo case. In the record before us there appear frequent instances of repetition of the unseemly exchanges of personalties denounced in that case as reprehensible and unbecoming to a courtroom. We do not approve of nor condone such conduct upon the part of either counsel who again equally engaged in them here. Although unnecessarily prolonging the trial and taxing the patience of the trial judge and the jurors, we are not able to say they resulted in such prejudice to appellants as to require a reversal. The type of argument condemned in the Hidalgo case as predicated upon the prosecutor's personal opinion of guilt not based upon the evidence was not used here. The experiences of the prosecutor and others alluded to in his argument can not be said to seriously exceed the bounds of fair illustration. People v. Kynette, 15 Cal.2d 731, 104 P.2d 794. He was entitled to state to the jury and to argue his opinions and deductions based upon the evidence adduced. We have carefully reviewed the many instances in which it is claimed that he exceeded that right and find none in which he seriously went beyond the bounds of fair argument. The comment upon the failure of appellants to deny or explain by their testimony any of the accusations made against them is expressly authorized by Article I, Section 13 of the Constitution and by penal Code Section 1323. The right to so comment is not, as stated by appellant Torres in his brief, limited to cases where the defendant has become a witness. People v. Adamson, 27 Cal.2d 478, 165 P.2d 3.

[17-19] The district attorney committed no misconduct in his argument in referring to and quoting from the admissions made by Coloretti, Silvers and Ruby which were received in evidence as against them, but excluded as to Torres. Those portions thereof which incriminated Torres likewise incriminated and were competent evidence of the guilt of the defendant or defendants making them. Certain portions tended to refute certain testimony of the defense witnesses and it was proper argument to attack the credibility of the latter by directing the attention of the jury to these inconsistencies. Because these admissions were not evidence of the guilt of Torres did not preclude the prosecutor from arguing their full effect within the limits of their competency. There was no suggestion in his argument that any of these admissions be considered by the jury in determining the guilt of Torres. On the contrary, he expressly cautioned the jury, in his closing argument, not to so consider them, saying, "Now, ladies and gentlemen of the jury, the statements that were made before the Board of Musicians, and I'm sure that the Court will so instruct you, in which the three defendants appeared were admissible and are admissible and are competent evidence so far as they are offered and as against all individuals who were at that time present when the statements were made. Listen for the Court's instruction on that particular effect. Henry Torres was not there. Under the hearsay rule he's not present when the admissions are made, therefore, it is not to be used as against him."

[20] Repeatedly during the argument, objection was interposed by counsel for Torres to any reference to the admissions of the other defendants. In every such instance the court repeated its admonition to the jury that these admissions were not to be considered as evidence against Torres. In ruling upon one such objection during the argument the trial judge read to the jury, from the transcript, his previous ruling as to the limited effect of this evidence as follows: "The motion will be denied and the objection will be overruled. But the jury will be instructed again definitely and distinctly and clearly, I trust, that evidence of this kind and character cannot be used against any defendant who was not present or a party to it. In this instance, if it should develop, as it has in the previous instances, that the defendant Torres was not present and did not participate in these conversations, it cannot be used in any wise in connection with proving the alleged offense against him. Briefly it may be said that evidence which is received, as is this evidence and as was the evidence of the conversations heretofore testified to by other witnesses, in which certain defendants participated, may be considered by you only as against the defendants who made the statement, and must not be considered by you in connection with the case of any other defendant, unless that defendant was present and participated in it."

The record is so replete with instances where the jury was so instructed and cautioned as to leave no doubt but that it fully understood the limited effect of this evidence and its duty with respect to it. Although in the formal instructions to the jury only general reference was made to these admissions and their limited effect, the instruction given was adequate, particularly in view of the many more specific instructions given during the course of the trial.

[21] The jury was fully and correctly instructed as to the law. Appellants complain of the failure of the trial court to give several of their proposed instructions. All such proposed instructions that were applicable or contained a correct statement of the law were adequately covered by the instructions given. The contention that the court was here required to instruct as to the necessity for corroboration of the testimony of an accomplice in accordance with Penal Code Section 1111 is devoid of merit.

The judgment and the order denying their motions for new trial are affirmed as to all appellants.

NOURSE, P. J., concurs.

DOOLING, Justice.

I concur in the affirmance of the judgments of conviction of the defendants Coloretti, Silvers and Ruby. I dissent from the order affirming the judgment against the defendant Torres.

Evidence of declarations made, long after the termination of any conspiracy, by the defendants Coloretti, Silvers and Ruby before the board of directors of the Musicians Union was admitted over the repeated objections of counsel for Torres that it was not binding on Torres. The court properly ruled at the time that this evidence could not be considered by the jury against Torres. In the face of such ruling, several times repeated, the prosecuting attorney frankly admitted, while the testimony was being introduced, that his purpose in eliciting it was to involve Torres. This hearsay evidence was the only evidence in the case directly connecting Torres with the putting of knockout drops in the glass of cognac served to De Selva. Substantially it was that Torres put a heavy dose of the knockout drops in the cognac glass; that Silvers said: "For Christ's sake don't give that to them. It will kill them", that Torres said that it was meant for De Selva and the bass player; that Silvers refused to serve it to them and that Torres procured a waiter other than the defendants to serve the cognac; and that Torres put enough of the knockout drops in the cognac glass "to kill a mule".

During the prosecuting attorney's argument to the jury the following occurred:

"Mr. Mullins: * * * And this time Torres is going to be sure. This time not a few drops, but a whole lot from the bottle and he's going to see that there is enough in there so that at this time De Selva really gets it, and gets it good. And Silvers, of course, was quite willing to give a Mickey Finn but now he gets scared, it looks like murder to him. Torres is putting in enough to kill a mule.

"Mr. Gillen: I'm going to object to any line of testimony or any statements on that line. We went over that very carefully when the musicians, when the Petrillo boys were on the witness stand.

"The Court: What is your objection?

"Mr. Levin: That it is a deliberate misquotation. Your Honor has stricken from the testimony and has ruled there will be nothing in the testimony that will be hearsay evidence and we went into that entire musicians' stuff. They came and tried to drag in Torres. Counsel said the purpose of that hearsay was to drag Torres in.

"The Court: No speeches.

"Mr. Levin: It is a deliberate misquotation and I assign it as misconduct and I ask for a mistrial at this time on that basis.

"The Court: The objection will be overruled. Keep in mind the instructions and admonitions heretofore given both during the course of the taking of the testimony, the limited purpose of any evidence when it was so limited, and the further instruction with respect to counsel's arguments.

"Mr. Levin: Do I understand Mr. Mullins can now go into the evidence—

"The Court: The Court has ruled, counsel."

Following the last ruling the prosecuting attorney continued to argue the hearsay testimony against Torres.

That it was gross misconduct of the prosecuting attorney to argue the effect of this hearsay testimony against Torres is obvious. That it was prejudicial misconduct seems clear to me from the following considerations:

The jury was instructed clearly that each member of a conspiracy is legally responsible for the act of any other member of the conspiracy. In the face of this instruction the jury found Torres not guilty of the substantive offense of giving De Selva poison in the whisky and soda. This verdict indicates that the jury must have found that Torres did not become a member of the conspiracy until after the whisky and soda had been served to De Selva. If they so believed, the hearsay testimony that Torres put enough knockout drops in the cognac "to kill a mule", so much that Silvers would not take the responsibility of serving it, could easily have turned the scales against Torres in their determination that he entered the conspiracy after the poisoned whisky and soda had been served.

The error of the trial court in overruling the objection to the prosecuting attorney's argument of the hearsay testimony against Torres was not cured by the general admonition of the court in connection with the ruling: "Keep in mind the instructions and admonitions heretofore given both during the course of the taking of the testimony, the limited purpose of any evidence when it was so limited, and the further instruction with respect to counsels' arguments."

The objection to this line of argument should have been promptly sustained and the jury clearly and plainly instructed at that time to disregard it. Only so, if at all, could its damaging effect have been eradicated from the minds of the jury. The effect of permitting the erroneous argument to stand and to be continued by the prosecuting attorney while at the same time giving an instruction in such general terms, not pointed directly to the objectionable character of the argument being made, must at best have been confusing to a jury of laymen, and at worst might well have convinced them that the judge by overruling the objection to this line of argument had placed his approval upon it.

In the final instructions to the jury, which cover more than thirty pages of the reporter's transcript, the following instructions, not pointed to this particular evidence in any way, were given on this particular question:

"No act or declaration of a conspirator that is committed or made after the conspiracy has been terminated by its purpose having been fully accomplished or by its objective having ended is binding upon his co-conspirators, and they are not criminally liable for any such act or declaration."

"Now, in the trial of this case, ladies and gentlemen, there were instances when certain evidence was admitted as against one or more of the defendants but denied admission as against others. It may be difficult for you, when considering the case for or against any one certain defendant, to disregard any evidence that was admitted only as to another, but that is your plain duty with respect to evidence not admitted by the Court as against a certain defendant, and you must try conscientiously to so treat such a situation."

The latter instruction instead of being clearly mandatory was only precatory in an almost apologetic way: "It may be difficult for you * * * but * * * you must try * * *."

These general instructions in my judgment were not sufficient to undo the effect of the deliberate and wilful misconduct of the prosecutor in arguing matters against Torres which he knew from the previous rulings of the court, and at another time stated himself, constituted no evidence of Torres' guilt.

I cannot agree with the statement in the majority opinion that there was no suggestion in the prosecutor's argument that any of these admissions be considered by the jury in determining the guilt of Torres. "This time Torres is going to be sure * * * he's going to see that there is enough in there so that at this time De Selva really gets it and gets it good. And Silvers * * * gets scared, it looks like murder to him. Torres is putting in enough to kill a mule." The requoted language finds no basis in the evidence except in the testimony of the statements made by the other defendants before the officers of the Musicians Union. It does not tend to incriminate the other defendants in any way but is directed solely against Torres. The fact that the prosecuting attorney at another point in his argument stated to the jury that this evidence was not to be used against Torres only emphasizes the flagrancy of his misconduct in making this particular argument. Courts should not condone the attempts of their own sworn officers to sway juries by any such deliberately improper and illegal means.

Despite the opposite conclusion reached by my associates, for whose judgment and experience I have the greatest respect, I am unable to agree with them that the portion of the argument of the prosecuting attorney herein discussed did not constitute prejudicial misconduct entitling the appellant Torres to a reversal.

Hearing denied; CARTER, J., dissenting.

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84 Cal.App.2d 754

JENSEN v. JENSEN.

Civ. 3710.

District Court of Appeal, Fourth District, California.
April 7, 1948.

1. Cancellation of Instruments 🔑42

In action to quiet title and avoid a deed where pleadings alleged no fraud or undue influence upon grantor, and grantee was not taken by surprise, asked for no continuance, met the issue as presented, and made no claim that new evidence was available, amendment of complaint to conform to proof of old age, feebleness, and incompetency, and fraud and want of consideration at time deed was executed, was proper to cure possible error in admission of such evidence and to set forth facts incidental to the cause originally alleged.

2. Evidence 🔑87

In action to quiet title and avoid deed on ground of mental incompetence of grantor, failure of plaintiff to introduce medical evidence of grantor's mental incompetency, where at least three doctors had made a special examination along that line within a few days of date of deed, was of probative value in determining that grantor executed the deed while competent.

3. Deeds 🔑196(3)

Proof of opportunity is not sufficient to raise a presumption of undue influence in the execution of a deed.

4. Deeds 🔑211(1)

In action to quiet title and avoid deed on ground that grantor was subject to undue influence, proof of appointment of guardian for grantor 22 days after deed was executed was not conclusive as to mental condition on date of execution.

5. Deeds 🔑68(1½)

Where execution of deed, reserving life estate to protect the property and provide for grantee a proper object of grantor's bounty, though technically not a testamentary act, served the purpose, similar principles were to be applied in determining whether grantor had sufficient mental capacity to understand effect of thus disposing of her property upon death.

6. Wills 🔑35

Fact that one has been adjudged incompetent in guardianship proceeding does not necessarily establish incapacity to dispose of property by will.

7. Wills 🔑21, 52(1)

Actual mental condition of deceased at time will was executed is controlling, the presumptions being in favor of validity, and the burden of proof always on those asserting invalidity.

8. Wills 🔑47

Infirmities of age and lapse of memory are not sufficient in themselves to establish lack of testamentary capacity.

9. Wills 🔑55(1)

In proceeding to contest a will on ground of testator's competency, issue does not rest upon contestant's evidence alone, and testimony of proponent's witnesses must be taken into account in weighing sufficiency of contestant's case.

10. Deeds 🔑211(1, 4)

In action to quiet title and avoid deed on ground of grantor's incompetence, evidence was insufficient to support finding that grantor was entirely incompetent mentally or that deed was procured by grantee's fraud in taking advantage of her mental condition and therefore void.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Hobert Jensen, executor of the last will of Kristine Hansen Smith, deceased, against Eleanor Jensen to quiet title to a house and lot occupied by deceased as a home, wherein defendant filed a cross-complaint. From the judgment, defendant appeals.

Judgment reversed.

Martin Thuesen, Iener W. Nielsen and William F. Partlow, all of Fresno, for appellant.

Chester E. Shepard, of Selma, Pauline Davis, of Selma, and Dorsey K. Dwelle, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to a house and lot in Selma which Mrs. Smith, the deceased, had owned and occupied as a home.

While living in Selma, Mrs. Smith took in and cared for two orphan sisters, Martina Sharp and the defendant Eleanor Jensen, who were some seven or eight years old. Martina left when she was about 17 and later became a nurse. Eleanor remained until she was 30, assisting and caring for Mrs. Smith, who moved to Fresno sometime prior to 1938 and bought a house there. In October, 1938, she executed a deed to this property to Martina Sharp, who was then married, telling Martina that she wanted her to see that the property went to Eleanor after Mrs. Smith died. She explained that while Martina was a nurse and had a husband Eleanor would probably never marry and would always need to be cared for. This deed was delivered to Martina, but was never recorded.

In 1942, with the consent and approval of Martina, Mrs. Smith sold the house in Fresno, bought the house here in question and returned to Selma to live in order to be close to her old church. She had had a hip injury which made her quite lame, and for some years she suffered from asthma and a heart condition.

On September 13, 1942, Mrs. Smith made an holographic will, leaving her furniture to Eleanor Jensen, to a stepdaughter, and to her niece Minnie Shirey; $100 each to a stepdaughter and a stepson; and the rest of her property in equal shares to two nephews, to her niece Minnie Shirey, and to Eleanor Jensen, the defendant.

This niece, Minnie Shirey, lived with Mrs. Smith and assisted in caring for her from 1941 until December, 1944. A Mrs. Anderson took care of her from December, 1944, until the latter part of May, 1945. At that time, Mrs. Anderson announced that she was leaving. Mrs. Smith's pastor and Hobert Jensen, the plaintiff, who is the husband of her stepdaughter, attempted without success to get someone to come and care for her. They then took her to the county hospital. The pastor testified that "They took her into the hospital with the understanding that she was a mental condition" and that "the only reason she was placed in the hospital was because we couldn't find any other way of taking care of her." An insanity complaint was signed by Hobert Jensen and she was kept in the psychopathic ward several days. A hearing was had on June 2, 1945. Three doctors reported that she was not insane and the judge who presided at the hearing remarked that she should have a guardian appointed.

On that day, June 2, Hobert Jensen took Mrs. Smith to a rest home in Fresno operated by a Mrs. Johnson. He then filed a petition to be appointed as her guardian. Martina Sharp heard that she was in this rest home and went to see her. Mrs. Smith begged Mrs. Sharp to take her away from this home, saying she wanted to go back to her home in Selma. Mrs. Sharp took Mrs. Smith to her home in Fresno for a few hours several times, returning her to the rest home at night. Mrs. Sharp then talked with Hobert Jensen and the pastor, and they told her that Jensen was going to be appointed guardian and that he intended to sell Mrs. Smith's home in Selma and use the proceeds to support her in a rest home. She reported this to Mrs. Smith who said that they were not going to sell her home, that she was not going to have Jensen for a guardian, and that if they were going to do this she wanted Mrs. Sharp as guardian. On June 6, 1945, Mrs. Sharp took Mrs. Smith, at her request, to an attorney who had acted for Mrs. Smith at intervals since 1938. On that date, acting on this attorney's advice, Mrs. Smith executed a deed conveying her home to Eleanor Jensen but reserving a life estate. This deed was recorded that day and on the same day a petition was filed in the guardianship proceeding which had already been started asking that Mrs. Sharp be appointed as guardian. This petition contained an allegation that Mrs. Smith had "by reason of old age and ill health, become mentally incompetent to care for or manage her property."

A hearing was had in the guardianship proceeding the next day, June 7, 1945. All that appears in the record is that the judge asked Mrs. Smith if she wanted a guardian appointed and she replied that she did not think she needed one, but if one was to be appointed she wanted Mrs. Sharp. The judge then asked Mrs. Sharp how old she was and what her condition of health was. He then said to her that maybe it would be better to have a guardian appointed because of her age and condition of health, and she replied "Well, if one is appointed, I want Martina Sharp to be my guardian." The matter was continued to permit certain notices to be given and on June 28, 1945, the judge signed an order reciting that the matter had come on regularly that day for hearing and that proof had been made, finding that all of the allegations of the petition are true, and appointing Mrs. Sharp as guardian. She did not qualify as guardian because of the early death of Mrs. Smith.

After the first guardianship hearing on June 7, Mrs. Sharp took Mrs. Smith to her home in Selma, having arranged for a woman to care for her. Mrs. Anderson, who was still in Mrs. Smith's home, refused to permit Mrs. Smith to enter. Mrs. Sharp then took Mrs. Smith to her own home in Fresno, where she remained for some ten days or two weeks, after which she became more seriously ill and was taken to the hospital where she died on July 5, 1945, at the age of 76 years.

After his appointment as executor the plaintiff brought this action as a simple quiet title action with no allegations of fraud or undue influence. The defendant filed an answer and cross-complaint seeking to quiet her own title. At the beginning of the trial plaintiff's attorney stated that the purpose of the action was to show that the deed of June 6, 1945, conveying the property to the defendant was made under undue influence and at a time when Mrs. Smith did not know what she was doing, and the case was tried on that theory. After proving the appointment of an executor plaintiff's witnesses were asked questions relating to the general situation and mental condition of Mrs. Smith. An objection on the ground that this went to an issue not raised in the pleadings was overruled. No request for a continuance was made and the trial proceeded on that line, with both parties introducing evidence thereon. The case was submitted on briefs and thereafter, by permission of court, an amended complaint to conform to the proof was filed in which it was alleged that Mrs. Smith was the owner of this property during her lifetime and "that on or about the 6th day of June, 1945, the said Kristine Hansen Smith was old, sick, infirm and feeble and was wholly and mentally incompetent to take care of herself or her business transactions and on said day the defendants, fraudulently taking advantage of said mental incapacity of the said Kristine Hansen Smith, procured her to sign a deed of conveyance to said property hereinabove described and the said deed was recorded on the same day, which conveyance was made without any consideration; and the said defendant, Eleanor Jensen, grantee in said deed, claims title and ownership to said property through said conveyance." The court found in favor of the plaintiff and the findings included one which was in essentially the same language as the paragraph just quoted. A decree was entered quieting title to this lot in the plaintiff for the purpose of administration, and this appeal followed.

[1] It is first contended that the court erred in admitting evidence of old age, feebleness, incompetency, fraud and want of consideration at a time when the complaint alleged no fraud or undue influence; that the court erred in admitting evidence with respect to the guardianship proceeding; and that the court erred in allowing an amended complaint to be filed. It is argued that the evidence thus objected to was inadmissible under the pleadings as they then stood, and that an amendment to conform to the proof should not be allowed where the nature of the action is changed and the other party is taken by surprise. While the evidence referred

to was probably not admissible under the pleadings as they then stood (Thompson v. Moore, 8 Cal.2d 367, 65 P.2d 800, 109 A.L.R. 1027), the appellant was not taken by surprise, asked for no continuance, and met the issue as thus presented. There is nothing to indicate that additional evidence was available to her and in the motion for a new trial, subsequently made and denied, no claim was made that new evidence was available. The case was tried on the one theory and any error in these matters was cured by the filing of an amended complaint to conform to proof. This amended complaint did not set forth a new or different cause of action but set forth facts which were incidental to the action to quiet title. No reversible error appears in connection with these matters.

A more important contention is that the evidence is not sufficient to support the court's findings and judgment; that there is no evidence to support findings of fraud or undue influence on the part of the appellant or any one else; none to support a finding that Mrs. Smith was at the time in question so mentally incompetent that she did not know what she was doing; that the evidence clearly shows that Mrs. Smith intended to give this property to the appellant and knew what she was doing; and that there was, in fact, some consideration for the transfer in that there was an agreement to pay Mrs. Smith's funeral bill.

The record discloses that a rather strong case was made out by the appellant. That Mrs. Smith should want the property to go to the appellant after her death was most natural since she had raised the appellant and her sister, they had given her great assistance financially and in personal service for many years, and she felt that the appellant would especially need caring for. She had made a deed for that purpose a few years before, at a time when her mental condition is not questioned. That she should again take steps to this end, at this particular time, is also natural in view of her removal from her home and its threatened sale. The evidence that the respondent intended, through the guardianship proceeding he had started, to sell the house and that Mrs. Smith seriously objected to this was in no way contradicted or denied.

Aside from the factual background above set forth, concerning which there is no conflict, certain evidence was received relating to the issue as to whether this deed was procured by fraud and undue influence at a time when Mrs. Smith was so mentally incompetent as not to know what she was doing. On behalf of the appellant, Mrs. Sharp testified that when she saw her at the rest home early in June Mrs. Smith knew where she was and did not want to stay there; that Mrs. Smith told her she wanted to fix it so Eleanor would get this property after she was gone and asked to be taken to the attorney's office; that in this office Mrs. Smith said that Eleanor had been good to her, that she wanted it fixed so Eleanor would get the property, and that "We girls would see that she got a decent burial"; that she there asked the witness if she would be her guardian; that a reservation of a life estate was put into the deed to Eleanor because that was what Mrs. Smith wanted; that she was not incompetent at that time; that during the preceding year Mrs. Smith had written to her every week and knew what she was doing; that while Mrs. Smith was in her home the next couple of weeks she knew what she was doing; that during this period Mrs. Smith shelled peas and assisted in other things which she could do sitting down, and engaged in long conversations; and that she paid Mrs. Smith's funeral bills. Mrs. Sharp's husband testified that while Mrs. Smith was at their home she said prayers at table, talked as good as ever, and that she knew what she wanted to do and what she did not want to do.

The attorney who drew the deed on June 6, 1945, testified that Mrs. Smith came to his office with Mrs. Sharp; that he had known her since 1938; that while she was old, walked with a cane and had failed physically, he observed no change in her mentally; that on that day she appeared rational to him; that Mrs. Smith told him of the insanity charge, of the doctor's report thereon, and that a petition for guardianship had been filed; that she told him that she did not want Jensen as guardian because he wanted to sell her property and had caused her to be put in a rest home, that she did not want to stay there, that she did not have long to live and that she wanted to live in her own home in Selma; that she requested him to prepare a deed to the property to Eleanor and hold it until she died, so that no one could be selling the property; that he told her it would be better to deed it outright, retaining a life estate and recording the deed; that she said that this was what she wanted to do; that she told him that she had made a will and he informed her that in spite of that fact she could deed the property; that she told him that she wanted Eleanor to have the property and that Eleanor and Mrs. Sharp had agreed to pay her funeral bills; that Mrs. Smith also told him that the guardianship proceeding was coming up, that she did not want Jensen as guardian and wanted to know if he could stop it; that he told her that the court might appoint a guardian whether she wanted one or not, and that she replied if one was appointed she wanted Mrs. Sharp; that she handed him a slip of paper with a description of the property; that he prepared the deed, reserving a life estate, and she told him she wanted it recorded immediately; that his stenographer inadvertently placed the date on the deed in the wrong place; that Mrs. Smith called this to his attention and he corrected it in ink (this correction appears in the original deed); that because a guardianship proceeding had been filed he went into the matter carefully because he wanted to make sure that she knew what she was doing; that he was satisfied that she knew what she wanted to do because it was consistent with what she had said over a good many years, and as far back as 1938; that she expressed the same desires and gave the same reasons; that he explained to her that it would be necessary, in preparing a petition for the appointment of Mrs. Sharp as guardian, to put in a statement that she was unable to take care of her own affairs; that she replied that she did not care what was put in so long as she was permitted to live in her own home and no one could take it away from her; that at the hearing in court the next day the attorney for Jensen told the judge that there would be no contest and if Mrs. Smith wanted Mrs. Sharp as her guardian they did not care; that in reply to his questions Mrs. Smith told the judge that she did not want Jensen as her guardian, that she did not think she needed a guardian but that if one was to be appointed she wanted Mrs. Sharp; and that he later prepared the order appointing a guardian, which was signed on June 28. It may be further noted, in this connection, that Mrs. Smith's signature on the deed is remarkably good for a woman of her age and almost as good as her signature on the other deed which was prepared in 1938. Also, that while the judge finally signed on order appointing a guardian he asked Mrs. Smith who she wanted appointed and followed her wishes, although another person had first applied.

The evidence for the respondent on this issue was as follows. The pastor of her church testified that he lived next door to her and saw her often; that from March, 1944, until a guardian was appointed she was gradually deteriorating, both physically and mentally; that his reason for this statement was that at first she was able to go to church but during the last six months of her life she was too feeble to do so; that in March, 1944, he was asked to take care of her finances because her memory failed her, she did not realize what was going on and she lost a check which was found in a place where she had placed it for safekeeping; that from that time on he handled her business; that all she had was her old-age pension check; that she would indorse the checks each month and he would pay the bills; that she wrote fairly well; that after he took over her finances she did not seem concerned about it any more; and that he thought she was insane but would not put his judgment against the experts who had found to the contrary. As further reasons for his opinion he testified that whenever he discussed her problems with her she asked no questions, that she was like a child; that she never comprehended; that many times she was incoherent; that at times in the last six months she did not recognize him; that sometimes she did not recognize others who came in until they had been there awhile; that Mrs. Shirey had a two-year old son and when she left Mrs. Smith complained that she was taking "her boy" away; that after Mrs. Shirey left Mrs. Smith did not realize her own condition and thought she could get along alone all right; and that she was absolutely incompetent after March 31, 1944.

Mrs. Shirey testified that in the last six months she was there Mrs. Smith claimed that the witness' two-year old son was hers; that once she hit the boy with her crutch; that on one occasion she did not know Mrs. Shirey; that she could not get her mind on what she was talking about and would say that "I was a mean woman, because I was trying to take her little boy away from her"; that at times she did not recognize people; and that she misplaced money about the house so the pastor was asked to take care of it. Hobert Jensen testified that she was incompetent when he took her to the rest home on June 2; that he did not discuss her business or money matters with her; that he saw her many times in the last six months; and that sometimes she did not know him. Mrs. Johnson testified that when Mrs. Smith was brought to her rest home on June 2 she appeared quite old and in poor physical condition; that she seemed to have no will, no desire, did not care for this or that, did not seem to grasp what was said to her, "maybe she would answer me, maybe she wouldn't"; that she did not know there was a ration book; that she did not ask Mrs. Smith about her property but asked her about her people; and that she did not know that she had any people or who they were, and did not know whether Mrs. Sharp and Mr. Jensen were relatives.

[2] Mrs. Smith had just been taken from her home against her will and placed in the rest home. It is not surprising that she was unwilling to talk to Mrs. Johnson or to give her any information. The effect of the pastor's testimony as to her mental condition is largely destroyed by the reasons given for his opinion and by other portions of his own testimony. That she was forgetful at times may be conceded, and the fact that she had difficulty with her hearing would naturally account for some misunderstanding on the part of others. The only testimony relating to the day on which the deed was executed discloses that she fully understood the existing situation and what she was doing. There is no testimony to the contrary with respect to her condition on that day. The only adverse evidence as to her mental condition related to occasional incidents over a considerable period with no definite times fixed, to matters which were either explained or understandable, or was based on reasons and conclusions which are not too convincing. It is significant also that no medical or expert evidence of her mental incompetency was introduced although it appears that at least three doctors had made a special examination along that line within a few days of the date of the deed. Estate of Perkins, 195 Cal. 699, 235 P. 45. And the next day after its execution, the judge who heard the guardianship proceeding expressed considerable confidence in her mental condition by allowing her to nominate her own guardian.

No contention was or is made that Mrs. Smith was a person entirely without understanding. It had been found to the contrary four days before the deed was executed, and the evidence would not sustain such a finding if made. While the amended complaint alleged that she was "wholly and mentally incompetent" to take care of her business that situation is construed by section 1460 of the Probate Code, providing for the appointment of a guardian in such a case, to mean any person who by reason of old age, weakness of mind or other cause is unable to properly care for his property and by reason thereof is likely to be imposed upon. That allegation of the complaint is coupled with the charge that the appellant fraudulently took advantage of such mental incapacity and procured this deed without consideration. At the outset of the trial it was stated that the purpose of the action was to show that this deed was made under undue influence and when the grantor did not know what she was doing, and the action was tried on that theory.

[3-5] Aside from the fact that the evidence showed some consideration, in the payment of funeral bills, there is no evidence of fraud or of undue influence beyond the fact that an opportunity therefor existed. Opportunity is not sufficient to raise a presumption of undue influence. Estate of Smith, 200 Cal. 152, 252 P. 325. The order appointing a guardian was not made until tweny-two days after the deed was executed and recorded and would not be conclusive as to her mental condition on the date of the deed. Aside from the weakness of the evidence of Mrs. Smith's mental incapacity, as above pointed out, none of that evidence was sufficient to show that she did not know what she was doing when she made the deed. The making of that deed was technically not a testamentary act but it served that purpose here, and similar principles should be applied in determining whether it was valid and whether she had sufficient mental capacity to understand what she was doing in thus providing for the disposition of her property upon her death.

[6-9] In will cases it has been held that even the fact that one has been adjudged incompetent in a guardianship proceeding does not necessarily establish incapacity to dispose of property by will. Estate of Loveland, 162 Cal. 595, 123 P. 801. It is well settled that the actual mental condition of the deceased at the time the will was executed is the controlling question, that the presumptions are in favor of validity, and that the burden of proof is always on those asserting invalidity. Estate of Perkins, 195 Cal. 699, 235 P. 45. "The infirmities of age and lapse of memory are not sufficient in themselves to establish lack of testamentary capacity". Estate of Presho, 196 Cal. 639, 238 P. 944, 949.

In Estate of McDonough, 200 Cal. 57, 251 P. 916, 921, the court said: "In considering the question of a testator's competency, the rule by which the evidence must be measured is thus stated: '* * * the issue does not rest upon the contestant's evidence alone. The testimony of proponent's witnesses must be taken into account in weighing the sufficiency of the contestant's case. Evidence which standing by itself might be sufficient to sustain a verdict may in the light of all the facts be wholly inadequate, and that without invading the province of the jury as the judges of the weight and sufficiency of the evidence.' Estate of Casarotti, 184 Cal. 73, 192 P. 1085."

In Estate of Sexton, 199 Cal. 759, 251 P. 778, in considering whether there was substantial evidence of mental weakness amounting to incapacity, the court said: "While a survey of all the facts may warrant a diversity of opinion as to the exact state of her mind and the precise degree of mental capacity retained by her, it is evident that there was not such a complete prostration or alienation of intellect as to incapacitate her from making a testamentary disposition of her property."

[10] In our opinion the respondent failed to sustain the burden of proof resting upon him and the evidence is not sufficiently substantial to support the court's findings to the effect that Mrs. Smith was entirely incompetent mentally, that this deed was procured by the appellant's fraud in taking advantage of her mental condition, and that the deed is void. Rollins v. Smith, 72 Cal.App. 773, 238 P. 171; Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of McDaniel, 77 Cal.App.2d 877, 176 P.2d 952; Webb v. Saunders, 79 Cal. App.2d 863, 181 P.2d 43.

For the reasons given the judgment is reversed.

MARKS and GRIFFIN, JJ., concur.

85 Cal.App.2d 104

CALDWELL v. HARVEY et al.

Civ. 7488.

District Court of Appeal, Third District, California.

April 19, 1948.

1. Appeal and error ⚷801(1)

Where motion to dismiss appeal is filed in the appellate court, right to dismissal is determined by facts as they existed at time notice of motion was given. Rules on Appeal, rules 4(d), 5(c, d), 10 (a), 42.

2. Courts ⚷85(1)

Rules on Appeal have the force of positive law. Rules on Appeal, rules 4(d), 5(c, d), 10(a), 42.

3. Appeal and error ⚷628(2)

Appellant has burden of using reasonable diligence to perfect and prosecute his appeal and must exercise reasonable diligence to investigate any unwarranted delays by an officer of the court in taking steps required by rules and if necessary must take steps to see that legal duty is performed by such officer. Rules on Appeal, rules 4(d), 5(c, d), 10(a), 42.

4. Appeal and error ⚷784

Public policy favors hearing of appeals on their merits, but respondent is entitled to have appellant proceed with expedition and is entitled to have appeal dismissed if appellant fails to comply with rules. Rules on Appeal, rule 53(b).

5. Appeal and error ⚷784

Delay, circumstances, and relative injury that will flow to either party by granting or denying relief, must be considered in determining whether appellant should be relieved from failure to comply with Rules on Appeal. Rules on Appeal, rules 4(d), 5(c, d), 10(a), 42, 53(b).

6. Appeal and error ⚷629

Where nearly nine months had elapsed since notice of appeal had been given, and record was not on file nor had a record or transcript been certified, and no proceedings for certification were pending in trial court, and although failure to file reporter's transcript might have been due to reporter's failure to perform his duties, only steps taken by appellant's counsel to get records prepared was to make occasional inquiries of reporter as to his progress in preparing reporter's transcript, appellant was not entitled to relief from default and appeal would be dismissed. Rules on Appeal, rules 4(d), 5(c, d), 10(a), 42, 53(b).

◆

Action by William A. Caldwell against Carlos H. Harvey, individually and Carlos H. Harvey, doing business under the firm name and style of Placerville Concrete Products Company, for money had and received. Judgment for plaintiff and defendant appeals.

Appeal dismissed.

Thomas Marlor, of Placerville, and Anthony Chargin, of Stockton, for appellant.

Thomas Maul and Maul, Hughes & Maul, all of Placerville, for respondent.

ADAMS, Presiding Justice.

This is a motion filed in this court on December 8, 1947, to dismiss an appeal from a judgment which had been entered March 18, 1947. The motion was supported by a certificate of the clerk of the lower court dated December 3, 1947, which conformed to Rule 42 of the Rules on Appeal, and recited the nature of the action, the names of the attorneys of record, a description of the judgment and the date of its entry, a statement that no motion for a new trial was made, that notice of appeal to the Supreme Court was filed on March 19, 1947, and amended notice of appeal to this court dated March 27, 1947; that on said March 27th defendant's attorneys filed with affiant as clerk of the lower court a request for clerk's and reporter's transcripts; that no steps were taken to prepare an agreed statement; that no order extending time for preparation of the record was filed and no record of transcript had been certified by the lower court, and no proceeding for the certification of a record on appeal was pending in the said superior court, and that no transcript had been filed.

The notice of motion was served on appellant's counsel on December 3, 1947, and said motion was set for hearing in this court on February 5, 1948. No written opposition to said motion was filed by appellant and no written motion to be relieved of default was made by him; but on said February 5, 1948, counsel for appellant appeared and argued in opposition to respondent's motion.

In the meantime and on January 27, 1948, appellant had filed in this court the clerk's and reporter's transcripts on appeal, together with an affidavit of Lee Johnston, court reporter, verified on December 16, 1947. The clerk's transcript was certified on December 30, 1947, and the reporter's transcript, as corrected, was certified by the trial judge on January 9, 1948. It was averred in the reporter's affidavit that affiant had reported the proceedings on the trial of this action, that judgment was entered March 19, 1947, and notice of appeal to this court filed on March 28, 1947; that on the latter date appellant filed a request for clerk's and reporter's transcripts, and his counsel requested an estimate of the cost of preparation of reporter's transcript, which estimated cost was promptly given and said attorney forthwith paid the entire estimated cost and requested affiant to proceed as soon as possible with the preparation of such transcript. He further averred that "as soon as possible thereafter" he commenced preparation of the reporter's transcript, and whenever time and opportunity had afforded had diligently worked upon the said reporter's transcript; that since the request for same was made he had been in almost daily attendance upon court sessions, many of which were criminal trials; that the attorney for appellant had frequently asked him concerning the progress of the preparation of such transcript, and affiant had told him that he was preparing same as rapidly as possible; and that same was then (December 16, 1947) completed and ready to be filed. No extension of time to prepare said transcript was ever asked of this court by said reporter; and, as aforesaid, the record was not filed until the 27th day of January, 1948.

Rule 4(d) of the Rules on Appeal requires that the reporter's transcript shall be completed and filed with the clerk within 30 days after direction by the clerk; and Rule 5(d) provides that within 30 days after appellant has arranged for payment of the cost of the clerk's transcript, as provided by subdivision (c) of said rule, the clerk shall prepare and certify said clerk's transcript. It is obvious that in this case there was no compliance with either of the rules, and that, in fact, ten months elapsed after the notice of appeal was filed before the record on appeal was filed in this court, and then only after respondent's motion to dismiss was filed.

[1] In Murphy v. Krumm, 21 Cal.2d 846, 136 P.2d 8, the Supreme Court held that where a motion to dismiss is filed in an appellate court, the right to a dismissal is determined by the facts as they existed at the time the notice of motion was given. It is apparent here that when said notice was given nearly nine months had elapsed since the notice of appeal, the record was not on file nor had a record or transcript been certified; and no proceedings for certification were pending in the trial court. On the face of the record, then, respondent was entitled to have the appeal dismissed under the authority of that case, and under subdivision (a) of Rule 10 which provides that "If the appellant shall fail to perform any act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion."

[2, 3] And while the failure to file the reporter's transcript may be said to have been due to the failure of the reporter to perform the duties imposed upon him by the rules (which have the force of positive law) it can hardly be said that appellant's counsel was without fault in permitting such a long delay in getting his record on file. As was said in Flint v. Board of Medical Examiners, 72 Cal.App.2d 844, 846, 165 P.2d 694, 695: "the burden is always

upon an appellant to use reasonable diligence to perfect and prosecute his appeal. Where some step is required by the rules to be taken by an officer of the court and such officer delays unreasonably the appellant cannot sit by indefinitely and do nothing. He must exercise a reasonable amount of diligence to investigate any unwarranted delays *and if necessary take steps to see that the legal duty is performed.*" (Italics ours.) Also see Whelpton v. Taylor, 81 Cal.App.2d 949, 185 P.2d 391. And as far as the record before us is concerned the only steps appellant's counsel took to get his record prepared was to make occasional inquiries of the reporter as to his progress in preparing the reporter's transcript.

[4,5] Rule 53(b) authorizes a reviewing court, for good cause, to relieve a party from a default occasioned by failure to comply with the rules, except the failure to give timely notice of appeal. But thereunder, to justify grace, there must be good cause shown. And while, as said in Jarkieh v. Badagliacco, 68 Cal.App.2d 426, 431, 156 P.2d 969, there is a strong public policy in favor of hearing appeals on their merits, on the other hand a respondent is entitled to have an appellant proceed with expedition, and, if he fails to comply with the rules, to have the appeal dismissed; and in determining whether an appellant should be relieved from default such factors as the length of the delay, the circumstances, and the relative injury that will flow to either party by granting or denying relief, are to be considered. See Leeper v. Ginsberg, 58 Cal.App.2d 591, 595, 137 P.2d 859; Wilson v. Wilson, 207 Cal. 364, 366, 278 P. 440.

[6] Here the record shows that plaintiff, the moving party here, recovered a judgment for nearly $5000 in an action for money had and received. For over a year he has been deprived of the fruits of his judgment. Appellant has not shown that he took any steps to expedite the hearing of his appeal on its merits except to make occasional inquiries of the court reporter as to his progress in preparing the transcript; and though the reporter was plainly in default appellant took no steps to compel him to perform his duty nor did he ask relief from his default, or make any excuse for his dilatoriness.

While Rule 53 of the Rules on Appeal provides that the rules are to be liberally construed, such liberal construction is specifically stated to be for the purpose of securing "the just and speedy determination of appeals and original proceedings."

It might be added that appellant has not filed any opening brief on his appeal nor has he requested any extension of time to file same.

Under the circumstances we conclude that appellant has not shown justification for relief from default. Accordingly, respondent's motion to dismiss the appeal is granted and the appeal is dismissed.

PEEK and THOMPSON, JJ., concur.

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85 Cal.App.2d 38

In re AVILA'S ESTATE.

AVILA v. SOUZA.

Civ. 13676.

District Court of Appeal, First District,
Division 2, California.

April 15, 1948.

Rehearing Denied May 15, 1948.

Hearing Denied June 10, 1948.

1. Wills 🔑561(1)

A devise to testatrix' sister of testatrix' "house, lot and improvements" at designated location included a small cottage erected in the rear of the lot for testatrix' own use, so that cottage did not go to residuary legatee under the will, where property involved was a single lot inclosed by a single fence and only means of egress and ingress from and to the cottage was that provided for use of main building on lot and lot in addition to the cottage contained several other improvements.

See Words and Phrases, Permanent Edition, for all other definitions of "House, Lot and Improvements".

2. Wills 🔑561(1)

The word "improvements", in a bequest devising improvements on a lot, meant those structures erected thereon which tended to enhance the value of the land.

See Words and Phrases, Permanent Edition, for all other definitions of "Improvements".

3. Wills ⚷488

Testimony of attorney who drew will as to what testatrix had said to him before will was drafted was inadmissible, where language in will presented no ambiguity calling for judicial interpretation. Probate Code, §§ 105, 106.

4. Wills ⚷439

Cardinal rule in interpretation of a will is that it is to be constructed according to the intention of testator. Civ.Code, § 1317.

5. Wills ⚷440

Purpose of construction of wills is to arrive, if possible, at intention of testator, but intention to be sought for is, not that which existed in the mind of testator, but that which is expressed in language of the will. Civ.Code, § 1317.

6. Wills ⚷456

Where terms of a will are free from ambiguity, the language used must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby. Probate Code, §§ 105, 106; Civ.Code § 1317.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Proceeding in the matter of the estate of Anna C. Avila, deceased, between Mary Avila and Maria F. Souza for interpretation of the will of Anna C. Avila, deceased. From an adverse judgment, Mary Avila appeals.

Affirmed.

Fred B. Hart, of Oakland, for appellant.

Weinmann, Rode, Burnhill, & Moffitt and Donald K. Quayle, all of Alameda, for respondent.

NOURSE, Presiding Justice.

This is a proceeding to interpret the provisions of a will reading: "Third: I hereby give, devise and bequeath unto my sister, Maria F. Souza, of San Leandro, California, my house, lot and improvements, located at No. 156 Estabrook Street, in the said City of San Leandro. * * *"

The controversy arises because the testatrix had erected a small cottage for her own use in the rear of the lot and, since appellant is the residuary legatee under the will, she contends that this cottage should go to her as property not specifically devised. The trial court after a full hearing as to the supposed intentions of the testatrix held that the will was not uncertain in its disposition of the lot and all the improvements thereon, and that the devise included the cottage.

The evidence is undisputed that the property involved is a single lot 100x150, enclosed by a single fence or hedge, that the only street number was affixed to the large house, that the only means of egress and ingress from and to the cottage was that provided for use of the main dwelling, that, in addition to the cottage, the lot contained a garage, a pump and tank house, several chicken houses, and similar improvements.

[1, 2] The finding of the trial court is sound and should not be disturbed. The language of the will "my house, lot and improvements" presents no ambiguity or uncertainty calling for judicial interpretation. The word "improvements" means those structures erected on the area noted which tend to enhance the value of the land. It includes the cottage just as surely as it includes the garage, laundry, and chicken houses. This is the clear purport of the language of the will. If the testatrix had intended to exclude the little cottage from the devise, that intention could have been expressed without any difficulty.

[3] Appellant's case rests on the inadmissible evidence of the attorney who drew the will as to what the testatrix had said to him before the will was drafted. Such declarations are of no aid in the interpretation of the plain words of the will. Section 105, Probate Code.

[4-6] The rule controlling the decision is found in Estate of Blake, 157 Cal. 448, 458, 108 P. 287, 291: "The cardinal rule in the interpretation of a will is that 'it

is to be construed according to the intention of the testator.' Civ.Code, § 1317. As said in the Estate of Young, 123 Cal. 337, 55 P. 1011: 'The purpose of construction as applied to wills is unquestionably to arrive, if possible, at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will.' It is not the business of the court to say, in examining the terms of a will, what the testator intended, but what is the meaning to be given to the language which he used. Where the terms of a will are free from ambiguity, the language used must be interpreted according to its ordinary meaning and legal import, and the intention of the testator ascertained thereby." See Probate Code, section 106, reading: "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." See also, 26 Cal. Jur. p. 887; Estate of White, 84 Cal.App. 2d 409, 190 P.2d 968; 27 Am.Jur. p. 260.

Judgment affirmed.

GOODELL, and DOOLING, JJ., concur.

WEST KEY NUMBER SYSTEM

84 Cal.App.2d 816

ALBERTSWORTH et al. v. GLENS FALLS INDEMNITY CO.

Civ. 13581.

District Court of Appeal, First District, Division 2, California.

April 13, 1948.

1. Appeal and error 🔑487
Attachment 🔑337

The failure of codal provision requiring bond in double the amount of debt claimed in order to continue in force an attachment to refer to effect of the appeal undertaking on prior undertaking, indicates an intention to make the latter undertaking, additional to the prior undertaking, and to give the person whose property is attached such added protection rather than to have the appeal bond supersede the attachment bond. Code Civ.Proc. §§ 539, 946.

2. Appeal and error 🔑487
Attachment 🔑337

Proceedings on appeal are in invitum against a successful party and therefore it is not just that the filing of the appeal bond should deprive him of any of his securities, particularly when the attachment bond sureties have the right of contribution against the appeal bond sureties. Code Civ.Proc. §§ 539, 946.

3. Appeal and error 🔑487
Attachment 🔑337

Attachment bond to pay all damages which defendant may sustain by reason of the attachment is not reduced or terminated by subsequent appeal bond given by plaintiff. Code Civ.Proc. §§ 539, 946.

4. Appeal and error 🔑989

On appeal from judgment in action on attachment bond wherein court allowed an attorney's fee, the amount of which was questioned, sole question for appellate court to determine is whether there is any substantial evidence to support court's findings.

5. Appeal and error 🔑1013

Where trial judge had personal knowledge of services rendered by attorney in attachment case and attorney testified that about a tenth of his services was devoted exclusively to dissolution of the attachment up to time of its dissolution and that percentage of time devoted exclusively to matters connected with dissolution of attachment through all courts was from one-third to one-half, appellate court could not hold as a matter of law that trial judge erred in taking one-half as the basis on which to fix attorney's fee.

6. Attorney and client 🔑140

A judge who is informed of the nature and extent of legal services can determine what is a reasonable fee from his own knowledge and experience without necessity of other evidence.

7. Attachment 🔑351

The amount and value of attorney's fees in order to determine surety's complete liability on attachment bond could be established only by evidence, and plaintiff was not entitled to interest on amount thereof prior to judgment.

8. Attachment 🔑351

In action on attachment bond claim for attorney's fees and costs was unliquidated until time of judgment and interest should not have been allowed on that portion of total sum prior to judgment.

9. Attachment 🔑351

Where defendants in attachment deposited a cashier's check to prevent their property from being attached, defendants were properly allowed interest at seven per cent per annum on amount of check as damages. Civ.Code, § 3287.

10. Attachment 🔑351

In action on attachment bond, the lapse of seven days between date of filing of remittitur in Superior Court and date of receiving check from sheriff was not unreasonable as respects right to damages for such period. Civ.Code, § 3287.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by E. F. Albertsworth and Barbara K. Albertsworth against Glens Falls Indemnity Company on attachment bond. From judgment, for plaintiffs, the defendant appeals.

Findings of fact conclusions of law and judgment amended and as amended judgment affirmed.

Thomas E. Davis, of San Francisco, for appellant.

J. M. Atkinson, of Mountain View, and E. F. Albertsworth, of Los Altos, for respondents.

BRAY, Justice.

The principal question here is whether the liability of sureties on an attachment bond continues in whole or in part after the filing of a supersedeas bond on appeal.

On July 10, 1944, one Fruns commenced suit in the Superior Court of Santa Clara County against the Albertsworths (plaintiffs herein). That a writ of attachment might issue, defendant indemnity company filed an undertaking in the amount of $2500, in the usual form, promising that if the attachment was discharged or the defendants therein recovered judgment, defendant indemnity company would pay all costs that might be awarded and all damages within the amount of the undertaking, which the Albertsworths might sustain by reason of the attachment. Because of the issuance of the writ and to prevent their property from being attached, the Albertsworths on July 11, 1944, deposited with the sheriff a cashier's check in the sum of $5400.

Thereafter, the Albertsworths moved to dissolve the attachment. This motion was denied without prejudice. The Albertsworths again moved to dissolve the attachment, and on September 20, 1944, the motion was granted and the return of the deposited check ordered. From this order Fruns appealed, and filed an undertaking on appeal executed by the Fireman's Fund Indemnity Company, under the statutory obligations of section 946 of the Code of Civil Procedure. (This undertaking is hereafter referred to as the "appeal bond.") By reason of this undertaking and the appeal, the sheriff retained possession of the check. Later, after a trial, a decision on the merits of the action was rendered in favor of the Albertsworths, and Fruns appealed from the judgment. This appeal was consolidated with the appeal from the order dissolving the attachment. The District Court of Appeal affirmed both the judgment and the order. Fruns v. Albertsworth, 71 Cal.App.2d 318, 162 P.2d 666. Petitions for rehearing and for hearing by the Supreme Court were denied. The remittitur was filed in the Superior Court on December 27, 1945. On January 4, 1946, that court made its order for the return of the check. The sheriff, apparently in anticipation of the order, returned the check to the Albertsworths on January 3.

The Albertsworths then brought this action against defendant, the surety on the attachment bond. The trial court allowed plaintiffs, as damages, interest at 7% per annum on the $5400 deposited with the sheriff in the sum of $567, plus attorney's fees in the sum of $325, and costs in the sum of $50.62, which fees and costs it found were necessarily included in proceedings taken in all courts for the purpose of dissolving the attachment. Another item of interest allowed will be discussed later.

Is Liability on the Attachment Bond Reduced or Terminated by the Appeal Bond?

In its briefs, defendant takes the position that the appeal bond supersedes the attachment bond and terminates all liability thereon. On argument, it contended that the appeal bond either had that effect, or it limited the liability of the attachment bond sureties to damages incurred up to the time of the filing of the appeal bond only, and that while the sureties on the appeal bond are concurrently liable with them up to that time, the appeal bond sureties are solely liable from then on.

The question of the effect on the liability of the attachment bond sureties by the filing of an appeal bond has never been flatly passed on in California. The nearest our courts have come to the subject is in the four cases hereinafter mentioned. The first is Ayres v. Burr, 132 Cal. 125, 64 P. 120, where an action was brought against the sheriff for refusing to serve a second writ of attachment because of the filing of a bond to prevent the service of the first writ of attachment. It was the plaintiff's contention that as an appeal bond had later been filed, the lien of the attachment ended, and he was entitled to reattach the property under a new writ of attachment issued upon the filing of a new attachment bond. The court held that in spite of the filing of the appeal bond the bond for release of attachment was still in effect, and said, at page 129 of 132 Cal., at page 122 of 64 P.: "We think that the bond given to prevent the attachment was not destroyed or affected by the appeal. This bond was not given alone as personal protection to the sheriff, but was given for the benefit of the parties to the action,—as to the defendant Thomas, to protect his property from attachment; and as to the plaintiff, as security for the payment of the judgment that might be finally rendered in the case. Pending the appeal, it could not be enforced; but we cannot see that, because the statute provides that execution is stayed on the judgment, and that certain mentioned liens existing at the time the appeal is taken cease, it must follow that the bond given to prevent attachment should be disturbed. Certainly, the statute does not so provide, and we cannot add to its terms."

The second case is Primm v. Superior Court, 3 Cal.App. 208, 84 P. 786, 788, which holds that an attachment is not finally and irrevocably dissolved the moment a judgment for defendant is entered. Section 553 of the Code of Civil Procedure provides that in the event of such judgment, the property attached must be returned to defendant. But construing that section with the appeal bond section, the court states that the sections must "be harmonized and made operative as parts of one general law" and that "A fair, reasonable, unstrained construction leads to the conclusion that the dissolvent force of a judgment is neutralized by a perfect appeal, provided the additional undertaking is filed and the appeal perfected within the specified time. This construction gives harmonious effect to both sections and does not nullify any part of either." At page 212 of 3 Cal.App., at page 788 of 84 P.

In the third case there is language to the effect that the lien of an attachment ends with entry of judgment in favor of the defendant, whose property is attached, the liability on the attachment bond also terminates, and that the liability of the sureties on the appeal bond does not include the damages accrued prior to the filing of that bond. This case is Heine v. Wright, 76 Cal.App. 338, 244 P. 955, where the appellate court upheld judgments of the trial court which awarded damages against the sureties on an attachment bond up to the time of judgment in the original action and against the sureties on an appeal bond from the time of the appeal on. However, an examination of the opinion shows that the question of successive liability or total liability was not presented to the court, as the successful party elected to sue each surety in a separate action. Apparently, the court and the parties assumed without question that the rule applied was the rule of liability. The main point presented and passed on was whether the persons attached had consented to and requested the attachment. The statement that the lien of the attachment ends with the judgment and the attachment sureties' liability terminates there is contrary to the weight of authority. No case is cited to support the proposition, nor does the court consider the Primm case, supra. Moreover, it is agreed in the case at bar that, contrary to the holding in the Heine case, the liability of the appeal bond sureties is not limited to damages accruing subsequent to the filing of the appeal bond but includes *all* damages which the defendant may sustain by reason of the attachment, including those accrued at the time of filing the bond.

The fourth case is King v. Hartford Accident & Indemnity Co., 133 Cal.App. 711, 24 P.2d 906, 909. There, the sureties on an appeal bond paid the amount of the judgment from which the appeal has been made unsuccessfully. They then sued the sureties on a bond given early in the proceedings to procure a release of an attachment, to recover the amount they had paid. The appellate court reversed a judgment of the lower court permitting the sureties on the appeal bond to recover from the surety on the release of the attachment bond. The case establishes three rules on the subject: (1) That the second (appeal) and first (release of attachment) sureties are not cosureties, and, therefore, there is no right to contribution from the first where the second pays; (2) That there is no right to relief under the equitable doctrine of subrogation, or recovery by the second against the first where the former pays, in the absence of "special circumstances which operate to render the equities of the later surety superior to those of the earlier"; (3) That if the first pays he will recover by subrogation from the second.

While the third holding in that case is probably dictum, it is based upon the prevailing rule elsewhere. The opinion quotes the following from Stearns on Suretyship, 2d Ed., sec. 254: "The execution of a suretyship obligation in the course of a legal proceeding for the collection of a debt for which another is already bound as a surety, or where bonds are given in the prosecution of legal remedies in the appellate courts in which successive undertakings are required, generally results in placing the ultimate liability upon the last surety, through whose agency the litigation has been prolonged, and while as between such surety and the creditor he may be properly termed a surety for the prior promisor, yet if his contract is solely in the interest of the principal, and without the assent of the prior surety, he is regarded as debtor of all the prior parties, and not entitled to subrogation to the remedies of the creditor against the prior sureties; *but on the contrary if the prior surety pays he will recover by subrogation from the later surety.* * * *" (Emphasis added.)

The case of Associated Constructors v. Paonessa, 13 Cal.2d 241, 88 P.2d 924, relied on by defendant, is not in point. There an appellant filed an appeal bond, but when the adverse party excepted to the sureties on the bond the sureties could not qualify. Thereupon, the appellant filed a new bond with sureties who did qualify. In an appeal from a summary judgment against the sureties who did not qualify, the court held that there was no liability at all on their part and that the second bond had completely superseded the first. It is obvious that where the sureties fail to justify there is no bond at all, and that such is the effect of section 948 of the Code of Civil Procedure which provides that unless the sureties justify when required, the execution to stay which the bond is given is no longer stayed.

Defendant calls attention to section 946 of the Code of Civil Procedure which provides: "An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment"; and also to the fact that under section 539 of the Code of Civil Procedure the attachment bond need be only in an amount not less than $50 or more than the amount claimed in the complaint; and argues that because of the language in the former section requiring a bond in double the amount of the debt in order to keep the attachment in force, the Legislature intended that the appeal bond be in lieu of the original attachment bond.

Defendant asks that we follow the rule in Massachusetts as stated in Russia Cement Co. v. Le Page Co., 1899, 174 Mass. 349, 55 N.E. 70, which holds that the rule in that state is that the appeal bond is a substitute for the attachment bond. That, however, is the minority rule, and as pointed out in that case, is not the federal rule which holds that the bonds are supplemental to each other.

[1, 2] While section 946 makes no provision for taking into consideration, in determining the amount of the bond on appeal, the amount or value of the attachment bond, and requires an amount double the amount of the debt claimed, we cannot say that the Legislature, by the language used, meant to indicate any intent that the appeal bond is to supersede the attachment bond. The more reasonable interpretation is that the failure to make any reference to the effect of the appeal undertaking on prior undertakings indicates an intention to make the later undertaking additional to the prior undertaking, and to give the person whose property is attached this added protection. As held in Chrisman v. Jones, 34 Ark. 73, proceedings on appeal are in invitum against the successful party and therefore it is not just that the filing of the appeal bond should deprive him of any of his securities. Particularly is this so, when the attachment bond sureties have the right of contribution against the appeal bond sureties. Although it is a somewhat anomalous situation that if no appeal bond is filed, the attachment ends, and the liability of the attachment bond sureties continues no further, but if an appeal bond is filed, that liability continues on until the final determination of the case, still this continuing liability remains because the attachment which the first bond sureties brought into being, itself continues on.

Defendant quotes from 50 C.J. 281 as follows: "Sureties on successive bonds for the same obligation are cosureties if the bonds remain in force and are merely cumulative, but not where the latter bond supersedes the former, and the liability of the surety on the first bond terminates as to the future when the second is given. Sureties on different bonds given in successive steps in litigation are not cosureties, as in the case of sureties on a bond to pay a judgment and sureties for the original debt." However, such rule is based on the assumption that the latter bond *supersedes* the former, which is the question to be determined here. But, as set forth in 50 C.J. 315, in the case of "successive sets of sureties on different bonds given in judicial proceedings" the rule is different and the sureties on the first bond are supplemental to those on the succeeding bonds. 4 C.J. 1289 states: "An appeal bond does not supersede a redelivery bond given to dissolve an attachment in the same action, but the party executing them is liable on both." (See also 5 C.J.S., Appeal and Error, § 2061.)

In Chrisman v. Rogers, 30 Ark. 351, the successful plaintiff in the original action sued the sureties on a bond to discharge an attachment issued in that action, and it was held that he could recover his damage from those sureties, notwithstanding the fact that an appeal bond had been filed. The court stated that "the plaintiff most clearly had his election of remedy to sue out execution upon his judgment or to sue upon the attachment bond." 30 Ark. at page 355. In a later suit (Chrisman v. Jones, supra, 34 Ark. 73), one of the sureties on the bond to discharge the attachment who had been forced to pay the judgment in the foregoing case sued the sureties on the appeal bond, for contribution. The court held: "It is the law of this case * * * that the complainant was not discharged from his liability on the attachment release bond, by the execution of the appeal bond. The creditor had the option to pursue his rights upon either security." 34 Ark. at page 75. In allowing recovery from the sureties on the appeal bond it was said: "The principle in equity seems to be well established, that when successive securities for debt have been given in judicial proceedings upon the request of the debtor alone, to enable him to prolong the litigation, whilst all will be liable directly to the creditor, they will be, as amongst themselves, liable to exoneration in the inverse order of their undertakings." 34 Ark. at page 77. To the same effect see Day v. McPhee, 1907, 41 Colo. 467, 93 P. 670. While in these cases the first bond was one to release attachment, it is obvious that so far as the question here presented is concerned, there can be no difference in the rule applying to a bond to release an attachment than to a bond to obtain an attachment. The rule is well stated in Restatement of the Law, Security, Sec. 192, p. 530: "Where two bonds with different sureties are given in the course of the same litigation and one or both are appeal bonds, and the case is finally determined against the appellant, (a) each surety is liable to the appellee according to the terms of his undertaking; (b) as between themselves to the extent to which they secure the same duty of the appellant, (i) the second surety is the principal surety if the first surety has not concurred in the obtaining of the subsequent bond; * * *." To the same effect, 50 C.J. 315; Stearns Law of Suretyship, 4th Ed., p. 364.

[3] Neither counsel nor we have been able to find any case in any jurisdiction other than Heine v. Wright, supra, supporting the rule contended for at argument, namely, that the attachment bond sureties be held liable for all damages accruing to the time of the filing of the appeal bond and that the appeal bond be held to be supplemental to the attachment bond up to the time of filing the appeal bond, and from then on, be considered the sole bond. Such a rule would do violence to the language of section 539, under which the sureties undertake to pay *all* damages which a defendant may sustain by reason of the attachment. While, to some extent, the federal and majority rule is based upon the form of the statutes in the particular jurisdiction, we find nothing in our statutes to compel us to adopt any other rule, especially as that rule appears to be the better rule.

Attorney's Fees.

Defendant makes no contention that plaintiffs are not entitled to an allowance for attorney's fees incurred in all proceedings in all courts to obtain a dissolution of the attachment. It contends, however, that the allowance was too high. The court allowed for this purpose half of all attorney's fees incurred by plaintiffs in the trial and appellate courts. Plaintiffs' attorney testified that about a tenth of his services was devoted exclusively towards the dissolution of the attachment up to the time of its dissolution by the trial court on September 20, 1944, and that the percentage of time devoted exclusively to matters connected with the dissolution of the attachment through all courts was from one-third to one-half. Defendant contends that, at most, the court should not have allowed more than one-third, as plaintiffs are limited to the lowest figure mentioned by him. In support of this contention it cites Soule v. United States Fidelity & Guaranty Co., 82 Cal.App. 572, 255 P. 886, and 7 C.J.S., Attachment, § 560. These authorities do not discuss the amount of fees but only the general rule that the fees to be allowed are limited to those reasonably incurred in procuring a dissolution of the attachment. The other case cited on this point, McClary v. Endom's Transfer & Storage Garage, 19 La.App. 515, 139 So. 702, was a case in which the court held that in a suit for recovery of damages to an automobile where several witnesses testified for plaintiff giving varying estimates of damage, plaintiff was bound by the testimony of the witness giving the lowest estimate, and could recover no more than that estimate. That case is not authority for the contention that where an attorney estimates the time he has spent in obtaining a dissolution of the attachment as one-third to one-half of the time spent on the entire case, the court must necessarily accept the lower figure.

[4-6] The sole question for us to determine is whether there is any substantial evidence to support the court's finding. While

the court could have taken one-third as the basis, we cannot say as a matter of law that the judge, who was the same one before whom all proceedings in the trial court were had, with his personal knowledge of the services rendered in the trial court and his ability to evaluate them as well as those rendered in the appellate court, erred in taking the higher figure. As said in Mason v. United States Fidelity & Guaranty Co., 60 Cal.App.2d 587, at page 594, 141 P.2d 475, 479: "* * * it should be kept in mind that the judge who tried this cause was the same judge who presided at the hearing of June 3, 1940. The trial judge knew how much of the argument that day was devoted to the point relating to the dissolution of the restraining order and how much was devoted to other matters. As a lawyer he was able to evaluate the worth of those services. It is well settled that when a judge is informed of the extent and nature of legal services, he can determine what is a reasonable fee from his own knowledge and experience without the necessity of other evidence. See cases collected 3 Cal.Jur. p. 714, § 111."

Interest.

The court allowed interest on the $5400 from July 10, 1944, to January 4, 1946, in the sum of $567. It is conceded that that is an erroneous computation and that the correct figure for that period is $560.70. There is another error in that the correct date upon which the sheriff received the check is July 11, 1944, and the date upon which he returned it is January 3, 1946. Thus, there is an allowance of two days interest too much. This amounts to $2.10, which would make the correct amount of interest $558.60, reducing the total amount of the judgment from $942.62 to $934.22.

[7, 8] The court allowed interest on the total amount of damages from January 4, 1946, the date it assumed the check was returned, to March 31, 1947, the date of the judgment. Inasmuch as the claim for attorney's fees and costs was unliquidated until the time of the judgment, interest should not have been allowed on that portion of the total sum representing the allowance for attorney's fees and costs. The amount and value of the attorney's fees could only have been established by evidence in court, and therefore plaintiffs are not entitled to interest prior to judgment. Johnson v. Marr, 8 Cal.App.2d 312, 47 P.2d 489. As said in Samuels v. Singer, 1 Cal. App.2d 545, 555, 36 P.2d 1098, 1102, 37 P.2d 1050: "* * * in such cases interest is not allowable upon the theory that the person liable does not know of the sum he owes, and therefore can be in no default for not paying."

[9] That portion of the damages representing interest on the $5400 comes within the terms of section 3287 of the Civil Code: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

In Petersen v. Lyders, 139 Cal.App. 307, 33 P.2d 1032, the plaintiffs did not know at the time they filed their complaint the exact amount for which defendant was indebted to them; yet this fact alone was held not to render the claim unliquidated so as to preclude interest. The court stated at page 309 of 139 Cal.App., at page 1033 of 33 P.2d: "Defendant had the use of money collected for the use and benefit of plaintiffs and belonging to them, and it would be unjust and inequitable not to charge him with interest from the time the actions were brought. The correct amounts due were easily arrived at by allowing defendant certain credits, the amounts of which were at all times within his own knowledge. The claim of plaintiffs was certain, or capable of being made certain, by calculations within the meaning of section 3287 of the Civil Code." See also County of Imperial v. Adams, 117 Cal.App. 220, 3 P.2d 953.

[10] Approximately seven days intervened between the date of filing the remittitur in the superior court and the date of receiving the check from the sheriff. Defendant contends that interest should not be allowed for those seven days. Plaintiffs state that it was necessary to obtain an or-

der of release by the superior court before the sheriff would return the check. This order was obtained on January 4. Although the sheriff apparently did not wait for this order, as he returned the check on January 3, the delay of one week is not unreasonable.

The findings of fact, conclusions of law, and the judgment are amended to provide that plaintiffs have judgment against defendant in the sum of $934.22, together with interest on the sum of $558.60 at the rate of 7% per annum from January 3, 1946, to March 31, 1947, amounting to the sum of $48.55, making a total judgment in the sum of $982.77. As so amended, the judgment is affirmed, respondents to recover costs on appeal.

PETERS, P. J., and WARD, J., concur.

85 Cal.App.2d 122

SALSBERRY v. SMITH.

Civ. 3715.

District Court of Appeal, Fourth District, California.

April 20, 1948.

1. Automobiles 🔑206, 217(5)

A pedestrian is not required to look in every direction during every instant of his progress while crossing at an intersection, but must look at least in those directions from which danger may be reasonably apprehended and, once past the center, is not under obligation to anticipate the approach of an automobile coming from the left.

2. Automobiles 🔑245(37, 72)

In action by pedestrian struck in marked crosswalk by automobile making a left turn, whether pedestrian was struck while less than halfway across the street by driver making a proper turn and not cutting the corner, and whether pedestrian looked in the direction from which danger would reasonably be apprehended and as often and as carefully as would a person of ordinary prudence under like circumstances, was for the jury. Vehicle Code, § 544.

3. Appeal and error 🔑1001(1)

Implied finding of contributory negligence by jury will not be disturbed on appeal where there is substantial evidence or reasonable inferences to support it.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Helene M. Salsberry against William John Smith for personal injuries sustained in automobile accident. From the judgment, plaintiff appeals.

Affirmed.

Schmidt & Catalano, of Bakersfield, for appellant.

Mack & Bianco, of Bakersfield, for respondent.

GRIFFIN, Justice.

This is an appeal by plaintiff from a judgment on a jury verdict in favor of defendant in a personal injury action. The complaint charges that on July 26, 1946, defendant negligently drove an automobile into collision with plaintiff, a pedestrian, at the intersection of Highway 6 and Inyo Street, in Mojave, Kern County. Defendant denied generally the allegations and pleaded contributory negligence of plaintiff.

Highway 6 runs north and south and is 60 feet in width with a double center line and two traffic lanes on each side thereof. The curb is abutted by a sidewalk 10 feet wide. It is intersected at right angles by Inyo Street, which runs east and west and is 58 feet wide, forming a "T" intersection. The center of Inyo Street is unmarked and is likewise abutted by a sidewalk 10 feet wide. A pedestrian cross-walk 10 feet wide and marked on the pavement with white lines extends between the northeast corner and the southeast corner of the intersection. Plaintiff was in that cross-walk at the time she was struck. A hotel stood on the northeast corner of the intersection and parked cars were in front of it causing, to some extent, an obstruction to the view, under section 511, subdivision 4 of the Vehicle Code.

About noon on the day of the accident plaintiff, aged 66, a typist and notary, had been to the post office south of Inyo Street, and was returning to her office which was on the north side of that street about one-half block east of Highway 6.

Defendant testified that he was driving his car south on Highway 6 just west of the center line, about 25 miles per hour, with the intention of making a left turn; that after he reached the east-west cross-walk he rounded the center of the intersection and did not cut the corner; that while making the turn and traveling about 18 miles per hour he saw plaintiff standing on the sidewalk at the southeast corner; that he looked down at his speedometer and when he looked up again plaintiff was about three feet in front of him in the southerly half of the north-south cross-walk; that he applied his brakes and stopped within a few feet but the front portion of his car struck plaintiff and she fell to the pavement at a point indicated about three feet east of the east cross-walk marking and a short distance south of the center line of Inyo Street; that his front wheels stopped on that cross-walk marking. He then testified that the brake marks showed that the wheels on the left side of his car were then about four feet south of the center line of Inyo Street. Defendant was not asked as to whether or not he gave any signal indicating a left-hand turn.

The negligence of defendant in not looking and not properly watching the roadway while negotiating the turn was conceded at the trial and is conceded on this appeal. It is not conceded, however, that there was any evidence of his failure to signal a left turn, *at the time the law required him to do so.* See sec. 544 Vehicle Code.

Another witness corroborated defendant's testimony as to the position of the tire marks in the south half of the cross-walk.

Plaintiff testified generally that at the south curb of Inyo Street she looked up the street in all three directions; that as she got off the curb she saw some cars proceeding from the north on Highway 6; that she saw "that car up the street in the middle heavy lane"; that she watched that car and looked at the traffic in general; that "there were no arm signals so I took it the car was going on directly south and I proceeded on"; that "when I got, it seems to me, a little through the center lane * * * I may be wrong about that * * * all of a sudden I was conscious of something swinging, I heard a screech of brakes and horn, and I looked up and that big dark car loomed up, came right at me, and I tried to go forward and it got me." On cross-examination she testified that ordinarily she wore glasses with a correction in them; that on this day the sun was so bright she wore sun-glasses without the correction; that without such correction her vision was not "blurry." However, in her deposition she testified that before she got her new glasses (after the accident) my sight was "hazy, it was blurred" when she tried to read matter that was close to her. Therein she also testified, in reply to the question: "Can you tell me about how far you had gone from the sidewalk along the pedestrian lane when you first saw this automobile? A. It was somewhere, I would imagine, just in the middle, I tried to watch the crossing, I don't know whether I got half way across, I don't think so, I am not sure." She estimated that she had gone about 25 feet from the south curb at the time she was struck. (Inyo Street was 58 feet wide.) She then testified generally to her claimed injuries; that her right hand was not as efficient as before and affected her typing ability; that she had been dizzy at all times since the accident; that she had excessive pain in her right leg and had other similar ailments.

Several doctors examined her and testified or made reports substantiating, to some extent, her statement as to her condition. A doctor who examined her testified for defendant and said that he found "the examination entirely negative as far as anything relating to the injury which the patient stated she had on July 26, 1946"; that he concluded that her complaint as to her right lower extremity was attributable to deep varicosities (varicose veins); that he made tests of her complaint about partial loss of sensation in her right side (claimed hypesthesia); that his tests showed she did not have a "true hypesthesia"; that he tested the grip of her right hand on the dynamometer; that in his opinion there was no actual physical disorder present.

There was testimony that plaintiff had hypesthesia on the occasion of her first examination, on a second she did not, and on a third there was evidence of it again. The doctor described this reaction as possible "litigation neurosis," i.e., "a type ot neurosis that we usually clear up immediately upon receiving a satisfactory financial settlement."

One MacElroy testified that he was standing at the northeast corner of the intersection and saw plaintiff start across Inyo Street in the pedestrian cross-walk; that when she was near the center of the street defendant's automobile made a left turn, "cut the corner" and it struck plaintiff on her left side; that the left front wheel of defendant's car was about at the center line of Inyo Street. When asked if plaintiff ever turned her head and looked at the approaching car he answered "Not to my knowledge."

"Q. As far as you could tell, her attention was riveted on something ahead here? A. Walking to the other curb.

"Q. Walking to the other curb and never looked from the time you first saw her until she was struck? A. No.

"Q. Did she look 'anyplace except the cross-walk?' A. Well, I wouldn't know that, I saw her when she left the curb on the south side, and I didn't keep my eyes on her, but when I saw the car coming around the corner then I looked at her.

"Q. Where was she looking then? A. Well she was looking straight ahead or I didn't notice for sure.

"Q. She was looking toward you, as far as you recall? A. Well, she was looking the other side of the curb."

[1-3] Upon this evidence the jury found for defendant. Plaintiff appealed and relies upon her contention that the evidence is insufficient as a matter of law to support the judgment for defendant, relying principally upon Schomer v. R. L. Craig Co., 137 Cal.App. 620, 31 P.2d 396; Cleveland v. Petrusich, 117 Cal.App. 71, 3 P.2d 384; Minor v. Foote, 100 Cal.App. 441, 280 P. 197; and LeBlanc v. Browne, 78 Cal.App. 2d 63, 177 P.2d 347, in which latter case a pedestrian was in a marked cross-walk and *past the center of the intersection* when struck by a car coming from her left which had cut the corner. Upon the principle that the law does not require a pedestrian to look in every direction during every instant of her progress, but requires that she must look at least in those directions from which danger may be reasonably apprehended, and since she had passed the center of the intersection, she would be under no obligation to anticipate the approach of an automobile coming from her left. The facts here related do not bring plaintiff within that rule. While there is a conflict, the most convincing evidence shows that plaintiff was struck while she was in the south half of the pedestrian cross-walk and the jury had the right to so believe and that defendant made a proper turn at the intersection and did not "cut the corner". Whether, under the circumstances, plaintiff looked in the direction from which danger would be reasonably apprehended, and as often and as carefully as would a person of ordinary prudence under like circumstances, were factual questions for the jury. An implied finding of the jury on that question will not be disturbed on appeal where there is, as here, substantial evidence or reasonable inferences to support it. LeBlanc v. Browne, supra; Arundel v. Turk, 16 Cal.App.2d 293, 295, 60 P.2d 486; Fischer v. Keen, 43 Cal.App.2d 244, 248, 110 P.2d 693; Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660; McQuigg v. Childs, 213 Cal. 661, 3 P.2d 309; O'Brien v. Schellberg, 59 Cal.App.2d 764, 140 P.2d 159; Rapp v. Southern Service Company, 116 Cal.App. 699, 703, 4 P.2d 195.

The other cases relied upon by plaintiff were actions where the jury found that plaintiffs (pedestrians) were not guilty of contributory negligence and defendants argued that they were guilty of contributory negligence as a matter of law. Such is not the case before us.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

84 Cal.App.2d 802

BALASCO v. CHICK et al.

Civ. 15954.

District Court of Appeal, Second District, Division 1, California.

April 12, 1948.

Hearing Denied June 10, 1948.

1. Appeal and error ⚷989

When judgment is attacked as being unsupported by evidence, power of appellate court in passing upon such question is limited to determination as to whether there is any substantial evidence which will support verdict.

2. Appeal and error ⚷931(1), 996

On appeal from judgment for defendant all conflict in evidence must be resolved in defendant's favor, and all legitimate and reasonable inferences indulged in to uphold judgment, if possible; and, when two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of jury.

3. Automobiles ⚷244(6, 58)

Evidence that defendant's automobile was traveling at reasonable speed when defendant saw plaintiff walking from curb toward streetcar safety zone, that defendant attempted to pass to right of the zone, and that plaintiff turned suddenly again toward the curb and was struck, established that defendant was not negligent, and that proximate cause of the accident was negligence of plaintiff in attempting to return to the curb.

4. Appeal and error ⚷994(1), 995

An appellate tribunal does not sit as a jury to determine issues of fact, credibility of witnesses, or weight to be attached to testimony.

5. Appeal and error ⚷1010(1)

An appellate court is authorized to review evidence only when upon its face it may justifiably be held to be insufficient to support ultimate issues involved, since, in such a case, it is not a review of a question of fact but purely one of law.

6. Evidence ⚷591

A party to suit may call an adverse witness without being bound by testimony of that witness, but such testimony is evidence and may be considered in determining issues. Code Civ.Proc. § 2055.

7. Evidence ⚷591

Where plaintiff called one of defendants as an adverse witness and defendant gave testimony favorable to his position, although such testimony was not binding upon plaintiff, jury was justified in considering such testimony as creating a conflict with plaintiff's testimony, in passing upon weight of defendant's testimony, and, if believed by them, in predicating verdict thereon. Code Civ.Proc. § 2055.

8. Evidence ⚷318(4), 358

Photostatic copy of map prepared by police officer as a part of his official report of investigation of accident, which map showed various material points observed and recorded by officer when he arrived at scene of accident, and was separated from report and offered by defendant in course of cross-examination of officer, who had been called as plaintiff's witness, was not hearsay and was admissible as illustrative of officer's testimony. Code Civ.Proc. § 2055.

9. Appeal and error ⚷1050(1)

Admission of a map drawn by witness prior to trial, and showing physical facts as he observed them upon his arrival at scene of accident, is not prejudicial to litigant who called witness where witness, being under cross-examination at time map was introduced, could have been required to make similar marks and indications on map then in evidence.

10. Trial ⚷252(1)

Testimony of defendant, who was called by plaintiff as an adverse witness, indicating that plaintiff was guilty of contributory negligence, although not binding upon plaintiff, was before the court, and, where supported by an appropriate pleading, justified instruction on subject covered by testimony. Code Civ. Proc. § 2055.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Margaret Balasco against Ralph Oscar Chick and another to recover for injury sustained by plaintiff when she was struck by an automobile driven by named defendant. Judgment for defendants, and plaintiff appeals.

Affirmed.

Melvin Simon and Alexander Oster, both of Los Angeles, for appellants.

Forrest A. Betts and Crider, Runkle & Tilson, all of Los Angeles, for respondents.

WHITE, Justice.

Action for damages on account of alleged negligence. Judgment for defendants, from which plaintiff appeals.

At the trial, plaintiff testified that on the night of March 1, 1946, at about 10 p. m., she was standing in a streetcar loading zone at the corner of Hyde Park and Crenshaw boulevards in the City of Los Angeles, waiting to board an oncoming northbound streetcar. That she observed the streetcar approaching when it was about one block and a half from her position in the loading zone. That she first saw the automobile which struck her as it passed the streetcar; that the automobile turned onto the tracks in front of the streetcar, and when it was about 75 feet from her it swerved to the right "heading straight for the safety zone, heading straight for me." That she then "started to scream, put up my right arm, and I started to scream * * *. And the first thing I know I got hit, and that is all I remember." Plaintiff estimated the speed of the approaching automobile at from 50 to 55 miles per hour. She also testified that the automobile which struck her "only had one light, a very dim light."

Russell D. Derifield, motorman of the streetcar for which plaintiff was waiting, testified that on the night in question he was proceeding north and when he was a block and a half south of the intersection of Hyde Park and Crenshaw boulevards, defendant Ralph Oscar Chick's automobile passed the streetcar at an estimated speed of at least 50 miles per hour; that the vehicle then turned onto the car tracks and continued north on the easterly rail of the northbound track; that when within 10 or 15 feet of the safety zone, it swerved to the easterly side of the street and struck the button of the safety zone nearest the east rail; that during all this time there was a woman standing in the south end of the safety zone. That after striking the button the automobile proceeded through the safety zone approximately to the property line of Hyde Park and Crenshaw boulevards. This witness saw the automobile stop, and when he arrived at the scene of the accident he observed plaintiff "on the ground in front of the car." There was other testimony given by this witness from which the jury could infer that the streetcar had gained some 70 feet on defendant Chick's automobile, while the streetcar was going approximately 20 miles an hour and had slowed down to 15 or 16 miles an hour preparatory to stopping, though he estimated the automobile was travelling at a speed of 50 miles per hour.

George Gorciah testified that he was with his wife at the corner when the accident happened. That his attention was attracted to the accident by the application of brakes; that the vehicle was coming directly for a woman in the loading zone; that "the woman screamed, had her hands in the air, and the car hit the button and carried her, I think her coat caught under the car, and drug her up."

Henry Mack, a police officer attached to the Traffic Investigation Bureau, testified that he arrived at the scene of the accident at approximately 10:05 p. m. He observed an automobile facing north in the crosswalk on the east side of Crenshaw Boulevard, and a woman lying under the right side of the car. He observed skid marks which had a slight arch to the northeast, a slight arch to the right, and a curve to the left. The skid marks started just a few feet from the rail. The skid marks on the left side went over the outside of the button on the southeast end of the safety zone. The only point in which the left hand skid marks came near any portion of the safety zone was at the point at which the tire hit the button. That there were three "breaks" in the skid marks; that there was a one-foot break in the west skid mark and a 3-foot break in the east skid mark. This witness further testified that after the accident there was water in the street immediately to the north of the three-foot break in the tire mark. That aside from this one spot of water, the street was clear, immediately after the accident. The witness further testified that he asked the defendant Ralph Oscar Chick if those were his skid marks to which the defendant replied, "Yes." That the overall length leading up to the rear wheels of the vehicle was 115 feet; that the street was posted with 25-mile speed limit signs.

Defendant Ralph Oscar Chick, driver of the automobile in question, was called by plaintiff under section 2055 of the Code of Civil Procedure. He testified he was driving the car with the consent of his codefendant to whom it was registered. That 15 days prior to the accident the brakes on the car had been checked; that on the night in question he was proceeding home, driving at approximately 30 miles per hour. He testified that as he drove north, the weather was foggy up to approximately three blocks south of the intersection of Crenshaw and Hyde Park boulevards, at which point the fog had lifted, but that there was still a "haze." That with the aid of his headlights he could see approximately a block, or 200 feet, ahead. That he could see the reflection of his lights on the east curb about 75 to 100 feet ahead of him. That as he proceeded north on Crenshaw boulevard he was travelling approximately in the center lane, travelling over the eastern rail of the northbound track; that he was in that position when he reached the beginning of the streetcar tracks on Crenshaw boulevard and so continued north on Crenshaw. He did not observe any vehicle in the front or in the rear of him at any time after he reached the point where the streetcar tracks entered Crenshaw Boulevard.

He further testified that when he first observed the plaintiff he was some 75 feet away from her, that she was headed west, apparently going toward the safety loading zone. That she was about 10 or 15 feet north of the southerly button of the zone as she approached the zone. That when he first observed the plaintiff he applied his brakes and changed the direction of his vehicle to the right, from a northerly direction to a northeasterly direction. That when his automobile was about 20 feet from the south button of the south end of the loading zone the plaintiff suddenly turned about and ran from the loading zone back into the street. That he immediately applied his foot brake and his hand brake, and turned slightly to his left in an effort to avoid striking the plaintiff. That as he turned, his left wheel hit the southeast edge of the button at the southeast corner of the safety zone and that the wheels "bounded somewhat" after hitting the button. That the only time any part of his automobile was in contact with any portion of the loading zone was when the wheel hit the corner of the button. That the collision between plaintiff and the automobile of the witness occurred approximately a "second" thereafter at a point in the highway between the loading zone and the curb.

Ronald S. Siemund, called as a witness for the defendant, testified that he was driving on Crenshaw Boulevard near Hyde Park Boulevard at the time of the accident. That the automobile of the defendant was in the center of the area from the curb to the safety zone at the time of the collision and that it was also about the center of the safety zone lengthwise. That just before the accident he saw a shadow which appeared to be moving, but that he did not see the plaintiff in the safety zone.

The wife of the last-mentioned witness testified that at the time of the collision defendant's automobile was between the safety zone and the curb. That plaintiff was midway between the safety zone and the curb. This witness also testified that there was nothing "unusual" about the speed of defendant's vehicle.

Fred A. Webb, who was standing near the southeast corner of Hyde Park and Crenshaw boulevards at the time of the accident testified that when he first observed the automobile it was several carlengths south of the south end of the safety zone, between the easterly curb and the white line that runs southwesterly from the southeast corner of the safety zone diagonally to within a few feet of the track. That as the automobile moved in a northerly direction it seemed to go first toward the track, and then back toward the curb. That he saw an object between the curb and the streetcar tracks. That the vehicle was south of the crosswalk, between the track and the curb when the witness first heard the application of brakes. That before he heard it strike the object in the street, he heard it hit something else. That prior to the accident he observed that there were two lights on the automobile.

Appellant first contends that the evidence is insufficient, as a matter of law, to support the judgment.

[1, 2] When a judgment is challenged on the ground that the record is barren of any substantial evidence to support the same, it is well settled and firmly established in our law, as was stated in Arundel v. Turk, 16 Cal.App.2d 293, 295, 60 P.2d 486, 487, that "when a judgment is attacked as being unsupported by the evidence, the power of the appellate court in passing on this question begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the verdict rendered by the jury; and, on appeal from a judgment for defendant in an action for damages for negligence, all conflicts in the evidence must be resolved in favor of the defendant, and all legitimate and reasonable inferences indulged in to uphold the judgment, if possible; and, when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183."

[3-5] The case at bar presents substantial evidence which, if believed by the jury, tended to establish that defendant's automobile was traveling at a reasonable rate of speed at the time the driver thereof saw appellant moving from the curb toward the safety zone, and that his move to pass to the right of the zone and thus pass in back of her was the exercise of due care; that appellant turned suddenly again toward the curb; that the vehicle driver's efforts to avoid striking her were the acts of a reasonable and prudent person; that the proximate cause of the accident was the negligence of appellant in attempting to return to the curb. An appellate tribunal does not sit as a jury to determine issues of fact, the credibility of witnesses or the weight to be attached to their testimony. It is only when evidence upon its face may justifiably be held to be insufficient to support the ultimate issues involved that appellate courts are authorized to review the evidence, because, in such a case, it is not a review of a question of fact but purely one of law. The testimony in the case at bar, upon which the jury relied, does not admit of such stricture.

[6, 7] Appellant, however, contends that the testimony supporting the judgment came primarily, if not altogether, from the defendant driver when he was called as a witness under section 2055 of the Code of Civil Procedure. That because such testimony was not binding upon appellant, there is no conflict in the testimony as given by her and the witnesses sworn in her behalf. That, therefore the evidence, as a matter of law, is insufficient to support the judgment. Undoubtedly, it is true that any party to a lawsuit may call an adverse witness without being bound by the testimony of that witness, but "this testimony is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or if the case is before a jury, by the jury." Smellie v. Southern Pacific Co., 212 Cal 540, 559, 299 P. 529, 537. The jury in the instant case was therefore justified in considering the evidence of the defendant called under section 2055 of the Code of Civil Procedure, as merely creating a conflict with testimony in contradiction thereof, to pass upon the weight of such evidence, and if believed by them, to predicate a verdict thereon.

[8, 9] Appellant next complains of the ruling of the trial court admitting into evidence a photostatic copy of a map prepared by police officer Mack as part of his official report covering his investigation of the accident. Objection was made to the introduction of the map on the ground that it was hearsay. The objection was overruled. The ruling was correct. The map was separated from the officer's report and was offered to show various material points

observed and recorded by the witness on the evening of the accident. In other words, the physical facts as he observed them upon his arrival, such as the course of the skid marks, where they touched the safety zone button, where the automobile and appellant were when the officer arrived at the scene of the accident, where the water mark was from the thermos bottle admittedly carried by appellant. We perceive no prejudice to appellant because of the admission of the map in evidence. It was no more than an illustration. The witness, being under cross-examination at the time the map was introduced, could have been required to make similar marks and indications on the map then in evidence. When a map is introduced as in the case at bar, it is not used as evidence—it does not prove or tend to prove, in the sense of evidence, any fact; it simply contains figures drawn to suggest to the minds of the jurors the location of and the relations between objects about which the witness is testifying. In other words, it is merely illustrative of the testimony given by the witness. As such it is receivable by the jury and may be taken with them upon their retirement. The diagram here in question simply illustrated the relation between the objects about which the witness was testifying, as he saw them after the accident occurred, and served to make his testimony more understandable to the jury.

[10] Finally, appellant urges that the court erred in instructing the jury on the doctrine of contributory negligence. Appellant's contention in this regard is grounded on the claim that she was not bound by the testimony of defendant driver given pursuant to section 2055 of the Code of Civil Procedure, and that therefore, there was no evidence in the record to justify the court in giving instructions on the law of contributory negligence.

In view of what we have heretofore said concerning the right of the jury to consider such testimony in determining the issues of the case, it follows that the defense of contributory negligence having been pleaded and made an issue at the trial, it was the duty of the court to give proper instructions relative to the law applicable thereto. 19 Cal.Jur. sec. 159, p. 765; Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599; Mora v. Faville, 186 Cal. 199, 199 P. 17; Brown v. Yocum, 113 Cal.App. 621, 298 P. 845.

The testimony given by defendant driver creating as it did a conflict as to the position of the appellant at the time she was struck and as to her conduct and actions just prior to and at the time of the accident, it was for the jury to determine, under proper instructions from the court, whether or not she was guilty of negligence which proximately contributed to her injuries. No claim is made that the instructions given were not a correct exposition of the doctrine of contributory negligence.

In support of her last-mentioned argument, appellant cites us to three cases, but each is easily distinguishable from the case now engaging our attention. The case first cited is Shippy v. Peninsula Rapid Transit Co., 197 Cal. 290, 240 P. 785, but in that case defendants by their answer presented no issue of contributory negligence, nor was the case tried upon the theory that plaintiff's contributory negligence was an issue therein. In Evarts v. Santa Barbara, etc. Ry. Co., 3 Cal.App. 712, 86 P. 830, the defendant submitted no evidence whatever and the cause was tried upon the testimony of the plaintiff's witnesses alone. In the third case of Van Horn v. Pacific Refining etc. Co., 27 Cal.App. 105, 148 P. 951, there was no evidence adduced on the issue of contributory negligence sufficient to warrant the giving of requested instructions on that issue, and the defendant had not presented the issue of contributory negligence in its answer.

We find no error in the record. The judgment is therefore affirmed.

YORK, P. J., and DORAN, J., concur.

84 Cal.App.2d 783

In re SECORD'S ESTATE.

Civ. 13492.

District Court of Appeal, First District,
Division 2, California.
April 12, 1948.

1. Executors and administrators 🔑176

Alleged fact that widow's petition for a family allowance from deceased husband's estate was to preclude claimant, who had filed suit against the estate on a rejected claim, from having recourse to assets of the estate, did not preclude widow from asserting petition for a family allowance. Probate Code, § 680.

2. Executors and administrators 🔑176

Probate court has no discretionary right to withhold from a widow a family allowance from her deceased husband's estate, where at time of his death she had a right to receive support from him. Probate Code, § 680.

3. Executors and administrators 🔑176

A family allowance to widow from deceased husband's estate was intended by the legislature to continue, during settlement of the estate, the support that the wife was previously receiving or was at least entitled to receive. Probate Code, § 680.

4. Executors and administrators 🔑176

Where widow had right to support from her husband up to the time of his death, she was entitled to a family allowance from his estate after his death as a matter of right. Probate Code, § 680.

5. Executors and administrators 🔑190

Widow's right to receive a family allowance from deceased husband's estate pending its administration was not waived by her failure to apply therefor at time of her appointment as executrix. Probate Code, §§ 680, 681.

6. Executors and administrators 🔑176

Widow was not precluded from asserting right to a family allowance from deceased husband's estate because she had separate income from properties formerly held in joint tenancy. Probate Code, § 680.

7. Executors and administrators 🔑176

Widow's right to a family allowance from her deceased husband's estate, was not affected by disputed claim of deceased husband's former wife against the estate for arrearages allegedly due from the deceased husband for support during her minority of his daughter by former marriage. Probate Code, § 680.

Appeal from Superior Court, City & County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Walter Secord, deceased, wherein Fannie Shliff Secord filed a petition as widow for a family allowance from the deceased's estate and wherein a claim was filed by Muriel Ann Secord and Clara Orloff Secord. From an adverse order, Fannie Shliff Secord appeals.

Order reversed with directions.

Abraham Setzer, of San Francisco, for appellant.

Gregory S. Stout, Macklin Fleming and Heller, Ehrman, White & McAuliffe, all of San Francisco, for respondents.

OGDEN, Justice pro tem.

This is an appeal from an order denying the petition by a widow, the appellant herein, for a family allowance from the estate of her deceased husband pursuant to the provisions of Section 680 of the Probate Code.

The decedent died testate, the provisions of and the beneficiaries of his will are not, however, disclosed by the record. His estate, as disclosed by the inventory, consists of household furniture, an automobile, an interest in a promissory note and a small amount of traveler's checks all of the total value of $4,370. Prior to his death, he and appellant owned as joint tenants a bank account in the sum of $800 and two parcels of real property producing a gross rental of $300 per month. Appellant, as the survivor, became and was, at the time of her petition, the sole owner of the property so held in joint tenancy. She testified, however, that the bank account had been expended for funeral and other expenses, that the rental from the real property had not met the cost of necessary repairs thereto, and that it had become necessary for her to borrow money upon which to live.

In addition to appellant, decedent left surviving him an adult daughter by a prior marriage. A claim was filed by his former wife against the estate in the approximate sum of $9,000, based upon arrearages claimed to be due under a court order for the support of this daughter during her minority. It was rejected by appellant in her capacity as executrix and suit thereon was thereupon instituted against the estate. Shortly thereafter appellant petitioned the probate court for an allowance from the estate for her support, suggesting the sum of $500 per month effective as of the date of decedent's death.

At the hearing oral objection to the granting thereof was made by counsel representing the claimant. The probate judge denied the petition in toto.

[1] It is the position of respondent that the probate court was entitled to infer from the failure of the widow to apply for an allowance until after suit against the estate upon the rejected claim was instituted and from the excessive amount of the request, which if allowed would have consumed the entire assets of the estate in less than nine months, that no allowance from the estate was in fact necessary for her support, and that it was requested solely as a device to preclude the claimant, if successful in the pending litigation, from recourse to the assets of the estate. We agree that the inference is strong that such was the principal motive of the appellant. It does not follow, however, that solely by reason of such a motive the widow is precluded from asserting the right to support from her husband's estate given her by Section 680 of the Probate Code.

[2] The authorities relied upon do not support the contention of respondent that the granting or withholding of that right is discretionary with the probate court. Those authorities recognize a wide discretion in the determination of the amount of the allowance (In re Lux's Estate, 100 Cal. 593, 35 P. 341; In re Estate of Bump, 152 Cal. 274, 92 P. 643; In re Estate of Cowell, 164 Cal. 636, 130 P. 209; In re Estate of Nelson, 167 Cal. 321, 139 P. 692; In re Estate of Clark, 96 Cal.App. 243, 274 P. 76; In re Estate of Coffin, 16 Cal.App.2d 532, 61 P.2d 81) and in the determination, where the estate is solvent, of its duration (In re Estate of Clark, supra; In re Estate of Taylor, 12 Cal.App.2d 374, 55 P.2d 537; In re Estate of Coffin, supra; In re Estate of Kennedy, 64 Cal.App.2d 757, 149 P.2d 319). Where the wife has no legal right of support from her husband at the time of his death, it has been held that she has no right to support from his estate (In re Estate of Brooks, 28 Cal.App.2d 748, 171 P.2d 724) and the right to an allowance may be waived by agreement. (In re Estate of Schwartz, 79 Cal.App.2d 301, 179 P.2d 868). It is not waived, however, by mere delay in petitioning therefor. (See In re Estate of Fretwell, 154 Cal. 638, 98 P. 1058, where there was a delay of three years. Here the petition was filed within five months after appellant's appointment as executrix.) Our attention has been directed to no instance, however, and we know of none, where it has been held that where the right to receive support from her husband existed at the time of his death it is discretionary to grant or deny the right to receive support from his estate to an extent commensurate with the needs of the widow and the assets of the estate.

[3] As stated by Justice Traynor in Re Estate of Brooks, supra [28 Cal.2d 748, 171 P.2d 727], "* * * a family allowance was intended by the Legislature to continue, during the settlement of the estate, the support that the wife was previously receiving or was at least entitled to receive." It was said in Re Lux's Estate, supra [100 Cal. 593, 35 P. 344], "Its language is express and mandatory, and in the language of the counsel for the appellant, 'the duty of maintaining the family, which the law imposed upon deceased husband or father in his lifetime, is continued against his estate pending its administration,' if the estate is insolvent."

[4-6] Here the right of appellant to receive support from her husband up to the time of his death is not disputed. It appears from the record, at least inferentially, that at the time of his death she was living with

and supported by him. Her right to receive, by way of family allowance, that support from his estate pending its administration was not waived by her failure to apply therefor at the time of her appointment as executrix. Section 681 of the Probate Code expressly contemplates and authorizes such application being made subsequent to the filing of the inventory. She was not precluded from asserting that right because of any separate income from the properties formerly held in joint tenancy. (See In re Lux's Estate, supra, where the Probate Court was directed to make an allowance to the widow "without regard to the fact that she may have separate property sufficient for her support." See also In re Estate of Cowell, supra; In re Estate of Finch, 173 Cal. 462, 160 P. 556; Murray v. Guarantee Trust and Savings Bank, 79 Cal.App. 69, 248 P. 1039.

[7] Appellant's right to a reasonable allowance for her support was not affected by the disputed claim of the former wife. In Re Estate of Ettlinger, (56 Cal.App.2d 603, 132 P.2d 895, 896) this court held that the widow's right to family allowance took precedence over the contractual obligations of the deceased arising from a property settlement agreement with a former wife. The following language expressed in that case is equally applicable here: "The rights of the widow to a family allowance, and the status of the orders granting an allowance are covered by statute. Section 680 of the Probate Code provides that the widow is 'entitled' to such reasonable allowance as may be necessary. 'Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration.' Section 950 of the same code deals with the order of payment of debts of decedent. The family allowance is listed fourth in order, 'Mortgages and other liens' are listed seventh, 'Judgments' against decedent are listed eighth, and 'all other demands against the estate' are listed ninth in order. There is no uncertainty or ambiguity in this language, nothing which calls for interpretation or judicial conjecture. The widow and children are given a preferred right to such an allowance and this must be paid ahead of all claims except the three prior charges above listed."

The order is reversed with directions to the Probate Court to make its order granting to appellant a family allowance in such amount and for such period as in its discretion it shall determine to be reasonable and necessary, in accordance with the views herein expressed.

NOURSE, P. J., and DOOLING, J., concur.

85 Cal.App.2d 140

INNES FOOD EQUIPMENT CO. v. SANGUINETTI FRUIT CO. et al.

Civ. 3712.

District Court of Appeal, Fourth District, California.

April 21, 1948.

1. Sales 🔑72(5)

Under contract requiring buyers to pay for installation of potato washer if installation "works properly", quoted words were to be taken in their common usage and understanding and it was unnecessary that washer perform to satisfaction of buyer, but merely that it perform as well as a reasonable person would expect under circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Works Properly".

2. Sales 🔑72(5)

Where potato washer installed by plaintiff for defendants was an experimental device, the parties in making defendant's liability to pay conditional upon proper performance by washer would not be deemed to have contemplated same degree of performance as if a widely used standard machine were involved.

3. Sales 🔑72(5)

A provision of contract for installation of potato washer making buyers' liability contingent upon the installation working properly did not necessarily require that cost of operation be less than by hand washing.

4. Sales ⚷181(13)

Conflicting evidence with respect to operation of potato washer installed by plaintiff for defendants sustained finding that plaintiff's performance complied with provision of contract making buyers' liability to pay contingent upon the installation working properly.

5. Appeal and error ⚷931(1)

On appeal conflicts in evidence are to be resolved in favor of trial court's finding.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by the Innes Food Equipment Company against the Sanguinetti Fruit Company, a copartnership composed of Louis R. Sanguinetti and others, to foreclose a lien for labor and materials on real property. Judgment for the plaintiff and the defendants appeal.

Judgment affirmed.

Calvin H. Conron, Jr., of Bakersfield, for appellants.

Siemon, Maas & Siemon, Alfred Siemon, Walter L. Maas, Jr. and Bennett Siemon, all of Bakersfield, for respondent.

GRIFFIN, Justice.

This is an appeal by defendants from a judgment in favor of plaintiff foreclosing a lien for labor and materials on certain real property leased to defendants Franklin D. Rakow and Sanguinetti Fruit Company by the defendant Southern Pacific Railroad Company, a corporation. Plaintiff was engaged in the business of developing and making equipment for harvesting potatoes. On November 7, 1945, plaintiff wrote Rakow a letter reading in part as follows:

"This letter is written to set out the agreement we have had in our discussions during the past weeks, in concise form.

"This Company is to install in your building at Edison, Calif. equipment to handle potatoes in bulk the same being a reinforced concrete tank, holding 28,000 to 30,000 pounds of potatoes. And a suitable conveyor to convey the potatoes from the bottom of the tank to your sorting and grading means and a pump to pump the muddy water from a sump in or by the bottom of the tank and proper pipes to convey the muddy water away from the pump.

"The cost of this equipment will be the cost of necessary material, the labor and our regular overhead constant but not addition for profit.

"Next June 15th, *if this installation works properly* you to repay this Company the cost of the installation less 10% * * *

"If this proposal is agreeable to your recollection of our discussions will you kindly acknowledge its receipt as a memorandum for our files." (Italics ours.)

On November 10, 1945, plaintiff received a reply as follows:

"This is to acknowledge receipt of your letter written Nov. 7, 1945, in which you set forth certain agreements with regard to installing a concrete tank, mud pump and conveyor for handling bulk potatoes.

"The terms set forth in this letter are agreeable to me and I so accept them.

"With the sincerest hope that it all operates perfectly and efficiently".

This constitutes the extent of the written agreement between the parties. The main question presented is whether there is sufficient evidence to justify the finding of the court that plaintiff's performance of its part of the contract satisfied the conditions in that writing which provided for payment *"if this installation works properly"*.

Mr. Innes, president of plaintiff corporation, testified that prior to sending these letters he and defendant Rakow went to Pixley to see a Siemons Washer in operation which was a similar potato washer but operating only with one tank. Rakow stated that he needed one double that capacity and instructed the plaintiff to prepare plans and specifications for such a double washer. Plaintiff submitted plans and a model similar to the Siemons' Washer which provided for a floor in a sunken pit with a 45 degree angle slope. He testified that Rakow insisted upon the double tank washer even after he pointed out to him that if it were so constructed the slope of the floor would then only be 23 degrees and would not be great enough to provide for a free flow of the potatoes; that acting upon Rakow's instructions plaintiff then caused other specifications to be drawn and another model made of the washer, as finally built. Rakow testified that he knew the proposed slope was only 23 degrees and that he made no objections thereto. The washer was then constructed according to plans, and while partially completed, it was tested by processing an 85 carload crop of potatoes belonging to one Neff. Thereafter, according to plaintiff's evidence, the washer, after making certain changes and adjustments, was turned over to Rakow on April 29, 1946, and he was billed for the labor and material furnished in accordance with the contract.

There was evidence that Rakow was present during a great deal of the time the washer was being constructed and that he approved certain items going into its construction and was present when it was tested with the Neff potatoes and helped Neff operate the pit at that time.

Rakow used the washer between April 29th and May 23rd, and his entire crop of 67,000 sacks of his potatoes were processed through this washer. Demand was made by plaintiff for payment of the agreed price on June 15, 1946, but defendants refused. Innes testified that Rakow did not complain about the operation of the washer until he asked him for payment. However, Rakow testified that he made continuous complaints about its operation. The evidence relied upon by defendants is sharply in conflict with the testimony related by plaintiff.

Rakow testified that in 1945 the matter of construction, by plaintiff, of an experimental bulk potato washer in the Edison area was generally discussed between plaintiff's president, Rakow, and other interested growers and that such a washer was to be constructed by plaintiff at this particular shed and that Rakow was to pay for it only if it should prove satisfactory; that he agreed to this arrangement provided it would be of a double tank type so he could wash his own potatoes in one tank and those of customers in the other; that plaintiff prepared the plans and model which he approved, having confidence in plaintiff; that they all believed that a floor slope of 23 degrees would work properly; that they then wrote the letters referred to; that to make room for the new washer Rakow removed one of his sack method washers and thereafter plaintiff constructed the new washer; that in February, 1946, plaintiff tested it; that between April 29th and May 23rd, 1946, he used it and the entire unit failed to work in a satisfactory manner; that the slope of the floor was such that the potatoes failed to slide down it to the conveyor and had to be pushed down manually; that the equipment broke down at least once a week; that the pump continually froze up and broke down; that the entire equipment had various other specified faults; that he had to suspend further washing by this method and went back to the hand method formerly pursued by him at less expense; that he continually advised plaintiff that the machine was not working properly and that plaintiff made further changes in it even after May 23, 1946, and after he finished using it; that about June 1st, 1946, plaintiff asked him to pay $2,000 for the use of the washer in lieu of the contract price; that defendant refused and plaintiff billed him for the contract price of $7,102.79. A lien was then filed.

On this evidence the trial court found generally in favor of plaintiff and against the defendants' contention and specifically found that the washer was completed and accepted by Rakow on April 29th, 1946; that the washer worked properly and was without structural defect except for the slope of the floor, which was insufficient to cause all of the potatoes to flow and required that some of each washing be manually moved into the pit and that plaintiff and defendant Rakow were equally responsible for any such defect; that defendant Rakow waived any structural defect in such improvement by acceptance and use of the same. Judgment was entered accordingly.

Defendants appealed and argue that the writing between the parties clearly indicates that the washer "should perform in a manner satisfactory to Rakow" before he was obligated to pay for it, citing 46 American Jurisprudence, 658, sec. 495, and the rule set forth in Thomas Haverty Co. v. Jones, 185 Cal. 285, 296, 197 P. 105, 110, that "A stipulation in the contract to perform to the satisfaction of one of the parties only calls for such performance as should be satisfactory to a reasonable person", and that since Rakow acted as a reasonable person in rejecting the washer and since there was no evidence that he thus acted in bad faith, the evidence does not support the finding and judgment of the court; that since the court found that the slope of the floor of the washer was insufficient to cause all of the potatoes to flow and required that some of each washing be manually moved into the pit, such a finding was, in fact, a finding that the washer was in fact defective from a standpoint of operative fitness and therefore Rakow's dissatisfaction was reasonable, citing Fruit Growers' Supply Co. v. Goss, 4 Cal.App.2d 651, 41 P.2d 357; that if plaintiff believed that the floor slope was too flat, as designed, and nevertheless built it in such manner, even with the knowledge of Rakow, the plaintiff, by reason thereof, assumed all the risks involved as to whether or not the washer would perform properly.

[1-4] The written agreement does not provide, as suggested by defendants, that the washer must work "satisfactory to defendant Rakow" before he was obligated to pay for it, but only provides that "Next June 15th if this installation works properly", he must pay. There is a great deal of distinction between this contract and a contract to be performed to the satisfaction of one of the parties. The words "works properly" should be taken in their common usage and understanding. This does not mean that it would have to perform to the satisfaction of Rakow but, considering all of the factors involved, that it would have to perform as well as a reasonable person would expect under the circumstances. The installation admittedly was of an experimental nature and the parties naturally could not expect the same degree of performance as they could have expected from a standard machine that had been widely used and tested. Plaintiff's evidence shows that instead of rejecting the washer, Rakow in fact retained it after an experiment with the Neff potato crop, and in fact used it to wash and clean his entire crop. Innes endeavored to account for the claimed temporary mechanical failures, denied the facts generally related by Rakow, and then testified that as to the plans and specifications "every item that we designed to put in got his approval" first; that the double pit, with the resulting 23 degree slope, was built on the insistence of Rakow and against the advice of plaintiffs; that in his estimation, when the washer was turned over to Rakow on June 15th it operated in a proper manner and was adequate. The fact that some of the potatoes had to be manually forced into the pit did not necessarily defeat its utility. Defendants' entire crop of potatoes was processed through the washer. There was no evidence to the effect that the washer did not handle the potatoes as fast as they were harvested and it must be assumed that the potatoes were washed at least as expediently and as well as by the old method. The handling of a crop of potatoes of this size was probably more than a one-man operation and it cannot be assumed that the hiring of one additional man to manually force the potatoes into the pit would defeat the purpose and objective of the washer. The contract does not necessarily require that the cost of operation, compared to the old method, be lowered. Potatoes are a perishable crop and the market fluctuates from day to day. It is entirely possible that potatoes could be processed faster through the bulk method than the old method and that a somewhat higher cost would not necessarily mean less profit.

[5] The real question, therefore, is whether the evidence justifies the finding of the court that plaintiff's performance of its part of the contract satisfied the conditions set forth in the agreement. Since all conflicts in the evidence must be resolved in favor of such finding (Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301), it appears to us that there is sufficient evidence to support such a finding and the judgment. Jackson v. Porter Land & Water Company,

151 Cal. 32, 90 P. 122; Burrell v. Southern California Can. Co., 35 Cal.App. 162, 169 P. 405; 12 American Jurisprudence pp. 921-922, sec. 355.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

85 Cal.App.2d 119

STARK v. MINTZ et al.

Civ. 16231.

District Court of Appeal, Second District,
Division 1, California.
April 20, 1948.

Rehearing Denied May 6, 1948.
Hearing Denied June 10, 1948.

1. Divorce 🔑254

A complaint, alleging that defendant, in her previous action against plaintiff for divorce, falsely alleged that certain realty was community property, that trial judge was never informed that realty was husband's separate property, that husband was present in court at time of trial, and that judge stated orally that realty should be husband's if wife remarried, which she did, stated no cause of action to vacate portion of divorce decree awarding realty to wife on ground of extrinsic fraud.

2. Judgment 🔑375

A decree may be vacated for fraud only when fraud is extrinsic or collateral to questions examined and determined in action.

3. Judgment 🔑375

Fraud or mistake is "extrinsic," so as to authorize vacation of decree therefor, when it deprives unsuccessful party of opportunity to present his case to court.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud" and "Extrinsic Mistake".

4. Judgment 🔑511

Where unsuccessful party to action was kept in ignorance thereof or prevented from fully participating therein by fraud, judgment is open to attack at any time on ground of "extrinsic fraud".

5. Judgment 🔑511

Fraud on party given proper notice of action against him, not prevented from fully participating therein, and having opportunity to present his case, is "intrinsic," though he does not appear before court, and he cannot attack judgment against him on ground of fraud after lapse of time for appeal from or other direct attack on judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Intrinsic Fraud".

6. Divorce 🔑152, 254

A decree granting wife divorce and awarding her property, which she alleged and court found was community property, was not void on its face for lack of jurisdiction.

◆

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action by Adolph Stark against Rose Mintz and others to vacate a portion of a divorce decree disposing of certain realty. From a judgment of dismissal after sustaining a demurrer to plaintiff's third amended complaint, plaintiff appeals.

Affirmed.

Elon G. Galusha, of Los Angeles, for appellant.

Norman A. Obrand, of Los Angeles, for respondents.

BARTLETT, Justice pro tem.

The action is one to vacate a portion of a divorce decree rendered fourteen years ago, insofar as that decree made disposition of certain real estate. The Third Amended Complaint alleges that in the action of Stark v. Stark, D-117,728, the plaintiff in that action (the respondent Rose Mintz, formerly Rose Stark, in this case) alleged that the real property described in the complaint in this action was community property; that this allegation was false; that the property was acquired by appellant and the respondent in September 22, 1923, as joint tenants, "at which time they entered into possession of said premises as their home and homesteaded same and occupied same as such"; that plaintiff never entered into an agreement to change the character of the property but on information and belief, the judge who tried the case was never informed that said property was the separate property of appellant; that the defendant in that action, the appellant here, was present in court at the time of the trial and the court stated that plaintiff Rose Stark should have the right of the use and occupancy of the real estate and that in the event Rose Stark should remarry, the real estate should be his; that recently Rose Stark has remarried and now resides in Palm Springs, California; that "through mistake, inadvertence or otherwise" the decree as drawn, signed by the judge and entered, did not comply with the statement made concerning it orally by the court.

Appellant further alleges that by the decree in Stark v. Stark he was ordered by the court to execute a deed to the property in question but that he refused to do so and that following such refusal the court ordered the then Court Commissioner Kurtz Kauffman to do so in appellant's behalf, which was done on March 21, 1934, and the deed was recorded on that date. The Third Amended Complaint also alleges that the parties in Stark v. Stark owned other property which was community property, consisting of money and real estate in Brooklyn, N. Y., but that Rose Stark did not disclose this fact to the court. The complaint is silent as to whether any disposition of this property was made in the judgment. At any rate, no complaint is made concerning it.

The complaint then alleges certain claims of title made by the other respondents and asserts that those claims are without right.

[1-5] It is apparent that this pleading stated no cause of action and that the court's ruling was correct. A long line of decisions, from Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St. Rep. 159, to the present day, have held that a decree may be vacated for fraud only when that fraud is extrinsic or collateral to the questions examined and determined in the action. Here the appellant was deprived of no opportunity to present his case in court, nor was he in ignorance of the trial—in fact, he was present at the trial. As to just what constitutes extrinsic fraud is clearly set forth in Howard v. Howard, 27 Cal.2d 319, at pages 320, 321, 163 P.2d 439, 440: "Defendant concedes that the divorce provisions of the Nevada decree are not open to attack, but he contends that the money provisions thereof are not binding, on the ground that they were obtained by extrinsic fraud. 'Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St. Rep. 117; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98. See 23 Cal.Law Rev. 80; 9 Cal.Law Rev. 156. If an unsuccessful party to an action has been kept in ignorance thereof, Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Zaremba v. Woods, 17 Cal.App.2d 309, 61 P.2d 976, or has been prevented from fully participating therein, Caldwell v. Taylor, supra, there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; Abels v. Frey, 126 Cal.App. 48, 14 P.2d 594; Langdon v. Blackburn, 109 Cal. 19, 41 P. 814. Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack. Langdon v. Blackburn, 109 Cal. 19, 41 P. 814; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St. Rep. 117; see Eichhoff v. Eichhoff, 107 Cal. 42, 48, 40 P. 24, 48 Am.St.Rep. 110.' Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105, 107."

[6] Appellant cites many authorities to the effect that the court has power to set aside a judgment which is void on its face for lack of jurisdiction but that question is not involved in the case we have before us. There was nothing on the face of the record in Stark v. Stark indicating any lack of jurisdiction to make the decree rendered. Rose Stark alleged that the property involved was community property. The court found that it was, granted a divorce on the grounds of extreme cruelty and awarded her the property. With such a record pleaded in appellant's complaint there is no construction which could be placed upon the judgment that would enable it to be said that the judgment was void on its face.

The judgment is affirmed.

DORAN, Acting P. J., and WHITE, J., concur.

85 Cal.App.2d 22

CAMERON v. CAMERON.

No. 13664.

District Court of Appeal, First District, Division 1, California.

April 15, 1948.

1. Husband and wife 🔑279(2)

Generally, agreements by husband and wife, upon separation, for support fall into three categories, namely, contracts in which support and maintenance provisions are in nature of alimony and are separable from provisions that divide property, contracts in which support and maintenance provisions are a part of division of property and contracts in which wife waives all support and maintenance, or all support and maintenance except as provided in agreement, for consideration of receiving a more favorable division of the community property, and court has power to modify alimony provisions in first two classes of contracts but not in the third class.

2. Husband and wife 🔑279(2)

In determining whether agreement by husband and wife, upon separation, for support and maintenance was of class over which court had power to modify provisions therein for alimony, court should examine the agreement, circumstances under which it was made and nature and value of property as related to its division and amount of periodic payments, giving consideration to statutory rules on the subject.

3. Appeal and error 🔑931(1)

Appellate court must take facts most strongly in favor of respondent, including all reasonable inferences therefrom.

4. Husband and wife 🔑299(1)

Effect of decree granting wife separate maintenance was to establish wife as innocent party and husband as wrongdoer.

5. Husband and wife 🔑279(2)

Where it could be inferred from circumstances that husband transferred home to wife because of his guilt in breaking up marriage and wife's condition of health, and not because of any promise on wife's part to accept only $75 per month support, trial court had power to disapprove agreement in so far as it limited husband's obligations of support to $75 per month.

6. Appeal and error 🔑1013
Husband and wife 🔑298(1)

Award of support in wife's suit for separate maintenance is a matter in discretion of trial court and must be upheld unless there is a clear abuse of discretion.

7. Husband and wife 🔑283(1)

A wife who is owner of nonincome-producing property is not required to have recourse to such property for her support before seeking support from husband.

8. Husband and wife 🔑298(1)

Evidence failed to show that trial court abused its discretion in awarding wife support in amount of $125 per month in her suit for separation.

9. Divorce 🔑223

In husband's divorce action wherein wife filed cross-complaint for separate maintenance, allowance of counsel fees to wife was discretionary.

10. Divorce ⚷227(1)

In husband's action for divorce, wherein wife filed cross-complaint for separate maintenance, award to wife of counsel fees in sum of $250 was not an abuse of discretion.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Jesse B. Cameron against Louise A. Cameron for divorce, wherein the defendant cross-complained for separate maintenance. From judgment denying plaintiff a divorce, granting defendant decree of separate maintenance, awarding her sum of $125 per month for support and awarding her attorney's fees in the sum of $250, the plaintiff appeals.

Affirmed.

Anthony S. Devoto, of San Francisco, for appellant.

Henry Jacobsen, of San Francisco, for respondent.

BRAY, Justice.

Plaintiff husband commenced an action for divorce on the ground of extreme cruelty. Defendant wife cross-complained for separate maintenance. After trial, the court denied the husband a divorce, granted defendant a decree of separate maintenance, awarded her the sum of $125 per month for support until the further order of the court, and awarded her attorney fees in the sum of $250. The plaintiff appeals.

No attack is made on the action of the court in denying plaintiff a divorce, or in granting defendant a decree of separate maintenance. It is contended, however, that the court erred in allowing the sum of $125 per month as support and in allowing attorney's fees, and also in failing to approve the property settlement agreement entered into between the parties.

The parties were married in 1914, and lived together until their separation on February 10, 1942. On March 13, 1946 (about ten months prior to the filing of suit) they entered into an agreement denominated "Property Settlement Agreement." In his complaint plaintiff alleged that the rights of the parties in the community property were adjusted in this agreement. Defendant, in her answer, denied this allegation, and in her cross-complaint alleged that there was community property in the possession of plaintiff, the exact nature of which was known to him but not to her, and asked permission to amend to include a description of it when ascertained. It asked that the court inquire into the community property and award all of it to defendant, because of plaintiff's extreme cruelty.

Neither in the decree nor in the findings is there any mention that there is or is not any community property, nor does the court attempt to dispose of any community property. There is no mention of the agreement in the decree, and the only mention of it in the findings is in the following language: "That although the plaintiff and cross-defendant and defendant and cross-complainant *purported* to enter into a written agreement disposing of their community property rights and the duty of the plaintiff and cross-defendant to support and maintain the defendant and cross-complainant, the court disapproves the said agreement in so far as the same purports to limit the obligation of the plaintiff and cross-defendant to support and maintain the defendant and cross-complainant to the sum of Seventy-five Dollars ($75) per month on the ground that the court finds that the said sum of Seventy-five Dollars per month ($75) for said purposes is both unfair and inadequate for said purposes; * * *." (Emphasis added.)

Appellant contends that respondent received the entire community property and agreed in consideration thereof to accept the sum of $75 per month support, and hence, that the court had no power to increase the amount to be paid; that this was the type of agreement which in Adams v. Adams, 29 Cal.2d 621, 177 P.2d 265, was held must either be approved or disapproved in whole and not in part.

[1] In that case, the court held that there are generally three categories into which fall agreements entered into by husband and wife, upon separation, for support and maintenance: (1) "* * * contracts in which the support and maintenance

provisions are in the nature of alimony, whether in lump sum or monthly payments, and are separable from the provisions that divide the property. The contract may even provide solely for support and maintenance without reference to a division of property." 29 Cal.2d at page 624, 177 P.2d at page 267. (2) "* * * contracts in which the 'support and maintenance' provisions are not in the nature of alimony but are part of the division of property. This category also includes contracts that provide solely for the payment of monthly or lump sums 'in lieu of community property.'" 29 Cal.2d at page 625, 177 P.2d at page 268. (3) "* * * contracts in which the wife waives all support and maintenance, or all support and maintenance except as provided in the agreement, in consideration of receiving a more favorable division of the community property." As to contracts in the first and second class, the court has the power to modify the provisions for alimony; but as to those in the third class, the court cannot change the alimony provisions, but must either approve or reject the contract as a whole.

[2] It is often difficult to determine into just which category a particular contract falls. As said in the Adams case, 29 Cal.2d at page 625, 177 P.2d at page 268, in holding that the trial court when it renders a decree should determine which type of contract the one in question is: "'The court could examine the agreement, the circumstances under which it was made, and the nature and value of the property as related to its division and the amount of the periodic payments giving consideration to the statutory rules on the subject.'"

The agreement in question here differs from the one in the Adams case, in that in the latter it states that the wife expressly waives any right to support and maintenance other than, or in addition to, support for 18 months "in view of her skill and training as an experienced secretary, and by reason of her ability to become gainfully employed * * * and in consideration of [the husband's] agreement to transfer and assign to [her] the major portion of the community property as hereinabove set forth." 29 Cal.2d at page 622, 177 P.2d at page 266. In the agreement in question here, it does not set forth the community property or the claim that the wife is receiving a major portion of that property. Moreover, the allowance in the agreement is not a sum certain but one to continue until the remarriage of the wife and also is the exact sum which the husband had been paying her from January 7, 1943, to the time of the execution of the agreement.

The preamble of the agreement sets forth: "* * * it is the mutual wish and desire of said parties that a full and final adjustment of all their property rights, interests and claims be had, settled and determined. * * *" The agreement does not state what community property the parties have, the sole reference to any real or personal property being the statement that the wife is to receive the real property at 55 Rosewood Drive, San Francisco (actually, it was only the equity therein), and all the household furniture and personal property therein, save articles of "personal value to the husband." It provides a waiver of each party against any and all property that either might thereafter acquire, and that "The wife does and shall accept the provisions herein made for her full satisfaction of her right to the community property of the respective parties hereto, and in full satisfaction of her right to support and maintenance."

Interpreted in the light of the circumstances of the case, the agreement supports the construction which the court evidently gave it. According to the respondent's testimony, appellant retained an automobile worth $2000, had money in the bank, had told her that he was hiding money, and she believed there was more community property than that which she received. (Apparently there was some foundation for this belief, as he told her was "hiding money," and she did not know at the time that he had $1850 with which to buy a lot for his affinity.) Appellant testified that there was no other community property. However, he had a collection agency business with one of the major oil companies as a client and also was in the real estate and business opportunity business. The year before the execution of the agreement he was able to buy a lot costing $1850 for the woman who the evidence indicates came between him and respondent. For more than a year appellant lived with this woman, and when she died, about three months before the agreement was signed, he paid certain expenses of her last illness, and the cost of her grave. He was repaid by her estate for the cost of the lot and the moneys advanced by him. He contends that all these expenditures were made from the receipts from the sale of his diamond ring, presumably his separate property. Appellant was evasive about the amount of income from his business. "But there were so many entertainment items that I spent money on in the pursuit of my business that I lost money. * * *" "Nevertheless, there are lots of women clients I take out—I have got to take them out; it is my business." Appellant contended that he had sold the automobile. Respondent denied the claim of appellant that she signed the agreement because she believed appellant was turning everything over to her. She testified that she signed it because appellant had promised that "if and when his circumstances became so that he could afford to pay more, or your [respondent's] circumstances readjusted themselves so you needed more, that he would see to it that you got it." Appellant admitted this promise. This testimony does not vary the terms of the contract, but shows its true consideration.

[3-5] On this appeal, we must take the facts most strongly in favor of respondent, including all reasonable inferences therefrom. Examining the agreement in the light of the circumstances, it appears that the agreement is not one in which the wife in consideration of receiving a more favorable portion of the community property bound herself to only $75 per month support. Even assuming that the property received by her constituted all of the community property, it does not follow necessarily that it was given or received on condition that she would limit her claim for support to $75 per month. The testimony shows clearly that the break-up of the marriage was due to the fact that appellant became enamored of his secretary, finally left respondent, and made his home with his affinity. Particularly in view of the condition of respondent's health, it would not have been unreasonable, had there been no property settlement, for a court to award the entire community property to respondent, as well as require a reasonable support to be paid. "The effect of the separate maintenance decree was to establish [the wife] as the innocent party and the husband as the wrongdoer * * *." Cardinale v. Cardinale, 8 Cal.2d 762, 767, 68 P.2d 351, 353. The circumstances support the inference that appellant transferred the home to respondent because of his guilt and her condition, and not because of any promise on her part to accept only $75 per month support.

The case of Majors v. Majors, 70 Cal.App.2d 619, 161 P.2d 494, cited by plaintiff, is not in point. In that case the amended complaint set up the property settlement executed by the parties and prayed that it be approved by the court. The defendant defaulted. At the trial "No suggestion was made to the court that the agreement was in any respect unreasonable or unjust to either party nor that plaintiff's consent thereto had not been given voluntarily and advisedly." 70 Cal.App.2d at page 623, 161 P.2d at page 496. In spite of the fact that plaintiff was not asking for support and was asking that the agreement be approved, and offered no evidence to show that the agreement was unfair, the court disapproved the agreement and ordered defendant to pay $1 per month support. The appellate court very properly held that the trial court had no power, under the circumstances, to disapprove the agreement, nor in a default case to grant relief not prayed for.

While the complaint stated that the rights of the parties in the community property were settled by the agreement, it did not specifically ask that the agreement be approved. The cross-complaint asked that all community property be awarded to respondent. However, it is doubtful if the court was asked to pass on, or could have passed on, the agreement as a whole. At the time of the trial, the property had been sold, the mortgage against it paid, and respondent had realized the sum of $11,000. Apparently, after the execution of the agreement, and long before suit, appellant joined in a deed by which the property was transferred to a purchaser. Certainly, the agreement alone would not have enabled respondent to have conveyed title to the purchaser. In other words, appellant did not wait to find out if a court would approve the entire transaction, as it would have to do under appellant's theory. Appellant by his own act, in completely disposing of the property, placed it beyond the power of the court to approve the transaction as a whole. So that, in effect, the only portion of the agreement before the court for approval was that dealing with the support. The other portion of the agreement was completely executed. The court refused to approve what in effect was the only portion of the agreement presented to it. This accounts for the peculiar wording in the findings—that the "purported" agreement is disapproved "in so far as the same purports to limit" the amount of support.

Basis of Award for Support.

[6, 7] Appellant also contends that there is no evidence tending to show either respondent's need or appellant's ability to pay the amount awarded. The award of support, of course, is a matter in the discretion of the court and must be upheld unless there is no substantial evidence to support it, and hence, a clear abuse of discretion. Horton v. Horton, 18 Cal.2d 579, 116 P.2d 605. The evidence shows that while respondent has $11,000 in cash, $250 in U. S. Savings Bonds, and an income of $25 per month from the rental of a room, it also shows that respondent is no longer a young woman, has a heart condition which prevents her from working, is under a doctor's care, and that with doctor bills and other expenses she requires at least $150 a month to live on. It cannot be said as a matter of law that a wife whose husband abandons her for another woman after 28 years of married life, who has borne and raised two children, who during 10 years of the marriage worked as her husband's secretary in his collection business without compensation for her services, who is ill and unable to make her own living, has no need of support from her former husband as she can use her capital of $11,000. "The law is settled in California that when a wife is the owner of nonincome producing property she is not required to have recourse to such property for her support before seeking support from her husband. (Farrar v. Farrar, 45 Cal.App. 584, 586, 188 P. 289; Busch v. Busch, 99 Cal.App. 198, 200, 278 P. 456.)" Buehler v. Buehler, 73 Cal.App.2d 472, 475, 166 P.2d 608, 610.

[8] Nor can we say that the court was in error in finding that appellant has the ability to pay $125 per month. It is true that he claimed he was "broke." However, he is engaged in two businesses whose success depends upon how much energy and effort he puts into them. While during all his testimony he contends he is not making any money, still he talks of all the money he spends on entertainment and taking women clients out, and admitted making $2500 the previous year. An examination of his testimony raises a reasonable inference that he made more money than he admitted and justified the court in believing that he could make more money if he desired.

Counsel Fees.

[9, 10] The allowance of counsel fees, like allowance for support, is a matter within the sound discretion of the trial court. Heck v. Heck, 63 Cal.App.2d 470, 147 P.2d 110. "* * * the law does not require a wife to have recourse to her own resources first, to the impairment of the capital of her own separate estate." Westphal v. Westphal, 122 Cal.App. 388, 390, 10 P.2d 122, 123; Fallon v. Fallon, Cal.App., 189 P.2d 766. It cannot be said that the court in the case at bar abused its discretion in making the allowance for counsel fees.

The judgment appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

85 Cal.App.2d 1

In re GUARDIANSHIP OF O'DONNELL'S ESTATE.

DEPARTMENT OF MENTAL HYGIENE OF CALIFORNIA v. DUNHAM.*

Civ. 13575.

District Court of Appeal, First District, Division 1, California.
April 15, 1948.

Rehearing Denied May 12, 1948.

1. Insane persons 🔑74

Where services rendered by private investigator in locating an incompetent and his estate actually confer benefit upon incompetent, contract will be implied for payment by incompetent of reasonable value of services rendered.

2. Insane persons 🔑62

Where creditor of incompetent's estate had objected throughout to the allowance of a fee to another for locating incompetent, creditor did not lose right to object because during colloquy regarding reasonableness of fee, creditor had said "I am rather neutral about the affair."

3. Insane persons 🔑62

Creditor of incompetent's estate could not consent to an improper allowance to another from estate of incompetent, and it was court's duty, regardless of creditor's acts to inquire into all phases of matter and to require clear showing of justification before ordering payment of incompetent's money.

4. Insane persons 🔑62

Attorney for guardian of incompetent's estate had duty, as did guardian, to conserve incompetent's estate, and before requesting court to authorize paying out large portion of incompetent's money, to inquire objectively and make a detailed showing, that services rendered were actually of value to incompetent.

5. Insane persons 🔑62

Implied contract creating liability on part of incompetent must be supported by clear showing that incompetent received value under such contract.

6. Insane persons 🔑62

In proceeding for settling account and report of guardian of incompetent's estate, evidence was insufficient to sustain finding of implied contract to pay for services rendered by "heir hunter" in locating incompetent, because failing to show a benefit conferred upon incompetent, in absence of showing that incompetent would not have been located except for the services rendered, other than unsupported statement to that effect.

7. Attorney and client 🔑140

A judge who is informed of the extent and nature of legal services can determine what is a reasonable fee from his own knowledge and experience without necessity of other evidence.

8. Attorney and client 🔑140

The court, in "heir hunter" cases, may follow the rule applying to the fixing of attorney's fees, and hence must be advised of the extent and nature of services rendered before using its own judgment of the reasonable value of those services.

9. Insane persons 🔑62

In proceeding for settling the account of the guardian of incompetent's estate, evidence regarding the extent and nature of services rendered in locating incompetent was insufficient to establish reasonable value of services and hence was insufficient to justify allowance of 40% fee therefor, though incompetent was in fact located and alleged implied contract for fee was contingent.

10. Insane persons 🔑62

Department of Mental Hygiene by reason of accrued claim for care, had standing as creditor of incompetent's estate to object to allowance of fee to another alleged creditor, in view of incompetent's life expectancy and uncertainty that his estate would suffice to care for him as long as he might live.

11. Insane persons 🔑62

Department of Mental Hygiene was custodial guardian of the person of incompetent committed to its care and was entitled to appeal from allowance of fee for locating incompetent, regardless of department's status as a creditor of incompetent's estate.

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* Subsequent opinion 193 P.2d 143.

12. Insane persons ⚷68

Court had duty to preserve estate of incompetent for those who might succeed to it on his death, whether successors were heirs or the state.

13. Attorney and client ⚷11

If bureau which was initially engaged to locate incompetent as an "heir" of estate assumed or agreed to assume control of whatever legal proceedings were undertaken in matter of estate, and in matter of guardianship of incompetent, entire arrangement was contrary to public policy. Probate Code, § 1020.1.

WARD, J., dissents.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the guardianship of the estate of Frank H. O'Donnell, incompetent, wherein the Department of Mental Hygiene of the State of California objected to the allowance of an expenditure listed in the first account and report of May F. Dunham, as guardian of the estate of Frank H. O'Donnell, incompetent. From an order allowing the expenditure, the Department, as a creditor of the estate, appeals.

Modified and affirmed as modified.

Fred N. Howser, Atty. Gen., and Elizabeth Palmer and Miriam Wolff, Dep. Attys. Gen., for appellant.

Robert E. Hatch and Theodore Tamba, both of San Francisco, for respondent.

BRAY, Justice.

In settling the first account and report of the guardian of the estate, the court allowed the American Research Bureau the sum of $4000 for services rendered the incompetent in locating him. From this order the Department of Mental Hygiene (hereinafter referred to as the department), as a creditor of the estate, appeals.

Frank O'Donnell, the incompetent, was committed to the Mendocino State Hospital several years ago, as an intemperate, and has been a patient of the hospitals of the department ever since. He had two sisters, or half-sisters, Hazel Ryker and May Dunham. On April 28, 1946, Hazel Ryker died intestate in San Francisco. Upon her death, one Murphy proposed to handle her estate upon the grounds that he was a friend, a surviving partner, and that she had agreed to make a will leaving her estate to him. Murphy averred that he did not know the whereabouts of the half-sister, May Dunham, nor did he have any means of locating her. The American Research Bureau (hereinafter referred to as the bureau), licensed by the state as a private investigator, almost immediately located Mrs. Dunham and procured a written contract from her whereby she agreed to pay it 40% of whatever she might recover from her half-sister's estate.

Mrs. Dunham also "invited" the bureau to locate her brother, Frank O'Donnell. The bureau located him as a patient at a State Hospital, and Mrs. Dunham's petition for appointment as guardian of his estate was filed within eleven days of the death of the decedent.

On May 9, 1946, Mrs. Dunham petitioned for letters of guardianship of the estate of O'Donnell and shortly thereafter was appointed his guardian. On May 24, 1946, she was also appointed administratrix of the estate of Hazel Ryker, which consisted of $30,000 in cash, and "a lot of deeds to property." It is stated that Mrs. Ryker traded in real estate, but always had it in someone else's name. Her estate is still in probate due to disputes over titles. In December, 1946, a partial distribution was had in the Ryker estate, by which Mrs. Dunham, as an heir, received $10,000, and a like sum was distributed to her as guardian. On final distribution Mrs. Dunham and Frank O'Donnell's estate will each receive half of the balance of the Ryker estate, if any.

Mrs. Dunham, as guardian, in due course gave notice to the department of the ability of the estate to pay for the care and medical attention theretofore given and thereafter to be given O'Donnell. The department presented a claim in the sum of $1960, being at the rate of $40 per month from February 1, 1943, to February 28, 1947.

In her account and report, signed and verified only by her attorney, Mr. Hatch, the guardian asked for reasonable attorney's fees and guardian's fees, and for permission of the court to pay this claim, plus future maintenance at $40 per month, and an allowance of $10 per month to the incompetent personally for incidentals. The report also represented to the court that the services of the bureau were of value to the incompetent and his estate and asked for instructions in regard to paying for such services.

At the first hearing of the account and report, Mr. Hatch (who, incidentally, had been selected by Mrs. Dunham as her attorney at the suggestion of the bureau), testified that Mrs. Dunham had signed a contract with the bureau to pay it 40% of her interest in the Ryker estate, "with the idea that she would ask the Court, she being the guardian of her brother, that the Court make the same allowance with reference to the incompetent." He stated that he had a letter from Mrs. Dunham urging that the court allow the bureau the same fee that she was paying it.

A deputy attorney general appeared on behalf of the department, and objected to the allowance. On her statement of unfamiliarity with the matter, the hearing was continued to a later date. At that hearing, Mr. Hatch was again sworn and testified that Hazel Ryker had died without any apparent relatives, or records as to her family; that the bureau located Mrs. Dunham near Bakersfield; that Mrs. Dunham had no idea where her brother might be, as she had not heard of him for years; that the bureau had located him, and again stated that Mrs. Dunham had signed up with the bureau with the understanding that she would recommend to the court that a 40% fee be paid by the incompetent's estate; that if it had not been for the bureau's work the incompetent would not have been located and no money would have come into his estate. No claim had been presented to the estate by the bureau, and the attorney general contended, first, that it was necessary that such claim should be filed, and secondly, that such claim should set forth what the bureau had done, "the amount of the work, the validity of the claim, and so forth." Mr. Hatch, the attorney for the guardian, who throughout the proceedings both in the lower court and here, has assumed the laboring oar for the bureau, contended: "It is not a question of how much work was to be performed, but the fact that these people went in on a percentage basis and located these individuals." Then the following took place: "The Court: Suppose you just file with this Court—although you are not basing it on a claim, but on contract—on the question as to whether 40% is reasonable—Mr. Hatch: I will file a full exemplification." The hearing was then continued for this purpose. An unverified "Supplement to Guardian's First Account and Report," again signed only by the attorney, was filed. This in a general way stated the same matters which Mr. Hatch had given in his testimony. No detail of time spent, work involved, or how the bureau located Mrs. Dunham or O'Donnell was given. The report again recommended the payment of the 40% as being a reasonable contingent fee.

At the next hearing, Mr. Hatch called the attention of the court to his report. No detail of the services rendered by the bureau was given at the hearing. The deputy attorney general again took the position that the bureau should show what activities were done to merit the fee requested. Some discussion followed, not germane to to this statement, and then the following occurred:

"Mrs. Palmer [deputy attorney general]: (Interrupting) There was nothing signed here, your Honor—there was no contract with the incompetent.

"The Court: Well, I know, but the question is—I want to hear some law on it, if you are contending, or trying to contend, that this incompetent should come into this money without paying somebody for the efforts in discovering it.

"Mrs. Palmer: I don't contend that at all. We are merely asking to have the amount set by some—

"The Court: Do you think 40% is unreasonable?

"Mrs. Palmer: Well, I am rather neutral about the affair.

"The Court: If you are neutral, then you are not objecting, and I will allow it; all right, I will allow it."

The court thereupon made an allowance to the bureau of the sum of $4,000 "for investigation services rendered to and for the said incompetent," authorized the guardian to make the payments to the department and for the incompetent as requested, and allowed guardian's fees in the sum of $200, attorney's fees to Mr. Hatch in the sum of $300, plus the sum of $257.45 costs and moneys advanced by him.

The questions presented by this appeal are, first, can there be an implied contract under which the estate of an incompetent may be held liable for services rendered by a private investigator in locating the incompetent and his estate; second, if so, were the circumstances shown the court here sufficient to raise such contract; in fixing the fee, did the court have before it sufficient evidence of the services rendered; and was the fee allowed reasonable?

1. *There can be an implied contract.*

[1] Both parties to this appeal agree that Mrs. Dunham had no power to make an express contract binding upon the incompetent or his estate, although the respondent places great emphasis on the fact that Mrs. Dunham signed her personal contract "with the idea that she would ask * * * that the Court make the same allowance with reference to the incompetent." Where the services of an "heir hunter" actually confer a benefit upon an incompetent, a contract will be implied in law for the payment by the incompetent of the reasonable value of the services rendered. The situation would be similar to that in the Estate of Doyle, 126 Cal.App. 646, 14 P.2d 920, where reasonable attorney's fees were allowed an attorney for services rendered an incompetent. There, after adjudication of his incompetency, the incompetent employed an attorney to bring proceedings for his restoration to capacity. After rendering some service, but before the proceedings were instituted, the incompetent died. The attorney presented a claim to the administrator of the estate of the deceased for the services rendered the incompetent. Although holding that by reason of section 40 of the Civil Code, which provides that a person adjudged to be incompetent cannot contract, no express contract was entered into between the incompetent and the attorney, the court nevertheless determined that the estate was liable to the attorney under section 38 of the Civil Code. This section provides: "A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for his support or the support of his family." It held that "services rendered by an attorney in an attempt to restore an incompetent to capacity should be classed as necessaries of life." Page 647 of 126 Cal.App., page 921 of 14 P.2d. It further held it would be "unjust to deny reasonable compensation to the attorney, who is instrumental in" attempting to have the person restored to competency. Page 648 of 126 Cal.App., page 921 of 14 P.2d. It then goes on to state that the distinction between a true contract and one implied by law "is aptly illustrated by two cases reported in volume 111, California Appellate Reports. The first of these, Nielsen v. Witter, 111 Cal.App. 742, 296 P. 121, was an action on a common count for money had and received, brought by an incompetent, through his guardian, to recover $1,500 paid by him to an attorney for legal services. Prior to commencement of the action, a notice of rescission was served upon the attorney by the guardian. It was held by the court that plaintiff had no mental capacity when he executed the contracts and that he was not bound by them. On the trial of the case, plaintiff by his guardian 'offered to do equity, and include in his account such

amount as would compensate defendant attorney for such services as might be deemed beneficial to defendant.'

"The second case, Estate of Nielsen, 111 Cal.App. 744, 296 P. 122, involves the same facts, and is an application for allowance of attorney's fees due for services rendered the incompetent. On the theory of contract implied in law, the court made an order fixing the sum of $1,250 as the reasonable value of the attorney's services rendered to the incompetent." Page 648 of 126 Cal.App., page 921 of 14 P.2d.

"So far as the record in the instant case shows, no express contract was ever entered into by the appellant and decedent, and therefore sections 39 and 40 of the Civil Code, which refer to express contracts, are not applicable. Under the circumstances here presented, section 38 of the Civil Code * * * [quoting] may be invoked, in order to bind the estate of the incompetent upon a contract implied in law for the payment of necessaries, because we are inclined to the belief that services rendered by an attorney in an attempt to restore an incompetent to capacity should be classed as necessaries of life." Page 647 of 126 Cal.App., page 921 of 14 P.2d.

Certainly if services to have a person restored to competency constitute necessaries of life, services for an impecunious incompetent in locating him and making it possible for him to receive an inheritance, are also in the same category. It would be unjust to deny reasonable compensation to the person who is instrumental in so doing.

That the law will raise an implied contract for payment of services rendered an incompetent who receives the benefit of such services, even though no express contract can be made, is well shown in the case of Dorris v. Crowder, 26 Cal.App.2d 49, 78 P.2d 1039. There, a defendant was charged with the crime of murder. On his arraignment the defendant, who appeared to be completely without funds, told the court that he did not desire counsel appointed for him, and entered a plea of guilty to murder in the first degree. After the plea, the trial judge appointed attorneys to represent the defendant. The plea of guilty was withdrawn and pleas of not guilty and not guilty by reason of insanity were entered. After a trial, defendant was found to be insane and was confined in an asylum. It was later found that defendant was possessed of an estate of nearly $12,000. A guardian of the estate of the incompetent defendant was appointed. The attorneys then sued the guardian for the reasonable value of the services rendered in the criminal action, and obtained a judgment of $1500. On appeal, in affirming the judgment, the court stated that the question of whether attorneys appointed by the court to defend an insane person charged with murder could charge him a fee, when, after he had been found insane, it was discovered that he was possessed of an estate, was a novel question and of first impression in California. It then went on at page 51 of 26 Cal.App.2d, page 1040 of 78 P.2d:

"We have been cited to and have found no case in California deciding the first question presented. There is dicta on the question in the old case of Rowe v. Yuba County, 17 Cal. 61, where it is said:

"'Besides, it is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others; and for compensation, they must trust to the possible future ability of the parties.'

"It has been held that, while an incompetent person cannot make a valid and enforceable contract with an attorney at law, if he does engage an attorney and the attorney performs services for the incompetent, the attorney may recover the reasonable value of his services from the incompetent's estate."

The contention was further made at page 53 of 26 Cal.App.2d, page 1041 of 78 P.2d:

"Defendant urges that, since plaintiffs were appointed by the court to represent defendant, their services were entirely voluntary and in performance of their duty to the court and that no implied contract to pay for their services can arise from such situation." The court held that "Under these circumstances the trial judge was fully justified in disregarding defendant's statement that he did not desire an attorney. Defendant was insane and it became the duty of the trial judge to see that his legal rights were properly protected.

"At the time plaintiffs were appointed as attorneys for defendant it was not known that defendant had property and was financially able to employ and pay counsel. It, however, was a fact that defendant was able to employ and pay his counsel. Thus one necessary element was lacking to place the obligation upon the trial judge to appoint counsel and to require that the counsel appointed defend the case without compensation. Defendant was possessed of means. Counsel should not be required to defend, without compensation, a man of means who is charged with a crime."

[2, 3] Respondent contends that appellant has no right to object to the allowance made by the trial court, because it either consented to the trial court's action or induced the trial court to make the allowance it did. Appellant was not of much assistance to the trial court, for when asked if 40% was unreasonable, the reply was "I am rather neutral about the affair." However, appellant neither consented to nor induced the action of the court. In spite of the language last quoted, appellant at all times was trying to get Mr. Hatch to show why O'Donnell would not have been otherwise discovered, the extent and nature of the services rendered, and strenuously contended that 40% was not a reasonable fee. Moreover, appellant could not consent to an improper allowance from the estate of an incompetent. It was the duty of the court, regardless of the acts of appellant, to inquire into all phases of this question and to require a clear showing of justification before ordering the payment of the incompetent's money.

2. *Evidence not sufficient.*

[4-6] The evidence in the lower court was not sufficient upon which to base a finding of implied contract, value to the incompetent of the services rendered, or the reasonable value of the fee charged. It must be borne in mind that the record shows a most peculiar situation. It is claimed that Mrs. Ryker died without any known relatives. Yet, in less than eleven days the "heir hunter" found her brother and sister (Mr. Hatch stated that he was not sure whether they were full or half siblings), obtained a contract from the sister, and had the sister file petitions for appointment as administratrix of the estate of the deceased and as guardian of the estate of the brother. The evidence fails to disclose when the bureau discovered O'Donnell's whereabouts or that he had an interest in the Ryker estate. The report of the guardian on this subject is peculiar in form. It states: "Said incompetent became an inmate of Mendocino State Hospital, Talmage, California, several years ago, but petitioner, who is his sister, did not learn thereof until shortly before May 9, 1946, when she filed her petition herein to be appointed as guardian." May 9th was the eleventh day after Mrs. Ryker's death. It was mighty quick work in locating an unknown person. Then, the attorney for the bureau became the attorney for the administratrix and the guardian. He contends that he is not the attorney for the bureau in this matter (presumably in the matter of the collection of the 40% fee from the incompetent's estate), yet when testifying, under oath, he said: "*We* located this sister, Mrs. Dunham * * *." When asked "Who is 'we,' Mr. Hatch?" he replied "The American Research Bureau." (Emphasis added.) Also both the account and the supplemental account, the latter devoted entirely to the matter of obtaining a 40% fee for the bureau, are drawn up and signed by Mr. Hatch alone.

No evidence was produced before the court to show that the relationship of O'Donnell to the decedent would not have been discovered in the ordinary course of events, other than the bald conclusion of Mr. Hatch, who, to say the least, was representing conflicting interests. He owed a duty to the incompetent, as did the guardian, to conserve the estate, and before requesting the court to authorize the paying out of a large portion of the incompetent's money, to inquire objectively and make a detailed showing, that the services rendered were actually of value to the incompetent.

In the ordinary course of events the public administrator would have been appointed administrator of the Ryker estate. There is no showing that he would not have discovered what the bureau discovered in less than eleven days. It is not a sufficient showing for a person representing such conflicting interests to make the statement to the court of the conclusion that the incompetent would not have been discovered otherwise. The facts justifying such conclusion should be presented. The attorney general demanded that these facts be presented; the hearing was continued for that purpose; and yet no such facts were produced. For the law to raise an implied contract creating liability on the part of an incompetent, there must be a clear showing that the incompetent received value under such contract. The very basis upon which such contract rests is that a benefit is conferred upon the incompetent. No proper showing of such benefit was made here.

It may be that the bureau did perform valuable services in this matter, for which it should receive reasonable compensation. But the evidence below, in view of the equivocal position of Mr. Hatch, did not justify such a finding.

[7] The same is true of the evidence concerning the reasonable value of the services rendered. Assuming that an implied contract arose, there was no showing upon which the court could determine the extent of the services rendered and their value. Mr. Hatch takes the position, evidently followed by the trial court, that an "heir hunter" who discovers a missing heir (and for the purposes of this question we will consider O'Donnell to have been such), is entitled as a matter of law to a 40% contingent fee. In this behalf, he contends that the rule applying to the allowance by a court of attorney's fees should apply, namely, that the trial court, by reason of its experience in such matters, may fix the fees of an attorney without the necessity of expert testimony, and even, where it is familiar with the services rendered, without further testimony concerning them. But he overlooks the fact that in every instance where such rule is invoked, the court either knew of the services because they had been performed before it, or evidence of the *extent and nature* of the services was presented. As said in Mason v. U. S. Fidelity & Guaranty Co., 60 Cal.App.2d 587, 594, 141 P.2d 475, 479, "It is well settled that when a judge is informed of the *extent and nature* of legal services, he can determine what is a reasonable fee from his own knowledge and experience without the necessity of other evidence." (Emphasis added.) To the same effect, County of Riverside v. Brown, 30 Cal.App.2d 747, 87 P.2d 60; Mitchell v. Towne, 31 Cal.App.2d 259, 87 P.2d 908; "services shown by the record," Kirk v. Culley, 202 Cal. 501, 509, 261 P. 994, 997; "on evidence of the services rendered," Freese v. Pennie, 110 Cal. 467, 468, 42 P. 978. In Spencer v. Collins, 156 Cal. 298, 307, 104 P. 320, 20 Ann.Cas. 49, the court considered the time and labor involved. In Estate of Reinhertz, 82 Cal.App.2d 156, 185 P.2d 858, 860, in upholding certain allowances made to the executor for services personally performed by him in and about the estate's apartment houses, the court said: "In the case of services of a non-technical nature, such as here involved, the judge may fix the value from a description of the services performed bringing to bear his own general knowledge and is not necessarily bound by express evidence of the value of the services performed. [Citing cases.]" (Emphasis added.)

[8, 9] We agree that in "heir hunter" cases the court may follow the rule applying to the fixing of attorney's fees, and therefore the court must be advised of the *extent and nature* of the services rendered before using its own judgment of the reasonable value of those services. Certainly, in this case, the court was not advised of the *extent* of the services claimed to be rendered, nor of the *nature* other than the bald claim that without these services, O'Donnell would not have been found. When the court, from its own knowledge and experience, is fixing the fees, based on evidence of the nature and extent of the services performed, it probably can take into consideration the result achieved and the fact that the fees are contingent. But merely because a certain result is achieved and the fee

is contingent, does not justify the lack of evidence of the extent of the services.

We are not holding that a 40% fee may not eventually prove to be a reasonable fee, if it is proved that the incompetent actually benefited by the action of the bureau, and when the details of the time spent and work involved are shown. We are merely holding that the evidence before the court is insufficient upon which to base a finding of benefit to the incompetent, or the reasonable value of the services rendered. The circumstances here are somewhat similiar to those in Estate of Reilly, 81 Cal.App.2d 564, 184 P.2d 922. There, after holding that the heir hunter's contract was identical in form and language with the one condemned in Estate of Butler, 29 Cal.2d 644, 177 P.2d 16, 171 A.L.R. 343, because providing for legal services, the court, in discussing a contention that the case was distinguishable from the Butler case because of the fact that the appellant was a missing heir, went on to state that the record failed to show that the heir was missing or unknown. It also pointed out that the record failed to show any beneficial service rendered to appellant by the heir hunter.

[10] Respondent contends that the department has no standing on this appeal because there will be sufficient money left in the estate to pay its claim, even if $4000 is paid to the bureau. This is true as to the claim for $1960 already accrued. However, the court properly allowed the department $40 per month from March 1, 1947 on, for the care of the incompetent, and the sum of $10 per month from August 1, 1947, for incidentals to the incompetent. After the payment of the sums allowed by the court, including the $4000 to the bureau, amounting to $6717.45, there would be left in the estate the sum of $3282.55. This amount, under the court's present order, and without consideration of further expenses, such as guardian's bond, guardian's and attorney's fees, and payments of life insurance premiums which the account shows are now being paid by the guardian, would last the incompetent, who respondent says has an eleven year life expectancy, about five and a half years. O'Donnell may or may not live that long, and his estate may or may not receive additional property from the Ryker estate. Even the more or less slight uncertainty that there will be enough to care for the incompetent as long as he may live makes the department's interest as a creditor sufficient to give it standing on this appeal.

[11, 12] But the department stands in another and far more important light. O'Donnell has been legally committed to its care. The department is the custodial guardian of the person of O'Donnell. The department in this case is trying to give its ward the protection which should have been given him by his guardian, the attorney for his guardian, and the trial court. No niceties of just who is appealing should deprive the incompetent of his right to the protection of the court. Even if there be left plenty of funds to care properly for O'Donnell, whatever length his life may be, there is a duty, too, on the courts to preserve his estate for those who may succeed to it on his death, whether it be heirs or the state.

[13] All of the facts in the case are not disclosed by the evidence. It may be, when they are brought before the court, it may find that the agreement between Mrs. Dunham and the bureau was one in which, as in Estate of Butler, supra, 29 Cal.2d 644, 650, 177 P.2d 16, 19, 171 A.L.R. 343, there was "integrated in the consideration therefor * * * the parties' understanding that [the bureau] would manage whatever legal proceedings were undertaken" in the Estate of Ryker and the Guardianship of O'Donnell. The fact that the bureau's attorney became, at its suggestion, the attorney in both estates, and his great activity in the lower court and here in behalf of its fee, may be of importance. Apparently, in the Ryker estate, the Dunham agreement was not submitted to the scrutiny of the trial court as permitted under the provisions of section 1020.1 of the Probate Code. While such submission is not necessarily required, the failure so to do, combined with the other circumstances of this case, has some significance. However, when the true facts are known, that failure may have no significance. If the bureau assumed or agreed to assume control of the proceedings, then

the entire arrangement, under the ruling in the Butler case, would be contrary to public policy. The court, on the further trial of this matter, should examine all the facts and circumstances to see if that is the situation.

The order appealed from is modified by striking therefrom the order directing the payment of $4000 to American Research Bureau, and as modified is affirmed, appellant to recover its costs. This order is made without prejudice to the right of the trial court to take further testimony along the lines indicated in this opinion.

PETERS, P. J., concurs.

WARD, Justice.

I dissent. I cannot agree with the majority opinion insofar as it contemplates further action by the trial court with respect to the right of the American Research Bureau to share in the incompetent's estate. Merely striking the order directing the payment of $4,000 to the American Research Bureau would correctly dispose of the present matter.

With respect to the holding that, "Where the services of an 'heir hunter' actually confer a benefit upon an incompetent, a contract will be implied in law for the payment by the incompetent of the reasonable value of the services rendered," I agree that such is the prevailing law assuming that such services are "necessary for his support." (Civil Code, sec. 38.) The cases cited in support of this rule are based upon facts indicating that the services must be for stable necessities and of substantial benefit. In determining the applicability of said rule a showing must be made that the services rendered the incompetent meet these requirements.

Prior to the appearance of the bureau, the incompetent was living under the custodial care and expense of the state. His guardian now pays the state for his care, board and lodging. So far as he is concerned, he receives $10.00 per month for "incidentals" out of the partial distribution of $10,000, which dwindled immediately to $3,282.55 as is stated in the majority opinion. Unlike Estate of Doyle, 126 Cal. App. 646, 14 P.2d 920, where a payment was made to an attorney who endeavored to restore one to legal competency, in this case the "incompetent" is permitted to remain in a state asylum. The majority opinion does not hold that the $10.00 per month out of a $10,000 partial distribution is a "benefit" or "necessary for his support." (Civil Code, sec. 38.)

The incompetent, O'Donnell, has evidently been declared an incompetent based upon a charge of inebriety. Whether inebriety renders a person's mind unsound, either temporarily or permanently, is a question of fact. (14 Cal.Jur., p. 335, sec. 2.) This fact may be a proper phase of examination by the trial court.

It is suggested in the majority opinion that when all of the facts in the case are brought before the trial court "it may * * * find that the agreement between Mrs. Dunham and the bureau was one in which, as in Estate of Butler, supra, 29 Cal.2d 644, 650, 177 P.2d 16, 19, 171 A.L.R. 343, there was 'integrated in the consideration therefor * * * the parties' understanding that [the bureau] would manage whatever legal proceedings were undertaken' in the Estate of Ryker and the Guardianship of O'Donnell. * * * If the bureau assumed or agreed to assume control of the proceedings, then the entire arrangement, under the ruling of the Butler case, would be contrary to public policy. The court, on the further trial of this matter, should examine all the facts and circumstances to see if that is the situation." The majority opinion fails to consider that the present record reveals an agreement within the prohibition of Estate of Butler, 29 Cal.2d 644, 177 P.2d 16, 171 A.L.R. 343.

This is not an appeal in which evidence has been introduced by opposing litigants. There is no record from which conflicting inferences may be drawn. The preponderance of the evidence need not be weighed. Estate of Butler, supra, does not hold that the practice of law by an "heir hunter" must be proved to a moral certainty and beyond a reasonable doubt. It is sufficient that the practice be such as may be reasonably declared to be "contrary to public policy." See Business and Professions Code, sec. 6060 et seq.; Smallberg v. State Bar, 212 Cal. 113, 297 P. 916; People v. Merchants Protective Corp., 189 Cal. 531, 209 P. 363; 9 Cal.Jur., 10 yr. Supp., p. 335, sec. 8; State Bar of California v. Superior Court, 207 Cal. 323, 278 P. 432; People v. Sipper, 61 Cal.App. 2d Supp. 844, 142 P.2d 960; People v. Ring, 26 Cal.App.2d Supp. 768, 70 P.2d 281; Utz v. State Bar, 21 Cal.2d 100, 130 P.2d 377. The record here shows with unerring accuracy, or, in other words, without any doubt, that in this case the American Research Bureau was practicing law as that term is used in Estate of Butler, supra, and that the entire arrangement between the bureau and the incompetent was contrary to public policy.

At the outset it may be well to note that for the purpose of convenience the American Research Bureau may be appropriately and advisedly referred to as an "heir chaser." It appears from the statement of its attorney of record on appeal that the "bureau" is in the business of "hunting heirs." During the oral argument on appeal the question arose relative to the method of fixing forty percent as a "fee." The attorney replied in substance that it was necessary to fix reasonably large fees so that the heirs who were found should pay for the losses incurred in the search for heirs who were not located by the bureau. Respondent's brief contains the statement that the "American Research Bureau [is] licensed by the State of California as a private investigator and *in the business of finding* missing heirs." (Emphasis added.)

A license to act as an investigator does not permit the practice of law. Howe v. State Bar, 212 Cal. 222, 298 P. 25, holds that the fact that the West Coast Claims Bureau possessed a license to act as an insurance adjuster did not make its business of making contracts with injured persons to take all the steps necessary to collect their claims lawful. See Townsend v. State Bar, 210 Cal. 362, 291 P. 837; Shaw v. State Bar, 212 Cal. 52, 297 P. 532. Such "ambulance chasing" is analogous to that of "heir chasing." Estate of Butler, supra, page 648 of 29 Cal.2d, 177 P.2d 16, A.L.R. 343. A corporation may not engage in the practice of law by hiring attorneys to do the legal work. The same rule applies to individuals and associations. People v. Merchants Protective Corp., 189 Cal. 531, 209 P. 363. If the "heir chaser," "for compensation controls, directs, or influences" (Howe v. State Bar, supra, page 230 of 212 Cal., 298 P. 25, 27) the conduct of the probate proceedings or an "heir's" actions in an estate, it "amounts to 'commercial exploitation' of the legal profession and is contrary to public policy." Estate of Butler, supra, page 647 of 29 Cal.2d, page 18 of 177 P.2d, 171 A.L.R. 343.

The majority opinion criticizes the form of the report of the guardian and suggests that the attorney was representing conflicting interests. I am not interested personally or officially with the activities of the attorney except to the extent that his actions or statements prove that the "heir chaser" was practicing law and that such practice was against public policy. Estate of Butler, supra. If it may be adjudged as practicing law when the "heir chaser" openly, without any effort of hiding the facts, submits the matter upon the interpretation that may be placed upon a written instrument, for a greater reason it should be condemned when it is necessary to resort to an examination of circumstantial evidence submerged in a plan or device to evade the rule set forth in such cases as Estate of Butler, supra; Estate of Reilly, 81 Cal.App.2d 564, 184 P.2d 922; Estate of Seery, 81 Cal.App.2d 971, 184 P.2d 926, and In re Lynch's Estate, 154 Misc. 260, 276 N.Y.S. 939.

The only witness who testified in the present proceeding appears as (1) attorney for the administratrix in the Estate of Ryker, deceased, and (2) as attorney for the guardian in the Estate of O'Donnell, an incompetent, and (3) as attorney for the "heir chaser" in the presentation of the purported contract. His narration is set forth at length as follows: *"This case is similar to the last one.* The incompetent was confined to Talmage for many years. a lady died here who developed to be his half-sister. There is no record amongst her effects as to her relatives, *and my client, the American Research Bureau,* discovered the half-sister of this decedent, *procured a contract from her at the rate of 40%.* The half-sister inherits one-half of the estate, and the incompetent brother, who was discovered *after* the signing of the lady in Bakersfield, gets one-half. *She signed up on the basis of 40% with the idea that she would ask the Court, she being the guardian of her brother, that the Court make the same allowance with reference to the incompetent.* There has been distributed to him already by partial distribution the sum of $10,000. The estate has not been closed because of litigation to the title of property, but he has already received $10,000, and there should be an allowance of the same rate of fee as the sister paid. I have a letter from her urging that the Court make that allowance." (Emphasis added.) At a subsequent hearing the same attorney testified: "I am the attorney for the guardian in this matter, which is of the guardianship of Frank H. O'Donnell, who was committed to the Mendocino State Hospital some years ago as an intemperate. His time expired and he desired to stay on. He has been transferred to DeWitt General Hospital at Auburn, and is there at the present time, and apparently intends to stay there. *He had two sisters; I am not sure whether full or half,* but they were Hazel Ryker and May F. Dunham. Hazel Ryker died last year without any apparent relatives, or any records as to her family. *We located this sister, Mrs. Dunham,* living in a small town out of Bakersfield—". (Emphasis added.) Whereupon the witness was interrupted by the deputy attorney general with the question: *"Who is 'we?'"* (Emphasis added.) The witness replied: *"The American Research Bureau."* (Emphasis added.) Later the attorney testified that he was not the attorney "in this matter, but *I was brought in at their recommendation.*" Emphasis added.) He testified that the "incompetent * * * was discovered after" the sister Mrs. Dunham signed. His next statement is that *"She signed* up on the basis * * * she being the guardian of her brother, that she would recommend to the Court that the same allowance be made with reference to the incompetent." (Emphasis added.)

There would be no purpose in promising to ask the court to fix a stipulated amount as "fee" to the bureau if her brother was competent, in which event he could speak for himself. The only purpose of such a promise would be if the brother was incompetent. It does not require that an inference be drawn to prove this fact, as it appears in the testimony of the attorney that when Mrs. Dunham was located she was informed that her brother was an inmate of one of the state hospitals. This information was given to Mrs. Dunham "shortly before May, 9, 1946," less than eleven days after Mrs. Ryker's death. It was at that time that Mrs. Dunham agreed with the "bureau" that she would make the "fee" recommendation. Subsequently she was appointed guardian. The attorney representing her as guardian was recommended by the bureau. Thereafter she was appointed administratrix. The attorney representing her as administratrix is the same attorney who reprsented her as guardian. The purported contract is upon a contingent basis. If $100,000 more or less should be recovered for the Hazel Ryker estate, the "heir chasers," subject to the approval of the probate court, will be compensated upon a forty percent basis upon each subsequent distribution according to the contention of the attorney. The "bureau's" attitude appears from the statement of the attorney that "It is not a question of how much work was to be performed, but the fact that these people went in on a percentage basis and located these individuals."

As further evidence that the "heir chaser" has assumed complete control of this litigation through its selected attorney, the following appears: The guardian did not sign the "Guardian's First Account and Report" except in the form "By * * * Her Attorney." The report is verified by the same attorney. The "Supplement to the Guardian's First Account and Report," which was requested by the probate judge as a means of showing the services performed, were reasonably worth the 40% requested contains the following statement that Mrs. Dunham, the guardian, believes the amount "to be fair and equitable because of various factors, including that without the aid of American Research Bureau neither she nor the incompetent would have received any part of the estate of Hazel Ryker, deceased, *and because said American Research Bureau performed the services purely upon a contingent basis, all at its own cost and expense*." (Emphasis added.) This "guardian's" unverified report is also signed by the attorney as attorney for the guardian.

The "heir chaser," through the selection of the attorney to direct Mrs. Dunham personally in her affairs of the estate and to control her in her actions as guardian of the incompetent, as demonstrated by his actions and the agreements with Mrs. Dunham, held the reins of litigation. If not identical in facts, this case is identical in results with Estate of Butler, supra, wherein the Supreme Court declared at page 647 of 29 Cal.2d, page 18 of 177 P.2d, 171 A.L.R. 343, that the "heir hunter" had assumed "complete control of litigation instituted on behalf of the beneficiaries."

In the present case the results are as follows: Mrs. Dunham has received $10,000, $4,000 of which (40%) has been paid to the controller of the litigation. The incompetent has received $10,000, $4,000 of which through the efforts of the attorney and the guardian was marked for the treasury of the "heir chaser." In brief, from the $20,000 partial distribution the half-sister of Hazel Ryker received $6,000; the estate of the incompetent, according to the present plan, will receive $6,000, and the controller of the litigation, $8,000. *This is only on the first distribution.* If respondent's position is correct, the same ratio of apportionment will be maintained in future distributions or increased on the basis of attorney fees for extraordinary services in determining title to property claimed by the estate of Ryker. In addition to the $4,000 to be received by the "heir chaser," the guardian was instructed to pay $1,960 to Mendocino State Hospital and $40 per month "until further order" to DeWitt State Hospital and $10 per month for the incompetent's personal account; $200 to the guardian for services; $300 to the attorney for services up to March 13, 1947 and $257.45 to reimburse the attorney for money advanced. It is not my intention to indicate that the amounts—except to the "heir chaser"—are improper, but they are listed to show that at the end of one month the incompetent's $10,000 estate would be decreased by a sum in excess of 66%.

Respondent contends that if the contract was void because of transgressing public policy, the heir-hunter still would be entitled to recover upon a quantum meruit, citing Trumbo v. Bank of Berkeley, 77 Cal. App.2d 704, 176 P.2d 376. The Trumbo case recognizes the general rule which is controlling in the present matter, namely, that the law does not imply a promise to pay for services which are illegal or against public policy. Restatement of the Law, Contracts, sec. 598, comment c. The facts of that case were such that this court ruled as follows, page 710 of 77 Cal.App. 2d, page 379 of 176 P.2d: "* * * it would be most unjust and inequitable to allow the promoters to take the benefits of respondent's efforts, all of which were legal, and then to be allowed to escape all liability on the ground that the consideration they agreed to furnish was illegal. The proper rule, amply supported by authority, is thus stated in 27 Cal.Jur. p. 210, section 17: '* * * if the services rendered under a void contract by one party thereto were not intrinsically illegal and the other party fails voluntarily to perform on his part, the former may recover as upon a quantum meruit for what the latter actually received in value, though no recovery can be had upon the contract.'" In the present case the services rendered by the American Research Bureau constitute the unlawful practice of the law and are contrary to public policy. For such intrinsically illegal services no quantum meruit recovery is allowed. Estate of Butler, supra.

The estate of Cohen, 66 Cal.App.2d 450, 152 P.2d 485, is relied upon by the attorney and the "heir chaser" in support of their position. The judicial views as expressed in Estate of Cohen, when such conclusions are based upon facts as stated in that opinion, must be approved. In that case decedent died in 1938. A genealogist after considerable work located a sister of decedent approximately twenty-eight months later and obtained from her an assignment of 30% of whatever amount might be recovered in consideration of revealing to the sister the funds and assets which she subsequently obtained. The assignment was duly filed with the county clerk of the county in which the probate proceedings were pending in accordance with the provisions of Probate Code, secs. 530, 530.1. See present Probate Code, sec. 1020.1. In the Estate of Cohen, the record does not disclose that any arrangements were made by the designated genealogist or "heir hunter," with an heir, devisee or legatee on the subject of arrangements to select an attorney for the heir. There, negotiations with the "heir hunter" were conducted by the heir's two adult sons and an attorney of her own selection. This court stated at pages 456, 457 of 66 Cal.App.2d, page 488 of 152 P.2d, that "the evidence definitely shows that prior to and at the time of the execution of the assignment he not only informed those acting for appellant that he could not select a lawyer for her, but that he expressly refused so to do; furthermore the record shows that throughout the probate proceedings appellant was represented in and out of this state by attorneys of her own selection." In the Cohen case the agreement offered to the court for approval was made a part of the record; it was not invalid "as being repugnant to good morals and against public policy * * *." The distinction made in Estate of Butler, supra, page 649 of 29 Cal.2d, 177 P.2d 16, 171 A.L.R. 343, with respect to Estate of Cohen applies with equal force to the present case. The purpose of the Probate Code sections is to protect heirs from professional "heir chasers." Estate of Lund, 65 Cal.App.2d 151, 150 P.2d 211. The legal principles set forth in Estate of Butler, supra, are indeed guide posts leading to safety zones for the protection of "heirs" from "heir chasers."

The frame designed by the "heir chaser" does not fit the picture developed from the filed record and the evidence. No question is raised other than the propriety of the $4,000 "fee." That item should be stricken from the probate court's order.

85 Cal.App.2d 112

REID et al. v. JOHNSON.

Civ. 16211.

District Court of Appeal, Second District, Division 1, California.
April 20, 1948.

1. Contracts 🔑164

Where two or more written instruments are executed contemporaneously with reference to each other for purposes of obtaining a preconceived object, they must all be construed together, and effect be given if possible for the purpose intended to be accomplished. Civ.Code, § 1642.

2. Contracts 🔑164

Generally, two or more separately executed instruments may be construed as one contract only when upon their face they deal with the same subject matter and are by reference to one another so connected that they may be fairly said to be interdependent. Civ.Code, § 1642

3. Appeal and error 🔑931(1)

On appeal on ground of insufficiency of evidence conflicting testimony will be considered in light most favorable to findings.

4. Contracts 🔑155

If uncertainties exist in written agreements, trial court may infer that draftsman of instruments cause them to exist and that language of contract should be interpreted against him. Civ.Code, § 1654.

5. Appeal and error 🔑1008(3)

An appellate court will adhere to interpretation of a contract adopted by trial court and not substitute another of its own where parol evidence was introduced in aid of its interpretation and evidence is such that conflicting inferences may be drawn therefrom.

6. Landlord and tenant ⚿79(2)

Under contract for purchase of a lease executed simultaneously with second agreement to purchase a second lease and with agreement to permit pasturage of horses for seller, modified by later agreement to extend time of purchase, purchaser could take possession of land affected by first lease following purchase thereof, though defaulting in performance of other agreements where the several agreements though relating to similar matters could not be construed as a single transaction. Civ. Code, § 1642.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Henry S. Reid and Henry S. Reid, Jr., against R. M. Johnson to recover possession of real estate and personal property. From the judgment, plaintiffs appeal.

Judgment affirmed.

Harold M. Davidson and Aubry Miller, both of Alhambra, for appellants.

Snyder & Fletcher, Viola C. Glaister, and Louis T. Fletcher, all of So. Pasadena, for respondent.

BARTLETT, Justice pro tem.

This is an appeal by the plaintiffs in an action brought to gain possession of two parcels of real estate and some personal property. The appellants were the holders of leasehold interests in two parcels of land in Los Angeles County. The first parcel, known as the Wheeler lease, contained some 513 acres, and the second parcel, known as the Standard and Baldwin leases, was contiguous to the Wheeler lease and embraced 1100 acres. For purposes of convenience this second parcel will be hereafter referred to as the Standard lease.

On January 9, 1947, the parties entered into a written agreement which reads as follows:

"January 9, 1947—This agreement entered into between R. M. Johnson, San Gabriel, California, and Henry S. Reid, Palm Springs, California, for the assignment of the Wheeler lease for a total consideration of $2400.00 and the selling of truck, $250.00, one horse $100.00 and Squeeze $150.00, I hereby acknowledge receipt of $1,000.00 as part payment. Payment of the Wheeler lease to be assumed by R. M. Johnson and the refunding of any amount paid by Henry S. Reid on the 1947 lease.

"Balance of payment to be made Tuesday, January 14, 1947. If unable to pay at this time this Agreement is null and void and money advanced to Henry S. Reid shall be returned.

"Cattle comprising around 100 head and 6 head of mares to remain on the place rent free until they are in good enough condition to sell at a good price or until May 1, 1947.

R. M. Johnson
Henry S. Reid."

On the same day the parties also signed the following agreement:

"January 9, 1947

This agreement entered into this day between R. M. Johnson, San Gabriel, California and Henry S. Reid, Palm Springs, California, to turn over as far as I am able, the Standard Oil lease and Baldwin lease. To use my good offices to obtain this lease for Mr. R. M. Johnson. He to assume the lease with all its provisions and to reimburse Henry S. Reid for the money paid for the lease for 1947.

R. M. Johnson
Henry S. Reid."

and also the following document:

"January 9, 1947

R. M. Johnson agrees to pasture all horse and cattle for H. S. Reid that has not had pasture paid until they are all paid for or have been sold for pasture. R. M. Johnson to be paid for pasture from Tuesday, January 14, 1947.

"R. M. Johnson
Henry S. Reid."

Thereafter, on January 14, 1947, two further documents were executed as follows:

"These Agreements are an extension of Agreements signed January 9, 1947, concerning the Standard and Wheeler leases, I am giving R. M. Johnson an extension of one week from today which would be January 21, 1947, for the completion of the deal, the only difference being that he is not to collect pasture rent on cattle or horses held or sold for bills due me.

"R. M. Johnson
"Henry S. Reid, M.D."

"This Agreement entered into this 14th day of January, 1947, between R. M. Johnson and Henry S. Reid, to-wit:

"That in the event that the Standard and Baldwin lease is not transferred to R. M. Johnson at the completion of our Agreement upon all the leases, it shall be kept in the name of Henry S. Reid and Henry S. Reid, Jr., as it is at present with the full use of the lease to R. M. Johnson, until such times as it is transferred. This also applies to the Wheeler Lease.

"Henry S. Reid, M.D."

The appellants state: "The sole and only question before the Court on this appeal relates to the interpretation of certain written documents under which the defendant took possession of a portion of the real property in controversy."

The property to which the appellants refer as having been taken possession of by the defendant was that known as the Standard lease, on which there was a house occupied by the respondents. The Court held that the instruments dated January 9, 1947, —one for the purchase of the Wheeler lease, the second for the purchase of the Standard lease, and the third for the pasturing of cattle, were entered into by the parties to them as separate and divisible transactions. Having so held, the Court confirmed the possession of the Standard Lease in the respondent and denied appellants' restitution of the property covered by that lease.

[1, 2] It is the appellants' contention that the Court's finding that the agreements pertaining to the Standard lease were entered into and executed by the plaintiff as a single, separate and individual transaction, is not supported by the evidence and that the various written agreements executed by the parties formed one complete contract. Appellants cite Section 1642 of the Civil Code, which reads as follows:

"Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

The only cases referred to by appellants are: Cameron v. Burnham, 146 Cal. 580, 80 P. 929, which merely recognizes the rule set forth in the quoted code section, and People v. Ganahl Lumber Co., 10 Cal. 2d 501, 75 P.2d 1067, 1070. That case is cited because of appellants' contention that the trial court violated the rule of construction set forth therein as follows:

"Where two or more written instruments are executed contemporaneously, with reference to each other, for the purposes of obtaining a preconceived object, they must all be construed together and effect given, if possible, to the purpose intended to be accomplished."

That has always been the law and how it is to be applied when the Court is concerned with two or more separately executed instruments is clearly set forth in Merkeley v. Fisk, 179 Cal. 748, at page 754, 178 P. 945, 947. In its decision the Court first quotes the language of section 1642 of the Civil Code and then says:

"Obviously, the most certain criterion of the completeness of an individual writing will be found within the writing itself. It is therefore the general rule that two or more separately executed instruments may be considered and construed as one contract only when upon their face they deal with the same subject-matter and are by reference to one another so connected that they may be fairly said to be interdependent."

Let us examine these documents in the light of the rules laid down in Section 1642 of the Civil Code and the cases referred to. The first contract of January 9, 1947, which we set forth in full herein, refers to the Standard lease alone and no reference whatever is made to the subject matter of the other two contracts. The second contract of January 9, 1947, deals with certain personal property and the Wheeler lease, with no reference whatever to the subject matter of one concerning the Standard lease. The third contract is a similar one, whereby respondent agrees to pasture certain cattle and refers in no way to the Standard lease. On their face then, whether we take them together or separately, it is difficult to see how they can be construed together as one contract, when each appears to be a separate, independent agreement.

To aid the Court in arriving at the intent of the parties, the two agreements dated January 14, 1947, were introduced in evidence. Little help is given by these documents. One of them is concerned mainly with giving the respondent an extension of one week to make the payments and itself refers to the contracts for the Standard and Wheeler leases in the plural as "the agreements". The other agreement provides that the respondent shall have possession of the Standard lease even if legal title had to remain in Dr. Reid. It concludes with the statement "This also applies to the Wheeler lease", which would seem to indicate that the signer looked upon them as separate contracts. We see that there is nothing in these documents of January 14, 1947, which would make the documents of January 9, 1947, interdependent. They were so worded as to apply to each of them separately.

[3, 4] As appellants' attack is on the sufficiency of the evidence to justify the findings, it also becomes our duty to examine the parol evidence admitted as bearing on the question of the intention of the parties. In this there were conflicts, it is true, but taking the testimony in the light most favorable to the court's findings, it discloses the following: The respondent never claimed a right to the possession of the Wheeler lease or to the personal property described in the complaint. He was in possession of the Standard lease at the time of the trial and had been there for some time, and was there on January 9, 1947. Prior to that date the parties had had several conversations relative to the desire of Dr. Reid to sell both leases, and on each occasion respondent had stated that he desired to take over the Standard lease where he was living. On January 9, 1947, they met at respondent's home on the Standard lease. At that time Dr. Reid asked the respondent if he still wanted the Standard lease, told him that he was going to give up both leases. Respondent said he would like to take the Standard lease and that he was sure he could and that he thought he might be able to take up the Wheeler lease as well but he would have to find out a few things about it. The agreements of January 9th were then drawn up by Dr. Reid and were in his handwriting. It may be remarked here, parenthetically, that if uncertainties existed in these agreements it was reasonable for the trial court to infer that Dr. Reid, as the draftsman of the instruments in question, caused these uncertainties to exist and that the language of the contracts should be interpreted against him. Civil Code, Section 1654; 6 Calif.Juris. 307; 4 Cal.Juris. suppl. 135, sec. 185 (note 5).

The agreement concerning the Standard lease provided that respondent was "to assume the lease with all its provisions and to reimburse Henry S. Reid for the money paid for the lease for 1947". The Standard lease ran from the period of October 15, 1946, to October 15, 1947, and cost Dr. Reid $1,000.00. On January 9, 1947, Mrs. Johnson, the wife of respondent, wrote out a check to Dr. Reid for $1,000.00, but he never cashed it. Respondent took possession of the Standard lease but did not take possession of the Wheeler lease. Dr. Reid testified that on that day in his presence a Mr. Rineholt wanted to pasture cattle on the Wheeler lease and offered to pay respondent in advance for the rental, but that respondent refused, saying something to the effect that that was to be left to a future date. Respondent says that he told Rineholt at that time that he had not yet taken over the Wheeler lease. On January 14, 1947, respondent told Dr. Reid he had been to see a Mr. McHenry at the Standard Oil Company and had asked him whether or not there would be any difficulty in signing the lease and had been told not if he got a letter from Dr. Reid or his son; that upon receipt of such a letter he would transfer it.

Dr. Reid said he would start the letter off. The first check for $1,000.00 not having been cashed, a second check in that amount was given to Dr. Reid. At that time respondent also told Dr. Reid that he did not yet know whether he could handle the Wheeler lease but would let him know definitely on January 21st. On January 22d Dr. Reid's son brought this second check back to respondent and said: "The deal is off." The court ordered the respondent to deposit $1,000.00 with the clerk of the court for the benefit of appellants, which he did.

The appellant contended that the two leases could only be operated as one unit, but the evidence showed the contrary. The two leases had both been used for pasturing cattle but each is fenced separately with a gate between them. There are facilities on the Wheeler lease for loading and unloading cattle, and also water available. In fact, these leases always had been operated separately until the year 1944.

[5, 6] From all of this testimony the trial court could reasonably deduce that the instrument dated January 9, 1947, purporting to assign respondent the Standard lease was a separate and independent contract from the one dealing with the Wheeler lease, and that the parties so intended. The rule governing Appellate Courts in the premises is set forth in Re Estate of Rule, 25 Cal.2d 1, at page 11, 152 P.2d 1003, 1008, 155 A.L.R. 1319:

"The rule is that an 'appellate court will accept or adhere to the interpretation (of a contract) adopted by the trial court—and not substitute another of its own— * * * where parol evidence was introduced in aid of its interpretation, and such evidence * * * is such that conflicting inferences may be drawn therefrom.' (4 Cal.Jur. 10-yr. Supp. (1943 rev.), 146–147, § 192; See also 2 Cal.Jur. 934–939, § 549.) Certainly inferences may be drawn from the contract and the surrounding circumstances here which would support the finding which we must presume was made by the trial court relative to the intention of the contracting parties." See also, Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, and Rutherford v. Berick, 82 Cal.App.2d 331, 186 P.2d 23.

Judgment is affirmed.

DORAN, Acting P. J., and WHITE, J., concur.

LOCKARD et al. v. CITY OF LOS ANGELES.*

Civ. 16234.

District Court of Appeal, Second District, Division 2, California.

April 23, 1948.

Rehearing Denied May 10, 1948.

Hearing Granted June 21, 1948.

1. Trial ⚷404(2)

A fact finding by trial court will be treated as such by appellate court, though found among trial court's conclusions of law.

2. Appeal and error ⚷1009(2)

Testimony of director and former member of city planning commission that certain properties were unsuitable for commercial purposes, to which zoning ordinances limited use thereof, but suitable for only light manufacturing purposes, and trial judge's view of properties, constituted "substantial evidence" sustaining his fact finding to such effect and judgment enjoining city from interfering with use of properties for light industrial purposes.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Evidence".

3. Constitutional law ⚷319

A city ordinance, so restricting use of property that regulation amounts to confiscation thereof, is unconstitutional as taking property without due process of law.

4. Constitutional law ⚷296(2)

A city zoning ordinance prohibiting use of properties for light manufacturing purposes, for which alone they were suitable, was invalid as arbitrary, unreasonable, and taking property without due process of law.

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* Subsequent opinion 202 P.2d 38.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Charles C. Lockard and others against the City of Los Angeles to declare certain provisions of a city zoning ordinance invalid as to plaintiffs' properties, to declare plaintiffs' rights to use such properties for light industrial purposes, and to enjoin enforcement of such provisions as against named plaintiff and interference with plaintiffs' use of properties for such purposes. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Ray L. Chesebro, City Atty., Bourke Jones, Asst. City Atty., and Thomas H. Hearn, Deputy City Atty., all of Los Angeles, for appellant.

Albert H. Allen and Hyman Goldman, by Albert H. Allen, all of Beverly Hills, for respondents.

McCOMB, Justice.

This is an appeal by defendant municipality from a judgment, after trial before the court without a jury, declaring invalid, in so far as they apply to properties of plaintiffs and others similarly situated, certain provisions of a zoning ordinance of the city which limit the use of said properties to certain commercial purposes and enjoining the enforcement of said provisions as against plaintiff Lockard; also declaring the rights of plaintiffs to use their properties for light industrial purposes as permitted by other provisions of said ordinance and enjoining the city from interfering in the use by plaintiffs of their properties for such light industrial purposes.

The essential facts are these:

By ordinance No. 90,500, effective on June 1, 1946, defendant municipality adopted a comprehensive zoning plan whereby the entire city was divided into many districts, each of which was assigned to one of sixteen zones established by the ordinance. Under this ordinance Jefferson Boulevard, an important thoroughfare of the city running in an easterly-westerly direction, was divided into several districts which were assigned to various zones. A portion of Jefferson Boulevard for a distance of several miles easterly of Vineyard Avenue was placed in C2 zone, being one of four commercial zones established by the ordinance, and providing for what was known as the "service type" of commercial use. In a portion of this district Jefferson Boulevard is intersected by Crenshaw Boulevard and proceeding westerly therefrom by Vineyard, La Brea, Sycamore and Cochrane Avenues respectively.

The portion of Jefferson Boulevard lying westerly of Vineyard Avenue and extending to Sycamore Avenue was placed in M1 zone, being designated a "light industrial zone." Herein certain light manufacturing uses are permitted. This district extended for approximately one-half mile westerly of Vineyard Avenue.

[1] The present action was instituted by some of the owners and lessees of that portion of Jefferson Boulevard lying between Crenshaw Boulevard on the east and Vineyard Avenue on the west. The trial court found: "That Jefferson Boulevard from Crenshaw Avenue to La Brea Avenue is *suitable only for light manufacturing purposes such as is permitted in Zone 'M-1'* of the Zoning Ordinances of the City of Los Angeles, and defendants, and each of them, should be enjoined and restrained from interfering with the use of said property for light industrial purposes such as is permitted under the Zoning Ordinances in Zone 'M-1.'" * (Italics added.)

Pursuant to the foregoing finding the trial court entered a judgment containing the provisions hereinbefore mentioned.

[2] This is the sole question necessary for us to determine:

(a) Was there substantial evidence to sustain the foregoing finding, and (b) did such finding support the judgment entered herein?

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* It is immaterial that this finding of fact is found among the conclusions of law, as it is a finding of fact and will be so treated by this court. (Linberg v. Stanto, 211 Cal. 771, 776, 297 P. 9, 75 A.L.R. 555; Gossman v. Gossman, 52 Cal.App.2d 184, 191, 126 P.2d 178.)

This question must be answered in the affirmative.

(a) Facts

In the instant case the preponderance of evidence was to the effect that the property in question was unsuitable for the purposes to which the ordinance limited its use, and was suited only for light manufacturing purposes.

Ernest R. Smith, an authority on zoning and a former member of the planning commission of Los Angeles, and William M. Thorpe, director and manager of the city planning commission of the city of Los Angeles for seven years, both gave testimony which alone would have supported the finding of fact set forth above. In addition by stipulation of counsel the trial judge "viewed" the property in question. This view of itself constituted independent evidence which would sustain the questioned finding of fact. (Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 704, 28 P.2d 919; Rowland v. City of Pomona, 82 Cal.App.2d 622, 186 P.2d 447; Gastine v. Ewing, 65 Cal.App.2d 131, 141, 150 P.2d 266; McManus v. Otis, 61 Cal.App. 2d 432, 446, 143 P.2d 380.)

(b) Law

[3] The law is settled in this state that if the use of property is so restricted that it can be said that the regulation amounts to a confiscation of the property, the restrictive ordinance is invalid and unconstitutional because the property is taken without due process of law. (Bank of America Nat. Trust & Savings Ass'n v. Town of Atherton, 60 Cal.App.2d 268, 272, 140 P.2d 678.)

Conclusion

[4] Since the trial court's finding that the property here involved was suitable only for light manufacturing purposes, which finding was sustained by substantial evidence, applying the rule of law above stated it necessarily follows that the ordinance which prohibited the use of the property for such purposes was arbitrary, unreasonable, and constituted the taking of plaintiffs' property without due process of law. Hence the judgment of the trial court was correct.

Authorities of Appellant

Defendant relies principally on the cases of Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479, and Wilkins v. City of San Bernardino, 29 Cal.2d 332, 175 P.2d 542. It may be conceded, as plaintiffs do, that each of the cases is an authority supporting the propositions urged by defendant. However, the factual situation in such cases is clearly distinguishable from the facts in the present case. In none of the cited cases was there a finding of the trial court that the zoned property was "suitable only" for a purpose for which its use was prohibited by the ordinance under consideration.

In each of the cited cases the finding of the lower court was that the property was suitable for the purpose for which it was zoned. This difference in the factual situation existing in the cited cases and the instant case makes it unnecessary to discuss the arguments predicated on such cases advanced by defendant.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

85 Cal.App.2d 54

LORI, LIMITED, Inc., et al. v. WOLFE et al.

Civ. 15572.

District Court of Appeal, Second District, Division 3, California.

April 16, 1948.

As Modified on Denial of Rehearing May 14, 1948.

Hearing Denied June 10, 1948.

1. Dismissal and nonsuit 🔑24

Where at time of filing by plaintiffs of dismissal of action as against certain of defendants, those defendants had not set up any counterclaim and had not sought affirmative relief by cross-complaint or answer and trial had not been had, plaintiffs had an absolute right to dismiss action as against them, though other defendants had filed a cross-complaint joining issue on a separate action from that joined on complaint itself and severable therefrom. Code Civ.Proc. § 581, subd. 1.

2. Judgment 🔑5

Where plaintiffs had an absolute right to dismiss action as against certain defendants, but court improperly refused to permit plaintiffs to dismiss as to those defendants, judgment, in so far as it adjudicated issues as between plaintiffs and those defendants, was a nullity. Code Civ.Proc. § 581, subd. 1.

3. Dismissal and nonsuit 🔑19(3)

Plaintiffs' attempted dismissal as to defendants who had filed a cross-complaint seeking affirmative relief, was ineffective. Code Civ.Proc. § 581, subd. 1.

4. Motions 🔑54

Where trial court stated at time that additional defendants were made parties that they should be permitted to file a cross-complaint, but formal order prepared by plaintiffs and making additional defendants parties did not include permission to them to file a cross-complaint, subsequent nunc pro tunc order giving additional defendants permission to file cross-complaint spoke as of date of formal order because it merely corrected a clerical error in formal order, and additional defendants were authorized to file cross-complaint.

5. Parties 🔑56

In action by landlords against tenants to reform a lease so as to include therein a provision forbidding assignment of lease, wherein landlords were required to join assignees of lease as necessary parties, assignees were properly permitted to file a cross-complaint against landlords for declaratory judgment that assignees were lawfully in possession of leased premises, for an injunction to restrain landlords from interfering with assignees' quiet enjoyment and for damages. Code Civ.Proc. § 442.

6. Appeal and error 🔑1056(1)
Reformation of instruments 🔑44

In action by landlords against tenants and tenants' assignees to reform lease, wherein assignees filed a cross-complaint contending that they had performed all terms, conditions and covenants of lease and were entitled to peaceable possession of leased premises, exclusion of landlords' evidence that assignees had allegedly maintained leased premises for immoral purposes was prejudicial error, though an unlawful detainer action by landlord against tenants and assignees was pending.

7. Landlord and tenant 🔑37

Where lease containing uncertain language was prepared by landlords' counsel, language would be interpreted most strongly against the landlords. Civ.Code, § 1654.

8. Appeal and error 🔑1008(3)

Where lease which had been drawn up by landlords' counsel contained uncertain language as to when landlords' option to receive gross revenue as rent instead of stipulated monthly amount was effective, and there was some evidence that option was not intended to be retroactive, appellate court adhered to trial court's interpretation that option was not retroactive. Civ.Code, § 1654.

9. Landlord and tenant 🔑171(3)

To be "constructive eviction" of a tenant, tenant must vacate the property, and there is no constructive eviction if tenant continues in possession of the premises however much he may be disturbed in the beneficial enjoyment.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Eviction".

10. Landlord and tenant 🔑171(3)

Fact that landlords permitted a subtenant of assignees of lease to sell liquor on premises and thereby waived provision in lease forbidding the sale of liquor on the premises, was not a "constructive eviction" of assignees, where assignees not only continued in possession but were litigating and seeking to remain in possession.

11. Appeal and error 🔑758(3)

Appellants who contended that certain findings of trial court were contrary to the undisputed evidence, had duty to show in their brief wherein evidence did not support the findings, and where appellants did not do so, claimed errors with respect to findings would not be considered.

12. Trial ⚷382

In absence of any evidence in regard to issues joined by amended and supplemental complaint and answer thereto, it was trial court's duty to find thereon against plaintiffs.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Lori, Ltd., Incorporated, and Zelletta M. Rose against E. E. Wolfe and Emma Wolfe, his wife, and Ben Hecht and others for reformation of lease, and for a declaration that assignment of lease from the Wolfes and Hecht and others be declared void, and for an accounting, wherein Hecht and others filed a cross-complaint naming plaintiffs as cross-defendants, praying for declaratory relief, for an injunction, and for damages. From an adverse judgment, the plaintiffs appeal.

Judgment reversed in part and affirmed in part.

A. Brigham Rose, of Los Angeles, for appellants.

Macfarlane, Schaefer & Haun, of Los Angeles, for respondents Wolfe.

Benjamin J. Goodman, of Los Angeles, for respondents Hecht and Salomon.

VALLÉE, Justice pro tem.

Plaintiffs sued defendants Wolfe seeking to reform a lease. The lease is dated February 15, 1944. It did not contain any provision against assignment or subletting. Plaintiffs sought, by their complaint filed April 26, 1945, to reform the lease by having a provision against assignment and subletting included. Defendants Wolfe answered, denying the principal allegations of the complaint and alleging that on April 10, 1945, they had transferred their interest, as lessees, to Hecht and Salomon, who were then in possession, and pleaded that the action should be abated until Hecht and Salomon had been made parties.

A rather extended statement of the proceedings in the trial court is necessary to an understanding of the questions presented. The action came on for trial on July 9, 1945. The trial judge declined to proceed to the trial of the plea in abatement before the trial of the other issues. At the conclusion of plaintiffs' case he stated that the plaintiffs had not produced any evidence which would warrant reformation. He then stated that it appeared from the evidence introduced that Hecht and Salomon had an interest in the subject of the action and that they should be made parties defendant and given an opportunity to file a cross-complaint and set up their rights under the assignment.

On July 13, 1945, an order was made reciting that Hecht and Salomon were necessary parties to a complete determination of the controversy and ordering that the plaintiffs file such other amended and supplemental pleadings as they might be advised within fifteen days; that Hecht and Salomon have ten days to plead thereto; that the pleadings be amended by the addition of Hecht and Salomon as parties defendant. It will be noted that this order did not permit Hecht and Salomon to file a cross-complaint. On September 26, 1945, the plaintiffs filed an amended and supplemental complaint in which they named the Wolfes, Hecht and Salomon, and Hecht and Salomon, as copartners, parties defendant. The plaintiffs by this pleading sought reformation of the lease, and in addition, prayed that the assignment of the lease from the Wolfes to Hecht and Salomon be declared void; that the Wolfes be required to account to plaintiffs for moneys collected by them as lessees; that Hecht and Salomon be required to account for moneys collected by them subsequent to the assignment by the Wolfes to them; that the Wolfes be required to account for personal property and be required to rehabilitate the leased premises; and that the court enter a judgment "adjusting the equities and rights of all parties in interest herein." The Wolfes answered, denying the principal allegations of the amended and supplemental complaint. They did not ask for any affirmative relief.

Hecht and Salomon answered and filed a cross-complaint. In the cross-complaint they named the plaintiffs but not the Wolfes, as cross-defendants. They pleaded the lease of February 15, 1944, between the plaintiffs and the Wolfes; alleged that it did not contain any provision against assignment; that the Wolfes had performed all covenants of the lease; that on April 9, 1945, the Wolfes had assigned their interest in the lease to them; that they had taken and were in possession of the demised premises and had offered and tendered to plaintiffs all rent due under the lease, which plaintiffs had rejected; that a controversy existed between them and the plaintiffs, relating to the lease and with respect to (a) whether the lease of February 15, 1944, was in force, (b) whether the Wolfes, as lessees, had the right to assign to them, and (c) whether they were lawfully in possession of the demised premises with the right to continue in possession for the remainder of the term of the lease. They also alleged that the plaintiffs, with the intent to interfere with their quiet enjoyment of the demised premises and with the intent to evict them therefrom, had maliciously committed numerous acts for the purpose of annoying and harassing them. They alleged general and punitive damages. The cross-complaint prayed for declaratory relief, for an injunction, and for damages.

Plaintiffs answered the cross-complaint. They alleged that it was an unauthorized pleading; denied its principal allegations; admitted that they had refused to accept rent from Hecht; alleged that there was no controversy between cross-complainants and the plaintiffs; that they had had no transaction whatsoever with cross-complainants; admitted that they claimed that the Wolfes had no right to assign any interest in the lease and that they claimed that cross-complainants were not in possession. They alleged that cross-complainants had converted the use of the demised premises to immoral and illegal purposes. The answer to the cross-complaint prayed that the cross-complaint be dismissed; that it be adjudged that cross-complainants had no enforceable rights against the plaintiffs; that the plaintiffs had the right to eject the cross-complainants from the premises; that the assignment by the Wolfes to cross-complainants was void and that the plaintiffs were entitled to all relief sought in their original complaint.

On January 11, 1946, a motion to place the cause off calendar was heard. At that time the trial judge was advised that in December, 1945, the plaintiffs had filed an action in unlawful detainer against the Wolfes, Hecht and Salomon. The court stated that he took judicial notice of the files in that action. Counsel for the plaintiffs then moved to dismiss the action because of the pendency of the unlawful detained action. The motions were denied.

After the hearing on January 11th, the plaintiffs filed with the clerk, a written request to enter the dismissal of the action against the defendants E. E. Wolfe and Emma Wolfe. At the same time they also tendered the clerk a separate written request to enter a dismissal of the action against Hecht and Salomon. The clerk refused to file the request for dismissal as against Hecht and Salomon on the ground that they had sought affirmative relief by the cross-complaint.

The cause came on again for trial on January 14, 1946, at which time counsel for plaintiffs advised the court of the filing of the dismissal against the Wolfes and of the attempted filing of the dismissal against Hecht and Salomon. After considerable discussion, the court requested counsel for defendants to serve and file motions to vacate the dismissals to be heard at 1:30 p. m. the same day.

Prior to the court convening at 1:30 p. m., the plaintiffs filed with the clerk a written statement objecting to the trial of the action before Judge Stutsman and setting forth facts alleged to constitute ground of disqualification. After the filing of the written statement of disqualification, counsel for defendants Wolfe filed a notice of motion to strike the dismissals. Notwithstanding the filing of the statement of disqualification, Judge Stutsman granted the motion to vacate the dismissals. Thereupon he continued the trial of the cause until the matter of his disqualification could be determined. Subsequently, it was determined that Judge Stutsman was not disqualified.

The cause came on again for trial on February 27, 1946. Counsel for the plaintiffs did not appear. The court then stated that counsel could "proceed to be heard on the cross-complaint." Evidence was received in defense of the amended and supplemental complaint and in support of the allegations of the cross-complaint. On the afternoon of that day, counsel for plaintiffs appeared and thereafter participated in the trial until its conclusion.

On March 13, 1946, the court made an order correcting the order of July 13, 1945, (making Hecht and Salomon parties) nunc pro tunc as of that date to provide that Hecht and Salomon be granted leave to file a cross-complaint. The order of March 13, 1946, recited that the order signed on July 13, 1945, did not speak the truth in that it did not contain the complete oral pronouncement made by the court.

The court found that there was no understanding between the parties to the lease that any restrictions against assignment were to be included therein and that there was no mistake in the making of the lease; that the Wolfes had a right to and had assigned the lease to Hecht and Salomon without the consent of the plaintiffs for a valuable consideration; that Hecht and Salomon took the assignment in good faith, for value, and without any knowledge of any claims of plaintiffs, and took possession of the leased premises and were lawfully in possession and had the right to continue in possession under the lease; that they had tendered to the plaintiffs all rent payable under the lease; that the plaintiffs had refused to accept the same; that a controversy existed between the plaintiffs and *all of the defendants* named in the action concerning the construction of a provision of the lease with respect to the payment of rental; that said provision should be construed as contended *by all defendants;* that *all defendants* had rendered accurate accounts to the plaintiffs; that *all defendants* had maintained and kept one set of books; that Hecht and Salomon had complied with the provisions of the lease, and had not violated any of its provisions; that the plaintiff Zelletta M. Rose, with the intent to interfere with Hecht and Salomon's quiet enjoyment of the demised premises and with the intent to evict them therefrom, had maliciously committed the numerous acts alleged in the complaint, which had injured and damaged the reputation and business of the demised premises and that she would continue so to do unless enjoined.

The judgment was that the plaintiffs were not entitled to reformation of the lease; that it did not contain a covenant against assignment; that it had been validly assigned to Hecht and Salomon; that they were lawfully in possession and had a right to continue in possession under the terms of the lease; that the plaintiffs had caused a constructive eviction of Hecht and Salomon from a substantial part of the leased premises; that Hecht and Salomon had complied with all provisions of the lease and that they had not violated any of its provisions; that plaintiff Zelletta M. Rose be enjoined from interfering with Hecht and Salomon's quiet enjoyment of the leased premises.

[1-3] Appellants first urge that the filing of the dismissal of the action as against the Wolfes was effective to dismiss the action and that the court erred in striking it from the files. The contention is well taken. At the time the dismissal was filed the defendants Wolfe had not set up any counterclaim or sought affirmative relief by cross-complaint or by their answer, and the trial had not been had. The Wolfes were not parties to the cross-complaint. Under these circumstances, the plaintiffs had an absolute right to dismiss the action as against them. Code Civ. Proc. § 581, subd. 1; Jalof v. Robbins, 19 Cal.2d 233, 234, 120 P.2d 19. The fact that Hecht and Salomon were also parties defendant and that they had filed a cross-complaint did not affect the right of the plaintiffs to dismiss the action as to the defendants Wolfe. The issue joined on the cross-complaint was a separate, distinct action from that joined on the complaint itself and severable therefrom. Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 182, 25 P.2d 983, 90 A.L.R. 384. A plaintiff has the absolute right to dismiss as to certain defendants who have not sought affirmative relief and not dismiss as to other defend-

ants, whether such other defendants have or have not sought affirmative relief. The effect of the dismissal as to the defendants Wolfe was to prevent any subsequent proceedings in the cause by the court as to them. They were thereafter strangers to the action. The judgment, insofar as it adjudicated issues as between the plaintiffs and the defendants Wolfe, is a nullity. The court was without power to entertain the motion to set aside the dismissal as to the defendants Wolfe, and such action, as well as the procedure that followed with respect to them, was without legal sanction and void. Rogers v. Transamerica Corp., 6 Cal.App.2d 340, 44 P.2d 635; Simpson v. Superior Court, 68 Cal.App.2d 821, 825, 158 P.2d 46; 9 Cal.Jur. 508, sec. 4. The attempted dismissal as to Hecht and Salomon was ineffective. They had sought affirmative relief.

[4] The cross-complaint was properly filed. At the time the court stated that Hecht and Salomon should be made parties, he said that they should be permitted to file a cross-complaint. The formal order of July 13, 1945, making them parties, prepared by appellants, did not include permission to them to file a cross-complaint. When the error was called to the attention of the court an order was made nunc pro tunc as of July 13, 1945, giving them permission to file the cross-complaint. The nunc pro tunc order speaks as of July 13, 1945. Combination Land Co. v. Morgan, 95 Cal. 548, 30 P. 1102; Moklofsky v. Moklofsky, 79 Cal.App.2d 259, 264, 179 P.2d 628. By the order nunc pro tunc the court merely corrected a clerical error in the order of July 13, 1945. Martin v. Ray, 74 Cal.App.2d 922, 928, 170 P.2d 75; McConville v. Superior Court, 78 Cal.App. 203, 207, 248 P. 553.

[5] There is no merit in the contention that the action was not one in which a cross-complaint may be filed. Code of Civil Procedure, section 442, in part, provides: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint." The affirmative relief sought by Hecht and Salomon in their cross-complaint against the plaintiffs related to and depended upon the lease which the plaintiffs in their amended complaint sought to reform. The gist of plaintiffs' amended complaint was that by mistake a provision against assignment had been omitted from the lease. Hecht and Salomon sought a decree that they were assignees of the lease. If the lease did not include a provision against assignment they, as assignees, had rights under the lease. If the lease included a provision against assignment they had no rights under the lease, if the lessors stood on that provision, as it is undisputed that the plaintiffs had not consented to an assignment. The affirmative relief they sought related to and depended upon the question whether the lease did or did not contain a provision against assignment. The applicable principle is stated in Kent v. Clark, 20 Cal.2d 779, 786, 128 P.2d 868, 873, 142 A.L.R. 576: "If the defendant's pleading sets forth matter inextricably related to the matter forming the basis of the plaintiff's complaint, it meets the statutory requirements of a cross-complaint, and it is immaterial that the relief sought thereby is independent of that prayed for in the complaint." In Eastin v. Roberts, Carpenter & Co., 19 Cal.App.2d 567, at page 570, 66 P.2d 224, at page 225, the court stated: "It has been said that the right to proceed by way of cross-complaint depends upon whether the matter set up therein bears a necessary relation to the matter constituting the cause of action, and, if such relation be present, it is immaterial that the relief sought is independent of that prayed for in the complaint; that the cross-complaint need not tend to diminish the plaintiff's recovery but may demand affirmative relief distinct from that demanded by the complaint. Hanes v. Coffee, 212 Cal. 777, 300 P. 963; California Trust Co. v. Cohn, 214 Cal. 619, 7 P.2d 297. See, also, Mikesell v. Gomez, 67 Cal.App.2d 507, 511, 154 P.2d 927; County of Humboldt v. Kay, 57 Cal.App.2d 115, 119, 134 P.2d 501; Hanlon v. Western Loan & Bldg. Co., 46

Cal.App.2d 580, 604, 116 P.2d 465. Likewise, the cause of action alleged in the cross-complaint for an injunction sets forth matter inextricably related to the matter forming the basis of the plaintiffs' complaint—the lease and the assignees' quiet enjoyment thereunder.

[6] During the course of the trial cross-complainants introduced evidence for the purpose of establishing that from the time they took possession of the demised premises they had performed all of the terms, conditions and covenants of the lease to be performed by the lessee. In response thereto the plaintiffs offered to prove that cross-complainants had not performed all of the terms, conditions and covenants of the lease, in that they had from the inception of their possession maintained the leased premises for immoral purposes. The court refused to hear such evidence from the plaintiffs upon the ground that he was not going to render any judgment which would be res judicata in the unlawful detainer action. Notwithstanding this ruling, the court found and adjudged that cross-complainants were lawfully in possession of the demised premises and the right to continue in possession under the terms of the lease; that ever since April 10, 1945, the date cross-complainants took possession, "there has existed and does still exist, privity of estate" between the plaintiffs, as lessors, and cross-complainants, as assignees, in the demised premises; that the cross-complainants "have complied with all of the covenants, terms, conditions and provisions of the lease aforesaid and they have not violated any of the covenants, terms, conditions and provisions thereof." The evidence offered by the cross-defendants was admissible. The refusal to receive it constitutes prejudicial error. The fact that an adjudication in the present action might be res judicata in the unlawful detainer action was of no moment. Cross-complainants tendered the issues as to whether they had complied with the lease. The plaintiffs were entitled to meet the issue.

The lease contained the following provision:

"The rental which shall be paid to the Lessors by Lessees for said premises for said term is as follows: To Zelletta M. Rose, the sum of eight hundred fifty ($850.00) dollars per month; to Lori Ltd., Incorporated, the sum of three hundred fifty ($350.00) dollars per month, payable in advance, at said rate for the period commencing February 15th, 1944 and ending February 14, 1945. Thereafter, the Lessors herein shall have the option in lieu of accepting said basic monthly rental to receive in lieu thereof, at their option, thirty per cent (30%) of the gross revenue received as rent by the Lessees herein, and in the event that the Lessors elect to collect as rentals the said thirty per cent (30%) in lieu of the sums per month hereinbefore specified as a basic rental, the Lessors shall on or before the 15th day of December during all of the period herein involved make known to the Lessees their election to accept the percentum hereinbefore specified in lieu of the specific sum fixed, and it shall be incumbent upon the Lessees to furnish the Lessors on the first of December of each year commencing the first of December, 1945 with a true and accurate account of all revenues obtained by the Lessees herein in connection with the operation of the herein leased premises: * * *."

[7, 8] One of the issues tendered by the cross-complaint was the proper interpretation of the foregoing provision. Cross-complainants contended that in the event the plaintiffs, as lessors, elected to exercise the option therein provided that the same was not retroactive in its operation but that 30 per cent of the gross revenue received as rent by the lessees became due and payable to the lessors upon the exercise of the option commencing with February 15th of the year following the election. The plaintiffs contended that upon exercising the option they were entitled to 30 per cent of the gross revenue received as rent by the lessees retroactively as of February 15th preceding the date of election. Evidence from both sides was received to aid the court in construing the lease. The court found that on December 15, 1945, the plaintiffs elected to exercise

the option to accept 30 per cent of the gross revenue received as rent by the lessees in lieu of accepting the basic monthly rental; that "the plain meaning, understanding and intent" of the quoted provision of the lease is as contended for by cross-complainants. Appellants urge that the finding is without support in the evidence. The contention is without merit. We are not in accord with the finding that the meaning of the provision of the lease is plain. We are not disposed, however, to disagree with the construction given the provision by the trial judge. Present counsel for appellants prepared the lease. The language should be interpreted most strongly against the party—appellants—who caused the uncertainty to exist, and any doubt as to its meaning is to be resolved against such party. Civ.Code, § 1654; 4 Cal.Jur. 10-Yr. Supp. (1943 rev.), sec. 185, p. 135. Appellants did not, prior to December 15, 1944, elect in writing to accept 30 per cent of the gross revenue in lieu of monthly rental. They accepted the basic monthly rental of $1,200 per month as rent for the months commencing February 15, and March 15, 1945. Wolfe testified that he understood that the option provision was not retroactive. In Re Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 1008, 155 A.L.R. 1319, it was said: "The rule is that an 'appellate court will accept or adhere to the interpretation (of a contract) adopted by the trial court—and not substitute another of its own—where parol evidence was introduced in aid of its interpretation, and such evidence * * * is such that conflicting inferences may be drawn therefrom.' (4 Cal.Jur. 10-Yr. Supp. (1943 rev.) 146–147, § 192; see also 2 Cal. Jur. 934–939, § 549.)"

[9, 10] The lease has a provision by which the lessees agree not to sell or permit the sale of liquor on the demised premises "without the consent of the Lessors." One Anzalone, as a subtenant of Hecht and Salomon, operated a cafe on the premises. Appellants wrote a letter to Anzalone waiving this provision of the lease and giving her permission to sell liquor, under her liquor license, in the cafe and on abutting property not part of the demised premises. The court found that the writing of the letter constituted a constructive eviction of Hecht and Salomon. Appellants attack the finding. We are unable to perceive how the mere waiver by appellants of a right which they had under the lease constituted a constructive eviction. Appellants' waiver did not in any way affect the rights of Hecht and Salomon, if any, as against Anzalone. The court did not find that Hecht and Salomon sustained any monetary damage by reason of the waiver. In order that there be a constructive eviction it is essential that the tenant should vacate the property. There is no constructive eviction if the tenant continues in possession of the premises however much he may be disturbed in the beneficial enjoyment. Veysey v. Moriyama, 184 Cal. 802, 805, 195 P. 662, 20 A.L.R. 1363; Tregoning v. Reynolds, 136 Cal.App. 154, 157, 28 P.2d 79. Hecht and Salomon not only continued in possession but were litigating, seeking to remain in possession. This finding is without support in the evidence.

[11, 12] It is asserted that the trial court made other findings "in no wise related to the original form of action or to any issue pleaded in the case." The original complaint was superseded by the amended and supplemental complaint. The other findings respond to the issues made by the latter complaint and the answer of Hecht and Salomon thereto and to the issues made by the cross-complaint and the plaintiffs' answer thereto. Appellants do not point out wherein the findings do not relate to the issues. They characterize certain of them as "unintelligible," or "an absurdity," or "an insult to the intelligence of a moron," or that it "shocks credulity." As to one or two findings the appellants say they are "diametrically contrary to that of the undisputed evidence," without pointing out wherein the finding is contrary to the evidence. The characterizations referred to are of no assistance and the claimed errors with respect to those findings will not be considered. It is the duty of appellants to show in their brief wherein the evidence does not support the findings. Wieczorek v. Texas Co., 45 Cal.App.2d 450, 456, 114 P.2d 377. We are satisfied, from an examination of the 918 page reporter's transcript that the criticized find-

ings are amply supported by the evidence. Appellants seem to contend that because, when the cause came on for trial the second time their counsel stated to the court that they abandoned their amended and supplemental complaint, findings should not have been made with respect to issues joined by that pleading and the answer of Hecht and Salomon thereto. The burden was on the plaintiffs to establish the truth of the allegations made in their amended and supplemental complaint. In the absence of any evidence in regard to the issues joined by the amended and supplemental complaint and the answer of Hecht and Salomon thereto, it was the duty of the court to find thereon against the appellants. Monterey County v. Cushing, 83 Cal. 507, 510, 23 P. 700; Hammond Lumber Co. v. Richardson, 94 Cal.App. 119, 123, 270 P. 751; Baines v. Shank, 12 Cal.App. 391, 394, 107 P. 631.

The judgment is reversed as to the defendants E. E. Wolfe and Emma Wolfe, with directions to dismiss the action as against said defendants. The judgment is reversed insofar as it decrees that the defendants, Ben Hecht and J. G. Salomon, Ben Hecht and J. G. Salomon, as copartners, are lawfully in possession of the demised premises and have the right to continue in possession thereof under the terms and provisions of the lease aforesaid and insofar as it decrees that ever since April 10, 1945, "there has existed and does still exist, privity of estate" between the plaintiffs, as lessors under the lease, and cross-complainants, Hecht and Salomon, as assignees of the original lessees in the demised premises, and insofar as it decrees that Hecht and Salomon have complied with all of the covenants, terms, conditions and provisions of the lease, dated February 15, 1944, described in the judgment as "Exhibit A," and that they have not violated any of the covenants, terms, conditions and provisions thereof, and insofar as it decrees that the plaintiffs caused constructive eviction of Hecht and Salomon from a substantial part of the demised premises. The judgment is affirmed in all other respects, including the decree that the lease was validly assigned to Hecht and Salomon.

SHINN, Acting P. J., and WOOD, J., concur.

GUERIN et al. v. KIRST.*

Civ. 16104.

District Court of Appeal, Second District, Division 2, California.

April 12, 1948.

Hearing Granted June 10, 1948.

1. **Bailment** 🔑32
Sales 🔑480(1, 5, 6)

Where agreement for conditional sale of tractor was followed by agreement purporting to be a lease with option to purchase, original owners who subsequently located the tractor in possession of innocent purchaser from buyer-lessee were entitled, either as conditional vendors or as lessors, to possession of the tractor or reasonable value thereof, and also to damages for its detention after demand for return. Code Civ.Proc. § 667; Civ.Code, §§ 3333, 3359.

2. **Damages** 🔑106

Measure of damages for deprivation of use of chattel is an amount equal to interest on value of the property from time of demand for its return, but owner may also be entitled to reasonable or usable rental value of property during detention if such rental value exceeds the interest. Code Civ.Proc. § 667; Civ.Code, §§ 3333, 3359.

3. **Replevin** 🔑76

In claim and delivery or replevin action, interest on value of the property is not adequate compensation for wrongful detention, and plaintiff may be entitled to reasonable rental value.

4. **Statutes** 🔑225½

Where a special statute provides for ascertaining extent of damage, a general statute embodying a principle of equity has no immediate application. Code Civ.Proc. § 667; Civ.Code, §§ 3333, 3359.

5. **Evidence** 🔑312
Pleading 🔑127(2)

Where answer in replevin action admitted that reasonable value of use of replevied tractor was $825 per month, and defendant's counsel agreed in colloquy that such figure was correct, while arguing that defendant was entitled to allowance for repairs, defendant thereby conceded that reasonable rental value was $825 per month.

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* Subsequent opinion 202 P.2d 10.

6. Bailment 🔑31(2)
Sales 🔑480(4)

In replevin by owners of tractor, as conditional vendors or lessors, against innocent purchaser from buyer-lessee, evidence of expense of overhauling tractor at time of defendant's purchase and prior to his knowledge of plaintiffs' claim was improperly excluded.

7. Bailment 🔑32
Sales 🔑480(5)

In replevin by owners of tractor worth $6,000 or $7,000 as conditional vendors or lessors, against innocent purchaser from buyer-lessee, plaintiffs could recover reasonable or usable rental value for 11 months from date of demand to date of judgment, aggregating $9,075, less expense of tractor's upkeep, as well as to possession of tractor or value thereof, notwithstanding defendant's ignorance of plaintiff's reservation of title. Code Civ.Proc. § 667; Civ.Code, §§ 3333, 3359.

8. Bailment 🔑7
Evidence 🔑441(1)
Sales 🔑461

All conversations preceding agreement for conditional sale of tractor were merged therein, and all conversations and writings with respect to sale or lease of tractor prior to subsequent agreement to lease to conditional buyer with option to purchase were merged in such instrument, and hence no testimony bearing on terms of the second instrument was admissible in absence of pleading and proof of mistake or imperfection. Code Civ.Proc. § 1856.

9. Contracts 🔑153

Where plain and unambiguous language of contract permits its complete fulfillment and promotes its object, that construction is to be preferred over one derived by elimination of or addition to its terms.

10. Contracts 🔑143

Making a new contract for litigants or rewriting clear terms to which they have freely pledged their faith is not a just or proper application of judicial function.

11. Evidence 🔑314(1)

Where parties to conditional sale of tractor subsequently executed agreement purporting to be a lease of tractor with option to purchase, hearsay testimony concerning purchase of another tractor from buyer by innocent purchaser of the leased tractor, and payment by buyer to sellers of balance due on the leased tractor out of money received from innocent purchaser was inadmissible. Code Civ.Proc. § 1856.

12. Estoppel 🔑75

More than mere possession of the chattel is involved in maintenance of contention that one holding another out as owner and placing him in possession is precluded from disputing title of innocent purchaser from the person in possession.

13. Sales 🔑234(1)

Where amount due original vendor of chattel is equivalent of value of the chattel, innocent purchaser from original vendee is without remedy if facts do not warrant estoppel. Civ.Code, § 1789.

14. War 🔑4

Violation of Emergency Price Control Act in conditional sale of tractor and subsequent lease of tractor to conditional buyer with option to purchase did not preclude conditional sellers from recovering in replevin the value of such tractor and damages for detention, from innocent purchaser from conditional buyer. Emergency Price Control Act of 1942, as amended, 50 U.S.C.A.Appendix, § 901 et seq.

WILSON, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Claim and delivery action by H. T. Guerin and others, copartners doing business as Guerin Brothers, against John M. Kirst to recover tractor. From a judgment for defendant, plaintiffs appeal.

Modified and affirmed on condition.

Prior opinion 188 P.2d 509

Latham & Watkins, by Richard W. Lund and James W. McNabb, all of Los Angeles, (John G. Evans, of San Francisco, of counsel), for appellants.

Frank P. Doherty, William R. Gallagher, Frank W. Doherty and James A. Doherty, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

In November, 1945, appellants delivered to one Vergil Grove a caterpillar tractor. They found it in May, 1946, in the custody of respondent Kirst who asserted title thereto as an innocent purchaser from Grove. A claim and delivery action was thereupon instituted for the purpose of establishing appellants' ownership and right of possession. Their demands having been rejected by the jury they now demand a reversal of the judgment on the grounds of (1) insufficiency of the evidence; (2) misapplication of the federal Emergency Price Control Act; (3) errors in admitting evidence; (4) misconduct of respondent's counsel, and (5) erroneous instructions to the jury.

On November 5, 1945, appellants as contractors were engaged in a general grading business, and bought, repaired, used and sold tractors and kindred equipment. On that day H. T. Guerin, one of the partners, called upon Grove at Santa Monica and pursuant to negotiations appellants delivered to Grove a used tractor bearing serial number 1 H 7401, herein referred to as tractor 7. As evidence of their transfer of possession of the tractor Guerin wrote by hand a conditional sale agreement which included in the transaction a second tractor and a carryall. The total value of the three items was $23,500, of which $2,500 was paid then by Grove and terms of further payments were specified in the writing herein referred to as Exhibit A[1] along with descriptions of the three movables.

It is evidently intended by the parties that Exhibit A should be reduced to typewritten form. After Grove had rejected two typed drafts of the agreement as prepared in the office of appellants, about December 15, they forwarded to him a third instrument (herein referred to as Exhibit B) dated November 7, 1945, entitled "Agreement of lease of personal property (with option to buy)," and required that he sign it or return the equipment delivered to him in November. The pertinent portions of Exhibit B are as follows:

"1. The lessor hereby agrees to lease to the lessee, and the lessee hereby agrees to rent from the lessors all of that certain personal property described as follows:

Equipment No.	Description
17	Caterpillar Tractor, Serial No. 1H7401
28	Caterpillar Tractor, Serial No. 1H 949
12	Carryall, R. U. Serial No. S 7747

"2. The period of this lease shall be for ten months commencing on the seventh (7th) day of November, 1945, and ending on the seventh (7th) day of August, 1946, and receipt of payments totaling the sum of $3,500.00 is hereby acknowledged to have been received up to December 14, 1945.

"3. The agreed monthly rental shall be the sum of $2,000 per month payable monthly in advance, commencing on the seventh (7th) day of November, 1945, and continuing on the seventh (7th) day of each and every succeeding month up to and including the seventh (7th) day of July, 1946, and the Balance of $1,075.00 shall be paid on the seventh (7th) day of August, 1946, and the total rentals for said period shall be the sum of $19,075.

"4. The lessor hereby grants to the lessee the option to purchase said equipment at the expiration of said rental period for a price of $4,425.00 provided that the lessee shall give notice in writing of his intention to exercise said option and which notice must be given to the lessor on or before the seventh (7th) day of August, 1946, and provided further that the lessee's right to so purchase said equipment shall be conditional upon a complete and full performance of his undertakings as herein provided, and also conditional upon the full payment by him to lessor of the rental herein above provided.

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[1] Exhibit A reads as follows:

"11-7-45

"I Hereby agree to Buy one cat & unit Serial 7401— to be bought as rent at Terms of $1,000 down and 1,000 each month for 7 months & one payment of $500, one cat. unit & 'A' frame Serial No. 1-H-949.

"1-H-949

and one R-U-Carry all for payment of $1,500 down and 13 payments of $1,000 and one payment of $500. R-U—7747- after Said payments have been made in full Said buyer H-T-& Guerin Bro' are to furnish me with Bill of Sale to all this Equipment. Interest of deferred payments at 8%.

"Guerin Bros By H. T. Guerin
"Vergil Grove"

"5. That should lessee exercise said option to purchase said personal property, he shall pay to lessor, in addition to the other sums herein provided, interest at the rate of eight (8) per cent per annum on the sum of $21,000.00 from the seventh (7th) day of November, 1945, to and including the seventh (7th) day of August, 1946, on the basis of the monthly deferred balances, and provided further that in the event of such election, lessee will pay to lessor the amount of repairs and maintenance incurred or paid by lessor in connection with said personal property during the term of this lease.

"6. Payments shall be made to the lessors at their office at 208 South Linden Avenue, South San Francisco, California."

At the trial appellants proved without contradiction that they had purchased tractor 7 from Oilfields Trucking Company of Bakersfield on November 10, 1941, and received its bill of sale on the same day. Such document was received in evidence without objection. It was established also without contradiction that appellants had never sold tractor 7; that it was completely equipped; that they had had no transaction with respondent; that they had located it May 31, 1946, in the latter's possession and on June 10 made demand upon him for its return to them; that the value of tractor 7 is $6,000 or $7,000. The answer admitted that its reasonable rental value was $825 per month.

[1] Upon the foregoing uncontradicted evidence of ownership appellants either as conditional vendors or as lessors of tractor 7 were entitled to judgment for the possession of the tractor or, in lieu of its return, to the reasonable value thereof. Code Civil Proc. sec. 667. That they were entitled to damages for its detention after demand for its return there can be no dispute. However, as to the amount of such damages and as to the rule for the admeasurement thereof the parties are at a wide variance and the authorities are at first glance not entirely in accord. By reason of such state of the law it is necessary to review the decisions of this state bearing upon the rule for the measure of damages in actions for replevin.

[2, 3] Section 667 of the Code of Civil Procedure is a part of Chapter 8 in Part II and Title VIII bearing upon trial and judgment in civil actions. Chapter 8 is entitled "Manner of Giving and Entering Judgment." Section 667 provides: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention." Under many authorities the rule for the measurement of the damages suffered by one who has been deprived of the use of a chattel is an amount of money equal to the interest on the value of the property from the time of the demand for its return. Such rule is stated in many decisions which nevertheless adhere to the doctrine that the owner is entitled to the reasonable or usable rental value of his property while it is detained from him, if such rental value exceeds the interest on the value of the chattel. Ruzanoff v. Retailers Credit Ass'n, 1929, 97 Cal.App. 682, 276 P. 156; Brandenburger v. Hanner, 1929, 96 Cal.App. 396, 274 P. 390; Drinkhouse v. Van Ness, 1927, 202 Cal. 359, 379, 260 P. 869; Crawford v. Meadows, 1921, 55 Cal. App. 4, 203 P. 428; Nahhas v. Browning, 1919, 181 Cal. 55, 183 P. 442, 6 A.L.R. 476; Tucker v. Hagerty, 1918, 37 Cal.App. 789, 792, 174 P. 908, 910. However, the preponderance of the authorities is committed to the doctrine that in a claim and delivery or replevin action interest on the value of the property does not furnish adequate compensation for the wrongful detention; and rightly so, for the reason that to be confined merely to interest upon the value of a chattel would enable a wrongdoer to

make profit out of his own wrong and would deny to a plaintiff damages which naturally and certainly follow from a wrongful invasion of his rights.

In Tucker v. Hagerty, supra, the court adopted the rule set forth in 34 cyc, 1563: "the measure of damages for such detention is the fair rental value of the machine, less the damages which would result to it from the extra wear and tear caused by the use of it while so rented." It is argued in the case at bar, as it has been in other actions reported by the appellate courts of this state, that the total allowance for the use of a chattel during the period of its detention is unfair and amounts to punitive damages. In the Tucker case the court declared: "There is nothing so startling in the fact that the rental value allowed by the court amounts to more than the value of the machine as to compel a reversal of the judgment."

In Drinkhouse v. Van Ness, supra [202 Cal. 359, 260 P. 877] the court held that the plaintiff in a replevin action "is not confined to interest as damages, if he can establish the fact that the value of the use of the property of which he was deprived exceeded the interest. * * * He is entitled to recover as damages for the detention the reasonable value of such use during the period he was wrongfully deprived thereof up to the time of the rendition of the judgment"—citing 5 Cal.Jur., page 208; Nahhas v. Browning, supra.

In Stanley W. Smith v. W. M. Pilgrim, 1927, 117 Cal.App. 244, 246, 3 P.2d 573, 574, it was held in an action for claim and delivery that "the party aggrieved is entitled to the usable value, regardless of whether or not he be shown to have hired other property to take its place. * * * Where property detained has a usable value, its owner is entitled to recover damages equivalent to the reasonable value of such use during the period he was wrongfully deprived thereof up to the time of the rendition of judgment."

In Ruzanoff v. Retailers Credit Ass'n of Sacramento, supra, 97 Cal.App. at page 687, 276 P. at page 158, the plaintiff sued for the recovery of certain fixtures and damages for the detention. After citing Drinkhouse v. Van Ness and section 3333 [2] of the Civil Code, the court held that plaintiffs were entitled to compensation for the usable value of the property of which they were deprived regardless of whether or not they hired other property to take its place.

In Ferris v. Cooper, 1932, 125 Cal.App. 234, 237, 13 P.2d 536, 537, plaintiff sued to recover a drilling rig and equipment. Judgment was entered for $1200 as the value of the rig and $800 for its detention for a period of seven months. The court held that notwithstanding that the ordinary measure of damages for wrongful detention is interest yet where "property has a usable value which exceeds the lawful rate of interest this rule has no application. In such a case the successful party is entitled to recover, as damages for the detention, the value of such use during the period that he was wrongfully deprived thereof. And this value is to be estimated by the ordinary market price of the use of such property." The court approved of damages in excess of $100 per month for the detention of property valued at only $1200.

Cases Applying the Apparent Exception to the Rule

[4] The seeming exception to the rule which allows the aggrieved party the right to damages in the amount of the reasonable usable value of personal property wrongfully detained was first expressed by this court in Mutch v. Long Beach Imp. Co., 1920, 47 Cal.App. 267, 190 P. 638. The facts of that case clearly show that the court did not reject the rule established by the foregoing authorities. That action was to recover possession of an automobile which had been taken under attachment in February, 1916. Although Mrs. Mutch subsequently claimed to be the owner she made no demand at first upon defendant for its

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[2] "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided (section 3333 of Civil Code.) by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." However, section 667, Code Civil Procedure, is directly applicable in cases of replevin.

possession nor did she make a third party affidavit of ownership upon the sheriff until eight months after the levy. On November 16 she instituted her action to recover the automobile and damages for its detention. Pending the trial of the action the automobile was delivered to her and subsequently judgment went in her favor for possession of the car and damages for its detention in the sum of $1500. The amount of damages was derived by computing the rental value of the car from the date of its attachment to the date of its redelivery to her, a period of 86½ weeks at $15 per week, making a total of $1297.50, and in addition thereto $203.15 for its depreciation. In holding that the trial court exceeded all reasonable bounds in assessing the damages suffered by the plaintiff this court pointed out the facts which made the allowance by the trial court a departure from the general rule. The automobile was a pleasure car and after its taking was not in use. Evidently the trial court computed the damages for the detention of the car on the basis of its gross rental value, whereas the true rule as declared in the opinion is the "net usable value less the expense of keeping up the property." A significant feature of the Mutch case lies in the fact that no third party claim was made to the sheriff under section 689, Code of Civil Procedure. For more than eight months after the levy of the attachment such failure to file a third party claim exempted the sheriff from liability for damages for the detention of the car until the third party claim was made. By reason of the unusual factors of this case the court felt constrained to apply the doctrine of section 3359 of the Civil Code which requires that "damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." However, section 3359 was not invoked merely because of the amount of damages awarded Mrs. Mutch but rather because the correct rule for computing her damage as contemplated by section 667 of the Code of Civil Procedure and as enunciated in Tucker v. Hagerty, supra, was ignored. Where a special statute makes provision for ascertaining the extent of damage sustained by a litigant a general statute embodying a principle of equity has no immediate application.

The first case to cite the Mutch decision with favor was Bonestell v. Western Automotive Finance Corporation, 1924, 69 Cal.App. 719, 232 P. 734. It was an action in claim and delivery for a touring automobile and damages for detention. The car had been the property of one Chrisman who applied to defendant for a loan in the sum of $750. Chrisman conveyed title of his car to defendant which thereupon executed a conditional agreement for the purchase of the car in the amount of his loan. All of the conveyances executed by Chrisman and the defendant were devices for the purpose of executing a loan. The court held under section 2924 of the Civil Code that the documents executed were in effect a mortgage on the automobile. Two installments under the contract having defaulted on March 3 and April 3, defendant took possession of the car under the conditional agreement. Thereupon Chrisman assigned his interest in the automobile to Bonestell. In citing Mutch v. Long Beach Imp. Co. as to the usable rental value of the automobile the court held that the detention of plaintiff's car was for 48½ days and the only reliable proof of the usable rental value would be $10 or $12 a day gross, including a 30 per cent profit. While the appellate court declined to make a finding as to the usable rental value of the Bonestell car it reversed the case for a retrial upon the question of damages for detention with the suggestion that such value according to the evidence did not exceed $3 per day.

In Booth v. People's Finance & Thrift Co. of Modesto, 1932, 124 Cal.App. 131, 138, 12 P.2d 50, 52, the court held that the facts did not justify the application of the general rule. The jury found the value of plaintiff's automobile to be $650. Her compensatory damages for its detention were assessed at $1350 and exemplary damages in the sum of $1500. The proof showed that plaintiff's automobile was not used during its detention, and the only evidence of the net rental value was the testimony of a witness that its fair usable rental value would run from $2 to $2.25 per day. This was the only testimony to support the verdict for $1350 for the usable value of the car during nine months. "It thus appears," said the court, "that there is absolutely nothing in the record to support the verdict returned by the jury as damages for the detention of the automobile. Had the testimony introduced by the plaintiff, as to the usable value of the car, been accepted by the jury, the damages would have been fixed at the sum of $4,050. On the other hand, if the usable value, as testified to by the only witness [who had knowledge of the subject matter] * * * been accepted as a basis for an allowance, the verdict would have been in the sum of $607.25." Since there was no other reliable proof of such usable rental value the court held that the damages for the detention of the automobile should be fixed according to that evidence, citing the Bonestell case, supra. It is thus seen notwithstanding the application of Civil Code, section 3359, that the court assessed the damages for the detention of the car according to reliable evidence as to the usable rental value of the car.

The next decision to follow the Mutch case is Shockley v. Elmore, 1935, 9 Cal. App.2d 419, 423, 50 P.2d 91. The judgment there was reversed also for the reason that the amount fixed as damages for detention of a service station equipment worth $513 was "without evidentiary support." In that event the doctrine of the Mutch case limiting recovery to the net usable rental value of the chattel was applicable.

Thus it is seen that there has been no decision denouncing the rule that in a replevin action the aggrieved party is entitled to recover the usable rental value of his property while detained by the wrongdoer.

We come next to a consideration of the proof of the reasonable rental value of tractor 7. Not only does the answer admit that value to be $825 per month but at the trial the same was stipulated as evidenced by the following colloquy:

"Mr. Evans: Counsel, perhaps I can obviate the next question if you will stipulate that in his answer Mr. Kirst has admitted that the reasonable value of the use of that equipment is $825 a month?

"Mr. Doherty: Yes, subject to the O.P.A. deductions, of course; I think you stated that was $240 a month, or thereabouts?

"Mr. Evans: May I read into the record the portion of the answer of defendant dealing with that?

"Mr. Doherty: I will agree to what we say in the answer, but you said to the jury there was $240 a month allowance because he was credited with repairs.

"Mr. Evans: No, we had contended it was $850 a month and had alleged reasonable value would be $825 a month, and we would accept that.

"The Court: That is correct; the answer does state at the botton of page 1, reasonable value of said D 7 caterpillar tractor $825 per month.

"Mr. Evans: Will you so stipulate?

"The Court: That is part of the pleadings.

"Mr. Doherty: Yes, his Honor has read it.

"Mr. Evans: That is all, Mr. Kirst."

[5] Respondent contends (1) that the answer's admission "is not an admission with respect to the reasonable value of the use of the tractor," and (2) that the correct measure of damages "is the value of the use less repairs made and expenses incurred in connection with the property." His first contention is answered by his pleading and by his counsel's acquiescence and statement during the quoted colloquy. From them no conclusion is reasonable other than that respondent conceded that "the reasonable rental value was $825 per month."

[6, 7] During the course of the trial respondent made an offer of proof that the expense of overhauling the tractor at the time of his purchase from Grove and prior to his knowledge of appellants' claim was $2,169.82. This evidence was improperly excluded. Mutch v. Long Beach Imp. Co., supra. The rule of usable rental

value would necessarily exclude the cost of the upkeep of the tractor to make it usable. But despite such rule respondent should pay the established reasonable or usable rental value of the tractor from June 10, 1946, to the date of judgment, substantially 11 months, aggregating $9,075, less the expense of its upkeep. Appellants are entitled to such damages as well as to the possession of the tractor, found to be worth $6,000, notwithstanding respondent's ignorance of the reservation of title by them. First Nat. Bank v. Thompson, 60 Cal.App.2d 79, 82, 140 P.2d 75; Merrill Lodge v. Ellsworth, 78 Cal. 166, 168, 20 P. 399, 2 L.R.A. 841.

Despite such state of the proof and the applicable law the trial court adopted respondent's special defenses, to wit: (1) That both Exhibits A and B together, and each of them, constitute a contract of conditional sale; (2) that they are void in that they were in violation of the "Emergency Price Control Act of 1942, as amended [50 U.S.C.A.Appendix, § 901 et seq.], and the Rules and Regulations issued pursuant thereto."

[8-11] Conceding, arguendo, it to be a fact that both writings constitute one agreement for the purchase of tractor 7 such fact could not avail respondent. Apparently his contention was made for the purpose (a) of defeating appellants' claim that the meaning and purpose of Exhibit B was to make a lease out of the transaction instead of a contract of sale, and (b) of then maintaining (1) that as vendee in possession and not in default Grove could with impunity "sell his interest" to respondent, and (2) that the latter could by parol establish that appellants' purpose was to evade the federal statutes by making the agreement into a lease. Respondent cannot thus dispose of Exhibit B in the absence of appropriate pleading and proof. All of the conversations preceding the execution of Exhibit A were merged in that document and all conversations and writings with respect to the sale or lease of tractor 7 prior to the execution of Exhibit B were merged in that instrument. Therefore no testimony that would vary the terms of Exhibit B was lawful, and no evidence of the terms of the agreement other than its own contents was admissible in the absence of a "mistake or imperfection alleged in the pleading." Code Civ.Proc. sec. 1856; Estate of Gaines, 15 Cal.2d 255, 264, 100 P.2d 1055; Mulrooney v. Pietro, 79 Cal.App.2d 311, 314, 180 P.2d 62. Where the plain and unambiguous language of a contract permits its complete fulfillment and promotes its object, that construction is to be preferred over one derived by the elimination of or addition to its terms. Winship v. Wilkes, 121 Cal. App. 44, 50, 8 P.2d 502. It is not a just or proper application of the judicial function either to make a new contract for litigants or to rewrite the clear terms to which they have freely pledged their faith. Nourse v. Kovacevich, 42 Cal.App.2d 769, 772, 109 P.2d 999. It follows that all the hearsay testimony concerning respondent's purchase of another tractor from Grove and the asserted payment by him to appellants of the balance due on tractor 7 out of the money received from respondent was erroneously admitted.

[12, 13] This leads to respondent's second contention whereby he undertook to establish that appellants, having placed Grove in possession of the tractor and held him out as the owner of the machine, are precluded from now disputing respondent's title which they permitted Grove to transfer to him by allowing Grove to appear to be in complete possession, citing Martin v. Hollins, 118 Cal.App. 561, 5 P.2d 899, 900. But the successful maintenance of such contention involves more than the mere possession of the chattel. 10 Cal.Jur., p. 641. In the Martin case the plaintiff as original vendor had sold four generator sets on a conditional sale agreement to Hollins and Arrousez and thereafter consented to their sale of two of such sets. About six months later, without the knowledge of plaintiff, Hollins and Arrousez sold to appellant Waldorf Productions, Incorporated, the set involved in the action for $7,000. The original vendees having become insolvent defaulted in making the final payment of $500 to plaintiff, who sued to replevin the set which was in the possession of Waldorf Productions. While the court found against the

"subsequent purchaser on the defense of authorization of said sale by plaintiff and also on the defense of estoppel," yet it was determined that since Waldorf Productions, Incorporated, believed that Hollins and Arrousez were the actual owners of the set they had sold to it, and since also the corporation had no knowledge of the fact that plaintiff was the owner, the subsequent purchaser was entitled to possession in event it made the final payment of $500. Such equitable disposition of the controversy was approved by the appellate court. The effect of that holding is to forestall a vendor from depriving an innocent purchaser of a chattel bought from the original vendee, if payment of the balance due the original vendor will effect justice to the latter and at the same time prevent hardship upon the subsequent vendee. Of course where the amount due the vendor is the equivalent of the value of the chattel in dispute the innocent purchaser is without a remedy if, as in the instant case, the facts do not warrant an estoppel.

The case of United States Machinery Co. v. International Metals Development, Inc., 74 Cal.App.2d 5, 168 P.2d 37, cited by respondent, is distinguished in that the defendant vendee under a conditional sale agreement established that it was entitled to damages for breach of warranty. Such sum when added to payments already made constituted substantially the balance due on the contract of purchase, thereby making applicable the equitable remedy announced in the Martin case. See Civ.Code, sec. 1789.

Since appellants did no act calculated to lead a reasonable person to believe that Grove was title owner of the tractor the thesis of respondent has no support in law. Grove was in the position of a mere possessor and could convey no title, however innocent his vendee. Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 297, 191 P. 524; Pacific Finance Corporation v. Hendley, 103 Cal. App. 335, 338, 284 P. 736, 285 P. 1048.

[14] Respondent claims that appellants should be denied recovery on the ground that they based their right to possession of tractor 7 upon Exhibits A and B which he contends are violative of the Emergency Price Control Act. Such claim is without lawful basis. While it is true respondent proved (1) that appellants sold the tractor to Grove for $8,500; (2) that the maximum price to be charged for such used tractor not rebuilt and guaranteed is 55 per cent of its "base price" (Maximum Price Regulations, No. 136 of the United States Office of Price Administration, sections 12 [e] [g], 4) which is the price f. o. b. the manufacturer's plant, and (3) that the base price of tractor 7 was $10,171.21, exclusive of sales tax, yet such proof was wholly immaterial and incompetent by reason of the fact that appellants did not rely upon their contracts with Grove to establish their right to possession. Respondent acquired no rights by virtue of appellants' violation of the federal statute or of the regulations pursuant thereto, if there were such violations.

In view of the conclusions above announced discussion of appellants' other points would be supererogatory.

It is therefore ordered that the judgment and the order denying plaintiff's motion for judgment notwithstanding the verdict be and each is reversed with instructions that judgment be entered in favor of plaintiffs as follows:

(1) That plaintiffs have and recover of and from defendant possession of the tractor bearing serial number 1H 7401 or, in the event possession cannot be restored, the value thereof in the sum of $6,000;

(2) That plaintiffs have and recover of and from defendant as damages for detention of said tractor the sum of $9,075 less such expense of maintenance and repairs of the tractor as may be hereafter established.

Provided, that in the event appellants shall within 10 days from date of this opinion file with the clerk of this court a waiver of their damages to the extent of $2,169.82, then the sum of $6,905.18 shall be substituted in lieu of $9,075 in paragraph (2) above, and as thus modified the judgment authorized shall be affirmed. Otherwise it will be reversed for the purpose of establishing the amount of respondent's said expense of repairs.

McCOMB, J., concurs.

WILSON, Justice (dissenting).

I cannot give my approval to a judgment that creates and sanctions an iniquity when justice may be rendered by the simple device of conforming to established law.

The judgment for damages which the majority of this court directs the trial court to enter is so grossly unfair and excessive and so disproportionate to the damage suffered as to be contrary to substantial justice. I can find no justification for it. The majority opinion ignores the command of section 3359 of the Civil Code that "Damages must, in all cases, be reasonable." The tractor is found to be valued at $6,000 and the judgment directs that plaintiffs recover possession of the machine or the sum of $6,000 if possession cannot be restored, and in addition thereto the sum of $9,075 as damages for its detention for 11 months, less the expenses of maintenance and repairs. Omitting the latter item, if the tractor cannot be delivered plaintiffs will receive two and one half times its value. If defendant had not used it for a single day and had completely destroyed it immediately on receiving possession of it, plaintiffs could recover no greater sum than the value of the machine. If it should be returned they will have their property plus one and one half times its value.

In addition to the foregoing quotation section 3359 of the Civil Code provides: "* * * where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." This is a case in which that section should be applied. In Mutch v. Long Beach Imp. Co., 47 Cal.App. 267, 190 P. 638, the court reversed a judgment that ordered the return of an automobile and the payment of three times its value as damages for its detention. What the court there said is applicable to the order made in this action by the majority: "It must be apparent at once that there is something wrong in a scale of damages that allows three [2½] times as much for the detention of an article from the possession of the owner for a period of two years [11 months] as could have been recovered if the trespasser had completely smashed it up and destroyed it in the first instance." In Bonestell v. Western etc. Co., 69 Cal.App. 719, 727, 232 P. 734, 737, the opinion refers to section 3359, cites the Mutch case with approval, and says "unless the damages allowed are shown to be such as approach actual, usable, or *reasonable* value of the article to the owner they have no support in this section." (Emphasis added.) In that case there was evidence upon which the judgment for damages could have been sustained, but because the amount allowed was excessive that part of the judgment was reversed and the cause remanded for trial on that issue alone. In Booth v. Peoples Finance & Thrift Co., 124 Cal.App. 131, 12 P.2d 50, the jury found the value of the automobile to be $650 and allowed the plaintiff $1350 damages for its detention. The court applied section 3359 and ordered the judgment for damages reduced to $607.25. "The amount of the recovery for the detention of property must bear reasonable proportion to the value of the same, otherwise the judgment cannot be sustained." Romberg v. Hughes, 18 Neb. 579, 26 N.W. 351, 353. In the Romberg case damages in the sum of $584 for detention of property valued at $285 was held to be excessive.

In Armstrong & Latta v. Philadelphia, 249 Pa. 39, 94 A. 455, 458, Ann.Cas.1917B, 1082, the court reversed a judgment for $13,774 allowed as damages for detention for a period of 11 months of machinery valued at $6,500. The court stated that the general rule in an action for replevin, where the plaintiff secures possession of his property, is that he may recover damages for its detention, and that where property is capable of such physical use and enjoyment as cannot be compensated by allowance of interest, it is necessary to consider the value of such use. The court referred to the fact that by reason of the judgment the plaintiffs would recover a sufficient amount of damages in one year to purchase two or more entire new plants and said: "This amount of damage shows on its face that there is something radically wrong in the method of calculation, if compensation is to be taken as the proper measure. * * * The amount of damages for detention should also bear some reasonable proportion to the value of the goods." The judgment ordered in the case at bar will return the tractor to plaintiffs and provide sufficient funds to enable them to purchase a new machine and have a large surplus to apply on another.

The majority of this court have disregarded the rule of reasonableness found in the foregoing decisions and have attempted to support their decision by the citation of cases in which the usable value was contrasted with the amount of interest that had accrued on the value of the chattel, and where it was found that that amount would not fully compensate the owner for the detention of his property. In those cases the rental value was held to be the correct measure of damages, but no question was raised as to whether the amount of damages awarded was reasonable or excessive. For that reason they do not support the decision. Section 667 of the Code of Civil Procedure merely provides that the plaintiff is entitled to damages for the detention of his property and does not lay down a rule for the determination of the amount he should be permitted to recover.

The majority have labored at great length, but vainly and ineffectively, to distinguish the California cases above cited and have brushed them aside as inapplicable to the instant case. Their endeavor in this regard is mainly directed to an elaborate statement of the facts in each of the cases differentiating them from the facts in this case. Of course the facts in the cases that I have cited are dissimilar from those in the instant case but that does not impair their effect as authorities in this or any other case in which the amount of damages awarded is, as here, grossly excessive and disproportionate to the value of the property. The decisions cited by the majority in which the reasonableness of the damages is not discussed cannot be relied on to sustain a judgment in a case where that is the question at issue.

The majority rest their decision on a rule found in cases in which usable or rental value is compared with interest at the lawful rate and where the question of reasonableness is not raised or discussed—a rule that they would apply strictly and undeviatingly, like "the law of the Medes and Persians, which altereth not," * giving no consideration to section 3359. They also rely on section 3333 of the Civil Code, apparently oblivious of the rule that all provisions of the code must be read and construed together and that effect must be given to every section. They ignore the fact that the provision in section 3359 that damages must be reasonable is an essential condition that must be acknowledged and applied in all cases. Insofar as the majority are concerned section 3359 is nonexistent.

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85 Cal.App.2d Supp. 821

PEOPLE v. GOODSPEED.

Cr. A. 2323.

Appellate Department, Superior Court,
Los Angeles County, California.
April 8, 1948.

1. Indictment and Information 🔑72

Complaint charging that defendant did willfully, unlawfully and maliciously draw, divert, or permit by seepage, overflow, or otherwise any water onto a public highway was defective in that charges were made in the disjunctive. Pen.Code, § 588.

2. Highways 🔑164(2)

Complaint charging violation of statute making it a misdemeanor to negligently, willfully or maliciously drain water onto public highway from lands lying adjacent to or in vicinity of such highway was defective for failure to allege that water which defendant allegedly permitted to flow onto highway came from lands lying adjacent to or in vicinity of the highway. Pen.Code, § 588.

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* Daniel, 6:12.

3. Highways ⚿163(1)

Statute making it a misdemeanor negligently, willfully or maliciously to drain or permit water to flow onto a public highway is invalid as imposing unnecessary and unreasonable restrictions upon the use of private property. Pen.Code, § 588.

4. Constitutional law ⚿81

The legislature may not under the guise of police power impose unnecessary and unreasonable restrictions upon the use of private property or the pursuit of useful activities.

5. Highways ⚿80, 89

Except in rare instances, the state has only an easement in a public highway, while owner of adjacent land presumably owns the fee and may use the land within the highway so long as he does not damage or interfere with its use as a highway. Civ.Code, § 831.

6. Criminal law ⚿1181

Conviction of violation of invalid statute making it a misdemeanor to drain or permit water to flow onto a public highway could not be sustained on theory that acts of defendant were such that they could have been made unlawful by a properly drafted statute. Pen.Code, § 588.

7. Criminal law ⚿1023(3)

Refusal to dismiss prosecution in the interest of justice was not an appealable order, but any error in such ruling was reviewable on appeal from judgment of conviction.

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Appeal from Justice's Court of Monrovia Township; John A. H. Sturgeon, Judge.

Richard C. Goodspeed was convicted of violation of Penal Code, § 588 and from judgment of conviction and refusal to dismiss case in the interest of justice, he appeals.

Appeal from refusal to dismiss dismissed and judgment of conviction reversed with directions.

The alleged offense arose out of the development and testing of a new water well by the California-Michigan Land & Water Company, a public water utility, the well being so located that as a matter of physical necessity there was no way to do the work except to discharge the development and test water into a public highway because there was no storm drain or natural stream bed in the immediate vicinity. The defendant was the president of the California-Michigan Land & Water Company.

William N. Parker, of Pasadena, and Gavin W. Craig, of Los Angeles, for appellant.

W. E. Simpson, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

Faries & McDowell, of Los Angeles, amici curiae for California Water Assn.

Walley & Davis, of Los Angeles, amici curiae for Water Well Drillers Assn. of Cal.

BISHOP, Judge.

If section 588 of the Penal Code is valid, then every property owner in the state whose land lies at any elevation above the highway which bounds it is guilty of a misdemeanor, subjecting him to a possible fine and imprisonment, if water from the car he washes, or the rain which falls upon the roof of his house, finds its way harmlessly into the ditch along the side of the roadway, or into the concrete gutter next to the curb. Indeed, if section 588 is valid as it affects the defendant in this case, any landowner who waters the grass or the trees in the parkway in front of his place, violates its provisions. We have concluded that the legislature in its attempt to outlaw a few harmful practices has unwarrantedly declared unlawful so many harmless ones, that as it bears upon this case section 588 is without validity.

The section, since its re-draft in 1921, reads as follows: "Every person who negligently, willfully or maliciously digs up, removes, displaces, breaks down or otherwise injures or destroys any state or other public highway or bridge, or any private way, laid out by authority of law, or bridge upon any such highway or private way, or who negligently, willfully or maliciously drains, diverts, or in any manner permits by seepage, overflow or otherwise, any waters thereinto or thereon from lands lying adjacent to or in the vicinity of any such state or other public highway or bridge or private way, shall be guilty of a misdemeanor."

[1, 2] The defendant has appealed from the judgment following his conviction upon the charge that he "did wilfully, unlawfully and maliciously draw, divert, or in any manner permit by seepage, overflow, or otherwise, any water onto a public highway, to-wit, Duarte Road * * *." The complaint was faulty in making its charges in the disjunctive. People v. Moss, 1939, 33 Cal.App.2d Supp. 763, 767, 87 P.2d 932, 935. It also perpetuated a defect appearing in the code section itself by failing to insert a verb to indicate what it was that was permitted. A further and more serious criticism of the complaint grows out of the fact that it does not charge that "any water" which the defendant was alleged to have permitted [to flow] onto the highway, came from lands lying adjacent to or in the vicinity of the highway. From the evidence it appears that Duarte Road was "adjacent" to defendant's land. The code section, it will be noted, does not purport to prohibit a person from discharging water from his land onto a highway, if the highway is neither adjacent to nor in the vicinity of his land.

[3] The complaint failed to state a public offense because of a still more vital defect, one found in the statute upon which it was based. We entertain no doubt that the legislature had a factual basis for concluding that public highways had been damaged by the wilful, as well as careless, acts of persons in permitting water to pass onto the highways from lands bordering upon them, and that it was to put an end to such damaging practices that section 588 was enacted. That section, however, as already suggested, not only puts an end to harmful practices but also prohibits, by its penal sanctions, a multitude of acts which by no stretch of the imagination can be said to damage the highways involved, or to endanger any public interest. Most unsurfaced county roads have ditches on both sides, required and maintained to keep the roadways drained in the rainy season. Many county, and perhaps most city streets, are paved or otherwise surfaced from curb to curb. No reasonable contention can be made that a prohibition against permitting any water, at any time and in any amount, to find its way into either the ditches or the gutters, is required in order to prevent an amount being discharged under conditions where damage will result. The provisions in question present the pattern of an enactment so general that by its terms many innocent acts are declared to be unlawful and for which no defense may be made other than the futile one that the innocent acts will be overlooked by the law enforcement agencies; that only in the more flagrant cases will the law be made use of.

[4] "A legislative body may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." McKay Jewelers, Inc. v. Bowron, 1942, 19 Cal.2d 595, 601, 122 P.2d 543, 546, 139 A.L.R. 1188. "* * * prohibition is very different from regulation." San Diego Tuberculosis Ass'n v. East San Diego, 1921, 186 Cal. 252, 254, 200 P. 393, 394, 17 A.L.R. 513. In a number of cases prohibitive legislation has been held unconstitutional although the need for some regulation was recognized. In addition to the case last cited, these few cases are given as illustrations: Ex parte Whitwell, supra, 98 Cal. 73, 32 P. 870, 19 L.R.A. 727, 35 Am.St.Rep. 152; In re Kelso, 1905, 147 Cal. 609, 82 P. 241, 2 L.R.A., N.S., 796, 109 Am.St.Rep. 178; Frost v. City of Los Angeles, 1919, 181 Cal. 22, 183 P. 342, 6 A.L.R. 468; Pacific Rys. Advertising Co. v. Oakland, 1929, 98 Cal.App. 165, 276 P. 629.

We find In re McCapes, 1909, 157 Cal. 26, 106 P. 229, a case quite in point. The petitioner had been charged with and convicted of violating subdivision 3 of section 384 of the Penal Code which declared it to be a misdemeanor if a person either negligently or wilfully built "a fire on his own land for the purpose of burning brush, stumps, logs * * * or any other thing whatsoever," without a permit. Of the statute, the Supreme Court said at pages 27–29 of 157 Cal., at page 229 of 106 P.: "The purpose of the law being for the general good of the state, to prevent the destruction of property by fires carelessly set and allowed to escape control, not only brings the act strictly within the police power, but the purpose must commend the act to every court. Nevertheless, in the accomplishment of that purpose, it is quite plain that the Legislature has transgressed all reasonable bounds. * * * Railroad companies, in the dry season, frequently burn the weeds along their rights of way for the very purpose of preventing fires. Road overseers and supervisors do the same thing along the highways. Yet under this law, not only may this not be done, but a farmer may not burn a brush pile or a rubbish heap in his back yard without first obtaining permission from some fire warden, and if in his county there be no such fire warden he may not make a fire at all, until in due course one shall have been appointed, to whom he may make petition. The language of this section is so broad as to have little or no relation to the real purpose of the act. It prevents the setting of any fire without permission from a fire warden, though the fire be set with scrupulous care, and by no possibility could work the destruction of property. Such a law upon the face of it is an unreasonable interference with the rights of property. But if it be said that, notwithstanding the language, the law will be given a construction which will avoid hardship, it must be answered that by its terms it makes it a crime for any man to light a fire on his land for the purpose of burning 'anything whatsoever,' and declares the person who does so a criminal, regardless of the fact that the fire was carefully set and guarded, and regardless of the fact that no injury to anybody resulted from the setting."

By way of contrast to the comparable provisions of section 588, Penal Code, we invite attention to these provisions in the Streets and Highways Code: "Drainage of water, etc., obstructing natural water course so as to cause damage prohibited. It is unlawful for any person to do any of the following acts: (a) Drain water, or permit water to be drained, from his lands onto any State highway by any means which results in damage to the highway. * * * (c) Store or distribute water for any purpose so as to permit it to overflow onto, to saturate by seepage, or to obstruct any State highway, to the damage of the highway." Sec. 725(a) and (c).

"Any person who, by means of ditches or dams, obstructs or injures any county highway, diverts any watercourse into any such highway, or drains water from his land upon any such highway, to the injury of the highway, is liable to a penalty of ten dollars for each day such obstruction or injury remains, recoverable as provided in section 1496, and is also guilty of a misdemeanor." Sec. 1487.

"Any person who, in storing or distributing water for any purpose, permits water to overflow or by seepage to saturate any county highway, to the injury of the highway, shall, upon notification by the road commissioner of the district where such overflow or seepage occurs, repair the injury occasioned by such overflow or seepage. * * *" Sec. 1488. The possibility that defendant's corporation may have violated one of these provisions not charged in the complaint does not, of course, serve to uphold the conviction appealed from.

[5] It is clearly established, then, that a statute which unnecessarily or unreasonably restricts the use which one wishes to make of his property is invalid although the purpose of the statute may be a worthy one. But, it may be contended, the conclusion does not follow that those provisions of section 588 which are under consideration are invalid, for they do not restrict the activities of an owner upon his own land, but only prevent him from trespassing upon the property of another, to wit, the State. The fallacy of this contention becomes apparent when we recall that, except in rare instances, the only property that the State has in a highway is an easement;

the owner of the "adjacent" land presumably owns the fee (sec. 831, Civil Code), and may make use of the land within the highway so long as he does not damage or interfere with its use as a highway. Wright v. Austin, 1904, 143 Cal. 236, 76 P. 1023, 1025, 65 L.R.A. 949, 101 Am.St.Rep. 97; Colegrove Water Co. v. City of Hollywood, 1907, 151 Cal. 425, 90 P. 1053, 13 L.R.A.,N.S., 904; Las Posas Water Co. v. Ventura County, 1929, 97 Cal.App 296, 275 P. 817. "The appellant had a right, upon this highway, to do that necessary for the drainage of his lands, provided he did not interfere with the use of the highway, rendering it less safe, useful, or convenient for the public." Nelson v. Fehd, 1903, 203 Ill. 120, 67 N.E. 828, 829. "The use which the abutting owner may make of the highway includes the right to maintain ditches or drains for the benefit of his lands, providing he maintains no nuisance in so doing, nor interferes with the use as a highway. [Cases cited.]" Holm v. Montgomery, 1911, 62 Wash. 398, 113 P. 1115, 1116, 34 L.R.A.,N.S., 506, 507, followed by a note.

[6] The statutory provisions we have been considering may not be found sufficient to support the conviction in this case on the theory that the acts of the defendant corporation were such that they could have been made unlawful. "Language prohibiting conduct that may be prohibited and conduct that may not affords no reasonably ascertainable standard of guilt and is therefore too uncertain and vague to be enforced. [Cases cited.] A conviction based upon such a statute cannot stand even though the acts of misconduct in the particular case could be validly prohibited by properly drafted legislation." In re Bell, 1942, 19 Cal.2d 488, 496, 122 P.2d 22, 27, quoted and applied in Re Porterfield, 1946, 28 Cal.2d 91, 115, 168 P.2d 706, 167 A.L.R. 675.

[7] The defendant's notice of appeal stated that an appeal was taken not only from the judgment of conviction but also "from the failure and refusal of the trial court to order the case dismissed in the interest of justice upon suggestion of defendant's counsel made when the prosecutor had rested his case." Any error which may lurk in the failure and refusal referred to may be reviewed on an appeal from the judgment of conviction, but it is not an appealable order. People v. Faber, 1938, 29 Cal.App.2d Supp. 751, 759, 77 P.2d 921, 925; People v. Ward, 1905, 145 Cal. 736, 738, 79 P. 448.

The appeal from the matter last referred to is dismissed. The judgment of conviction is reversed. The trial court is directed to dismiss the action, which dismissal may be for the purpose of filing an amended complaint.

SHAW, P. J., and STEPHENS, J., concur.

31 Cal.2d 682

COUMAS v. SUPERIOR COURT IN AND FOR SAN JOAQUIN COUNTY (PEOPLE, Intervenor).

Sac. 5910.

Supreme Court of California, in Bank.

April 23, 1948.

Rehearing Denied May 20, 1948.

1. Prohibition 🔑5(4)

Prohibition is appropriate remedy to prevent accused's retrial in state for offenses of which he was previously convicted in another country which also had jurisdiction thereof. Pen. Code, § 793.

2. Criminal law 🔑163
International law 🔑10

Under Greek law and extradition treaty between Greece and United States, Greek courts had jurisdiction over person of native Greek, naturalized as American citizen without Greek government's consent, and offenses committed by him in California, so that his convictions thereof in Greek court barred his subsequent prosecution therefor in California. Pen. Code, § 793; Nationality Act of 1940, § 335, 8 U.S.C.A. § 735; Treaty of Extradition between the United States and the Hellenic Republic, 47 Stat. 2185.

3. Citizens 🔑13
International law 🔑10

The doctrine of "expatriation" in fullest sense involves natural and inherent right of person to depart from his country of origin and absolve himself from allegiance thereto on identifying himself with another political community through naturalization. 8 U.S.C.A. § 800.

See Words and Phrases, Permanent Edition, for all other definitions of "Expatriation".

4. International law 🔑10

The taking of oath of allegiance to United States and renunciation of national ties to any foreign state by native of Greece on his naturalization in United States did not automatically divest him of his Greek citizenship, in absence of consent by Greek government to his naturalization as required by Greek law; denationalization being matter for domestic regulation by government concerned under its particular laws of expatriation. Nationality Act of 1940, § 335, 8 U.S.C.A. § 735.

5. International law 🔑2

The American doctrine of voluntary expatriation as matter of absolute right cannot postulate loss of original nationality on naturalization in United States as a principle of international law, as that would be tantamount to interference with exclusive jurisdiction of foreign nation within its own domain. Nationality Act of 1940, § 335, 8 U.S.C.A. § 735; 8 U.S.C.A. § 800.

6. Extradition 🔑2

Extradition is proper subject for treaty negotiation between sovereign nations, and any point of controversy with regard thereto will be governed by contracting powers' prevailing stipulations.

7. Extradition 🔑2

The stipulation in extradition treaty between Greece and United States that state appealed to shall decide whether person claimed is its own citizen countervails any argument that United States intended its doctrine of absolute right of expatriation to prevail in extradition demand on Greek government for return of Greek native naturalized as American citizen without Greek government's consent. Nationality Act of 1940, § 335, 8 U.S.C.A. § 735; 8 U.S.C.A. § 800; Treaty of Extradition between the United States and the Hellenic Republic, 47 Stat. 2185.

8. Criminal law 🔑163

A Greek native, not seeking trial as Greek citizen under Greek law by courts of Greece for felonies committed in California after his naturalization as American citizen until American government requested his extradition from Greece under treaty therewith, was not precluded from pleading convictions of such felonies in Greek court as defense to his subsequent prosecution in California for same offenses on ground of fraud or collusion, in view of evidence that trial was fair and impartial and that substantial prison terms were imposed on and served by him. Pen.Code, § 793; Nationality Act of 1940, § 335, 8 U.S.C.A. § 735; Treaty of Extradition between the United States and the Hellenic Republic, 47 Stat. 2185.

9. Extradition ⚷2

An extradition treaty may be set up by person having rights secured or recognized thereby as defense to criminal prosecution in disregard thereof.

10. Extradition ⚷2

The extradition treaty between United States and Greece is part of supreme law of land and binding on state courts. U.S.C.A.Const. art. 6, cl. 2; Treaty of Extradition between the United States and the Hellenic Republic, 47 Stat. 2185.

◆

Proceeding by Tom Coumas for a writ of prohibition to restrain the Superior Court in and for the County of San Joaquin from proceeding with petitioner's trial under an amended indictment for murder and assault with a deadly weapon with intent to commit murder, in which the People of the state of California intervened.

Peremptory writ granted.

Stanley P. Mamalakis, of San Francisco, and Anthony J. Chargin, Public Defender, of Stockton, for petitioner.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., Chester E. Watson, Dist. Atty., and Bradford Crittenden, Deputy Dist. Atty., both of Stockton, for intervenor.

Frederick L. Felton, County Counsel, of Stockton, for respondent.

SPENCE, Justice.

Petitioner seeks a writ of prohibition to restrain the respondent court from proceeding with his scheduled trial under an amended indictment returned on March 14, 1934, and charging him in two counts with connected offenses perpetrated on April 20, 1932, in the city of Manteca, county of San Joaquin: (1) "murder [of] one Olive Taylor" ; and (2) "assault upon the person of William Duval with a deadly weapon with the intent * * * to commit murder." He was arrested in Manteca on September 26, 1947, and imprisoned in the county jail awaiting trial. Upon arraignment, he pleaded the defenses of "prior conviction" and "former jeopardy" by reason of a judgment entered after criminal prosecution of the same charges in the Felony Court of Corinth, Greece.

[1] Section 793 of the Penal Code provides as follows: "When an act charged as a public offense is within the jurisdiction of another state or country, as well as of this state, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this state." Petitioner's pleas come precisely within the contemplated scope of this penal statute, and "prohibition is an appropriate remedy to prevent [his] retrial" on the offenses in question. (Rodriguez v. Superior Court, 27 Cal.2d 500, 501, 165 P.2d 1; see, also, Jackson v. Superior Court, 10 Cal.2d 350, 352, 74 P.2d 243, 113 A.L.R. 1422, and cases there cited.)

There is no dispute as to the facts. Petitioner, a native of Greece, emigrated on January 4, 1907, to the United States. He was then seventeen years of age. On February 25, 1914, he became a naturalized citizen of this country, at which time he took the required oath in renouncement of "allegiance * * * to any * * * state, or sovereignty of * * * which [he] was before a subject or citizen" and in pledge of "true faith and allegiance" to the United States. (54 Stats. 1157, 8 U.S.C.A. sec. 735; formerly 34 Stats. 596, as amended, 8 U.S.C.A. sec. 381; 2 Am.Jur., sec. 232, p. 583.) The Greek Government never at any time consented to his foreign naturalization.

Petitioner resided in this country continuously from his entry until shortly after April 20, 1932, the date on which he allegedly committed the two above-mentioned crimes of "murder" and "assault * * * with a deadly weapon" in the city of Manteca. To avoid arrest petitioner immediately fled from this state and ultimately reached Greece. On May 12, 1932, he was indicted for the two criminal offenses by the Grand Jury of San Joaquin County. An amended indictment was filed on March 14, 1934, and thereupon the United States Government instituted proceedings with the Greek Government for the extradition of petitioner as a fugitive from justice. Petitioner successfully resisted these proceedings upon the decision of the Council of the Court of Appeals at Nauplia, Greece, on

August 26, 1934, that "he [had] never divested himself of [his] Greek citizenship," and that Greek law therefore absolutely forbade his extradition but required his prosecution and punishment in Greece in accordance with its criminal law. Thereafter petitioner stood trial in the Felony Court of Corinth, Greece, on precisely the same two alleged criminal acts and on October 16, 1935, judgment was entered against him pursuant to a jury verdict (1) finding him "guilty of manslaughter" on the alleged murder charge and (2) acquitting him on the assault charge but finding him "guilty of the unlawful carrying of a firearm." He was sentenced to serve consecutive terms of imprisonment for the respective crimes as so determined: (1) four years and (2) four months. He served those terms, with credit for thirteen months' preliminary imprisonment. Subsequently petitioner returned to the United States, and since his arrest on September 26, 1947, in the city of Manteca, he has been confined in the county jail of San Joaquin County awaiting trial on the criminal charges contained in the amended indictment of March 14, 1934, as above mentioned.

[2] Section 3 of the Greek Code of Penal Procedure provided, at all times here pertinent, as follows: "Hellenes are never extradited to Foreign Authorities not even for the acts committed by them abroad. They are subjected to trial, however, in this country, even for the felonies and misdemeanors committed by them abroad and they are punished in accordance with the laws of this country as if they had committed these acts within the boundary lines of the state, subject, however, to the provisions of existing Government treaties." By Article VIII of the Treaty of Extradition as then in force between the Governments of Greece and the United States, it was provided: "Under the stipulations of this Treaty, neither of the High Contracting Parties shall be bound to deliver up its own citizens, except in cases where such citizenship has been obtained after the perpetration of the crime for which extradition is sought. The State appealed to shall decide whether the person claimed is its own citizen." (47 Stats. 2185, 2191.) Accordingly, petitioner properly maintains that Greece had jurisdiction over his person because it had never consented to this expatriation, and over the offenses because of its penal law.

[3-5] While the United States has long supported the doctrine of expatriation in the fullest sense—as involving a "natural and inherent right" of a person to depart from his country of origin and absolve himself from his original allegiance, upon identifying himself with another political community, through naturalization (8 U.S.C.A. sec. 800; Revised Stats. sec. 1999, from Act July 27, 1868, ch. 249, sec. 1, 15 Stats. 223; formerly 8 U.S.C.A. sec. 15; 2 Am.Jur., sec. 181, p. 558)—such principle of election as a matter primarily for the individual's determination is contrary to the common-law concept of "perpetual allegiance" to one's native land, which still prevails in many countries today, particularly on the continent of Europe, and precludes the voluntary severance of national ties unless the consent of the government is obtained. (Wilson on International Law, sec. 50, p. 217.) So it is with Greece as its pertinent law is recited in the "true copy" of the extradition proceedings had against petitioner—"according to which naturalization in a foreign country is not itself sufficient for the loss of Greek citizenship, but there is also required on the one hand the permission of the Greek Government, obtained through the Ministry for Foreign Affairs, and, on the other, the performance of the military duty of the person concerned, nonperformance of which excludes anyone from the right to obtain the aforesaid permission of the Greek Government." Admittedly, petitioner never obtained the consent of the Greek Government for his foreign naturalization—in fact, he never made such request—though compliance with such formality was necessary to bring about his loss of Greek citizenship. The taking of the oath of allegiance to the United States and the accompanying renunciation of national ties to any foreign state upon petitioner's naturalization in this country would not automatically divest him of his Greek citizenship, for the matter of denationalization is one for domestic regulation by the government concerned under its particular laws of expatriation. (Wilson on

International Law, supra, sec. 50, p. 217; 2 Am.Jur., sec. 182, p. 559.) The so-called American doctrine of "voluntary expatriation" as a matter of absolute right cannot postulate loss of original nationality on naturalization in this country as a principle of international law, for that would be tantamount to interference with the exclusive jurisdiction of a nation within its own domain. (48 C.J.S., International Law, § 9, p. 14.) The qualification of the right of expatriation prescribed by the Greek law, conditioned upon the national's fulfillment of his military obligations in the country of his origin and his procurement of the consent of the Government, does not involve abandonment of the fundamental principle but simply accords with recognized distinctions in the nationality concept as followed in different countries.

[6, 7] The matter of extradition is a proper subject for treaty negotiation between sovereign nations, and any point of controversy with regard thereto will be governed by the prevailing stipulations of the contracting powers. (35 C.J.S., Extradition, § 24, pp. 351, 352; 52 Am.Jur., sec. 8, pp. 809, 810.) In the present case, the Treaty of Extradition with Greece expressly provided that "the State appealed to shall decide whether the person claimed is its own citizen," an explicit stipulation according full recognition to any variance in the laws of expatriation existing between the two signatory powers and indicating their mutual intent that the citizenship status of the person seeking refuge in either's territorial limits should be determined in a manner consistent with its standards. Such stipulation in the Treaty, signed May 6, 1931, effectively countervails any argument that the United States nevertheless intended that its long prior established position on the "absolute right of expatriation" should prevail in an extradition demand upon the Greek Government and would permit disregard of the latter's law under which its national, irrespective of his American naturalization, might still be deemed its citizen. So here, according to Greek law, petitioner on April 20, 1932, the date of his alleged commission of the crimes in Manteca, was still a citizen of Greece by reason of his failure to procure the necessary consent to his foreign naturalization and, upon return to its territorial jurisdiction, he was amenable to prosecution under its penal statutes. (22 C.J.S., Criminal Law, § 115, pp. 190, 191; 48 C.J.S., International Law, § 11, p. 16; see, also, United States v. Bowman, 260 U.S. 94, 102, 43 S.Ct. 39, 67 L.Ed. 149.) The Greek Government so decided and in accordance with its "local laws," petitioner was tried for the offenses committed in this country and sentence was imposed upon the basis of his adjudicated guilt. (Greek Code of Penal Procedure, sec. 3, supra.)

[8-10] There is no force to the argument that petitioner may not effectively plead the defenses of "prior conviction" and "former jeopardy" before the respondent court because the Greek trial proceedings and judgment were procured by "fraud or collusion." (22 C.J.S., Criminal Law, § 245, p. 380; Edwards v. Commonwealth, 233 Ky. 356, 25 S.W.2d 746, 747; Halbert v. State, 18 Okl.Cr. 378, 195 P. 504, 507; State v. Bartlett, 181 Iowa 436, 164 N.W. 757, 758, notes and annotations L.R.A. 1918A, 1181.) Petitioner admits that he "escaped to Greece to avoid punishment," but, as he maintains, he "did not seek his trial by the courts of Greece until the American Government requested his arrest and extradition and the Greek laws were thereafter applied in proper and orderly fashion." At that time it was entirely proper for him to rely on whatever advantage might accrue to him by reason of his claim of Greek citizenship and resist surrender to this country, for "a treaty of extradition is available to persons having rights secured or recognized thereby, and may be set up as a defense to a criminal prosecution established in disregard thereof." (35 C.J.S., Extradition, § 25, p. 353; Dominguez v. State, 90 Tex.Cr.R. 92, 234 S.W. 79, 83, 18 A.L.R. 503.) There is no evidence in the record indicating any fraud, collusion, trickery or subterfuge on the part of petitioner in procuring, according to Greek law, the determination of his guilt on the criminal charges in question. Rather, it appears that petitioner's trial in the Felony Court of Corinth, Greece, was fair and impartial; that depositions of witnesses before the Grand Jury of San Joaquin

County were duly submitted along with the oral testimony of petitioner for the consideration of the jury in reaching its verdict; and that substantial terms of imprisonment were imposed on petitioner—four years and four months—and served by him, with appropriate credit for preliminary imprisonment, in accord with the judgment entered on the findings of guilt on the alleged crimes as above mentioned. In other words, petitioner's trial in the Greek court was not a mere farce, resulting in a sentence of imprisonment of inconsequential degree as related to the import of the criminal charges against him, but, on the contrary, its "bona fide" character in every respect is clearly shown by the record. The jurisdiction of the Greek court was established in pursuance of the Treaty of Extradition with Greece as then existing; such treaty, like others, is a part of "the supreme law" of our land and binding upon the courts. (U.S.Const. art. VI, cl. 2; 52 Am.Jur., sec. 17, p. 815.)

It is ordered that a peremptory writ of prohibition issue as prayed, restraining the respondent court from proceeding further with petitioner's trial.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

31 Cal.2d 743

Ex parte NORCUTT.

Cr. 4839.

Supreme Court of Caifornia, in Bank.

April 29, 1948.

1. Criminal law 🔑1202(3)

Courts of California cannot take evidence to prove, and upon that evidence adjudicate for themselves, that a defendant was not guilty of a crime with which he had been charged, for which he had been tried or to which he had pleaded guilty, and of which he had been convicted in another state, and the rule is equally applicable to a California conviction.

2. Habeas corpus 🔑85(1)

In habeas corpus proceeding by a defendant adjudged an habitual criminal because of two prior convictions of felony, one of which was for "grand theft, a felony," involving theft of a motorcycle, value of which was not shown on the judgment roll of the prior conviction, evidence that the offense was not in fact grand theft, a felony, was not admissible.

Proceeding in the matter of the application of Jack Norcutt, alias Jack C. Mooney, for a writ of habeas corpus to Robert A. Heinze, Warden of the California State Prison at Folsom.

Writ discharged, and prisoner remanded to custody.

Prior opinion, 184 P.2d 685.

Jack Norcutt, in pro. per., and Peter Mannino, of Sacramento, for petitioner.

Fred N. Howser, Atty. Gen., Ruth Bernfeld and Clarence A. Linn, Deputy Attys. Gen., for respondent.

SCHAUER, Justice.

Petitioner, who is serving a term of imprisonment by virtue of a judgment that he is guilty of robbery of the first degree, by this application for the writ of habeas corpus attacks the determination that he is an habitual criminal. The information charged, petitioner admitted, and the trial court found that petitioner had suffered two prior convictions of grand theft in this state and had served terms of imprisonment therefor in a state prison. Petitioner contends that the first of these prior convictions is not legally competent to support the determination of habitual criminality because it does not appear from the judgment roll in the case of such prior conviction that the property stolen, a motorcycle, was of a value of more than $200. This contention is without merit.

[1] In the proceeding which resulted in the mooted prior conviction, judgment

was entered on petitioner's plea of guilty to the charge of "the crime of Grand Theft, a felony, committed as follows: That [petitioner] * * * about the 27th day of June, 1930, at * * * Los Angeles, * * * California, did unlawfully take away a certain motor vehicle, to-wit, a Harley-Davidson motorcycle, which was then and there of the personal property of one George Butler." Petitioner has offered no evidence that the offense was not in fact "Grand Theft, a felony," nor would such evidence be competent in this habeas corpus proceeding. The courts of this state cannot "take evidence to prove, and upon that evidence adjudicate for themselves, that a defendant was not guilty of a crime with which he had been charged, for which he had been tried or to which he had pleaded guilty, and of which he had been convicted in another state." (In re Wolfson (1947) 30 Cal.2d 20, 31, 180 P.2d 326, 333.) The rule is equally applicable to a California conviction.

[2] The writ is discharged and the petitioner is remanded to custody.

SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., and NOURSE, Justice Pro Tem., concur.

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31 Cal.2d 696

PEOPLE v. DOTY et al.

Cr. 4835.

Supreme Court of California, in Bank.

April 23, 1948.

1. Criminal law 🔑1036(1)

Where confessions were admitted in evidence without objection by defendants and without any intimation that they were involuntary, and defendants' testimony that confessions were procured through violence merely created a conflict in testimony which jury resolved against defendants, their contention that confessions were involuntary was not available on appeal.

2. Criminal law 🔑1144(14)

Where instructions were not in the record and no complaint was made of them, court was required to assume that they were correct.

3. Criminal law 🔑1144(18)

Presumption on appeal is, in absence of anything in record to the contrary, that on motion for new trial, trial judge duly performed his duty and again considered disputed fact whether confessions were voluntary and that by overruling the motion he determined that the confessions were voluntary. Pen.Code, § 1181, subd. 6.

4. Criminal law 🔑1153(6)

Where the evidence is conflicting as to whether confessions were voluntary or not, court on appeal accepts determination of the triers of fact unless it is so lacking in support in evidence that to give it effect would amount to a denial of due process.

5. Criminal law 🔑1111(1)

Informal remarks of trial judge when there was nothing before him for decision could not impeach judge's subsequent final, considered opinion to contrary as evidenced by order denying motion for new trial, nor jury's verdict.

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Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Kenneth I. Doty and Edgar Scott Flohr were convicted on four counts of burglary of the second degree, and they appeal.

Judgement affirmed.

Prior opinion, 184 P.2d 23.

Paul E. Tapley and E. W. Miller, both of Los Angeles, for appellants.

Fred N. Howser, Atty. Gen. and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

[1] Defendants Doty and Flohr appeal from judgments entered on verdicts that each is guilty of four counts of burglary of the second degree. They contend that their confessions, which are in evidence, were extracted by the use of violence. This

contention, as hereinafter explained in more detail, is not now available to them as a ground for reversal because they allowed the confessions to be received in evidence without objection and without any showing of unlawfulness, and because the evidence as to violence which was subsequently adduced did no more than create a sharp conflict on the issue as to whether the confessions were freely and voluntarily given, which conflict we must presume to have been finally resolved against defendants by the triers of fact.

The following evidence, apart from the confessions, supports the verdicts: At about 2:30 a.m. on August 3, 1946, two police officers, O'Connell and Murphy, on patrol in a radio car, observed defendants in a Safeway market on Westwood Boulevard in West Los Angeles. Defendant Flohr was crouched before a safe. Officer O'Connell shouted, "We are police officers. Come out or we will shoot." Defendants ran from the store and attempted to flee. Officer Murphy shouted, "Stop, or I will shoot." Defendants disregarded this warning. Each officer then fired two shots at the defendants. Neither defendant was wounded by the gun fire but each flung himself to the ground. The officers then attempted to place handcuffs on defendants. Murphy testified, "I wanted to handcuff him [Flohr] but he persisted in lying on his hands and at that time I rubbed his face on the cement there." O'Connell testified that Doty "started to get up from the ground in a crouching position and I instructed him to place one hand out so I could place the handcuffs on him * * * and he refused and he kept coming up slowly from the ground. * * * When he began resisting the arrest, I struck him about three or four times and * * * there were boxes that were up against a wall * * * And as I hit him the last time he went back into these boxes." Defendants were handcuffed and lay on the sidewalk. Murphy "asked them where their car was and they said they had no car, that they came on the bus." Officer Whiteford arrived at the store just after defendants had been handcuffed and while they were lying on the ground. He testified that Doty "was raised to his feet and he staggered up and back to the corner of the store building. * * * I told him he had better tell us where the car was, he doubled over and I placed my hand against his front portion of the chest or neck and straightened him back up against the wall." Doty then said that the automobile was parked about a block from the store.

Three Safeway markets in Los Angeles, one on Third Street, one on Robertson Boulevard, and one on Melrose Avenue, had been forcibly entered on the night of August 2; the safes therein had been broken open, and from each safe had been taken coins, bills of denominations from one dollar to twenty dollars, and checks. Entry to each of the four Safeway stores was effected by cutting the hasp which held the padlock of the door. In the Westwood store, where defendants were apprehended, was found a bolt cutter. From microscopic examination it appeared that this instrument had been used to cut the hasp of the Melrose store. The total amount stolen from the Third Street store was $748.71; approximately two thirds of this amount was cash and one third was represented by checks. About $1,340 was taken from the Robertson store and $803.29 from the Melrose store. In defendants' car were three paper bags which contained "Everything from pennies to twenty dollar bills." One bag contained $925.25 in cash and eleven checks, in the total amount of $248.58, which had been taken from the Robertson store. The other bags contained, respectively, $657.20 and $710.15 in cash. Each of the defendants, at the time of their apprehension, was wearing old gloves. Defendants at no time gave to the police an exculpatory explanation of their presence in the Westwood store and their possession of the paper bags of money and checks. Their attempted explanation to which they testified at the trial was rejected by the jury.

[2] Immediately after their above described arrest defendants were taken to the police station. When they arrived there, at about 3 a.m. on the morning of August 3, they were given medical attention be-

cause of the injuries which they suffered when they resisted arrest. They were then interviewed by Captain Christensen, Officer Light, and Sergeant Armstrong, and confessed. Before evidence of the confessions was introduced at the trial, Officer Light, who testified thereto, made the requisite preliminary showing that they were "free and voluntary." Defendants did not object to the introduction of the confessions in evidence, did not make voir dire inquiry of the officer as to the manner in which they were obtained, and did not at this time attempt by their own testimony to show that either of such confessions was not "free and voluntary." Instead of availing themselves of their opportunity, in accord with the established practice of this state, to obtain a preliminary ruling of the trial court rejecting the evidence of the confessions if it found that they were improperly obtained, defendants chose to let the evidence of the confessions go to the jury and to present their evidence as to coercion as part of their defense. They testified that they were alternately beaten by Armstrong and urged to confess by Light. This testimony was contradicted in detail by rebuttal testimony of the police officers who were present at and about the time the confessions were made, including the testimony of Sergeant Armstrong, whom defendants accuse of brutality. There was no motion to strike the evidence of the confessions. The factual issue as to the manner in which they were obtained went to the jury which, correctly instructed (we must assume, for the instructions are not part of the record on appeal and no complaint thereof is made), resolved it against defendants.

[3] On motion for new trial defendants did not argue or even mention the contention which they now urge. Their motion was "under all the statutory provisions of Section 1181 with particular attention to Subdivision 6 thereof ["When the verdict is contrary to law or evidence"]." There being not the slightest indication to the contrary, we must assume that the trial judge, who saw and heard the witnesses, duly performed his duty, again considered the disputed question of fact, and, like the jury, resolved it against defendants. No appeal was taken from the ensuing order denying a new trial.

[4] There is nothing in the record which would justify our holding that, as a matter of law, the testimony of defendants is true and the directly conflicting testimony of the police officers is false. This is not a case like Ashcraft v. Tennessee (1944), 322 U.S. 143, 153, 64 S.Ct. 921, 88 L.Ed. 1192; People v. Jones (1944), 24 Cal. 2d 601, 150 P.2d 801, and other cases relied upon by defendants, where the conclusion that a confession was made under coercive circumstances was reached without the reviewing court's resolving any disputed question of fact. (See, also, Malinski v. New York (1945), 324 U.S. 401, 404, 65 S.Ct. 781, 89 L.Ed. 1029; Haley v. Ohio (1948), 332 U.S. 596, 68 S.Ct. 302. Rather, this case comes within the principle stated in Lisenba v. California (1941), 314 U.S. 219, 238, 62 S.Ct. 280, 291, 86 L.Ed. 166: "There are cases * * * where the evidence as to the methods employed to obtain a confession is conflicting, and in which, although denial of due process was not an issue in the trial, an issue has been resolved by court and jury which involves an answer to the due process question. In such a case we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process."

[5] Defendants rely upon an informal statement of the trial judge, made immediately after the jury had returned its verdict and had been discharged, to show that the receipt of the confessions in evidence was necessarily prejudicially erroneous. The judge said, "There was strong evidence in this case that the police exercised force and brutalities on these defendants. The Court isn't at all convinced that didn't happen, and from a preponderance of the evidence, the indication is that certain members of the Los Angeles Police Department did use force and threats on these defendants. * * * [T]o my mind the evidence as presented indicates there were brutalities used." These informal remarks of the trial judge, made at a time

when there was nothing before him for decision, indicate views which, if they endured after mature reflection, might well have impelled him to suggest that the district attorney consider the filing of criminal charges, or the initiation of a grand jury investigation looking toward possible indictments, against the assertedly transgressing police officers, but, as previously indicated, they cannot impeach the judge's final, considered, impliedly contrary opinion expressed in and by his order denying the subsequently made motion for new trial. (People v. Collins (1935), 9 Cal.App. 2d 156, 157, 48 P.2d 992). Neither can they impeach the jury's verdict. Moreover, the trial judge, upon the informal occasion mentioned, went on to say, "I have no criticism of the verdict. * * * They, the jury, [correctly instructed so to do should they find that the confessions were improperly obtained] rightly perhaps, disregarded the confessions and even admissions and still arrived at the result"; it is also shown that in this connection the prosecuting attorney replied (and, so far as appears from the record, his conclusion is equally as plausible as that of the trial judge), "I believe the verdict of the jury in this case has been a complete vindication of the Police Department * * * and that they have heard all of the testimony on both sides and that they believe the police officers." It may well be that at the time the judge passed on the motion for a new trial he had concluded that the district attorney's theory of the verdict was correct. In any event, by denying the motion he evidenced the view that the defendants were guilty in fact and that the verdicts had been lawfully rendered.

As to other contentions, briefly mentioned, defendants concede that they "could not hope for a reversal of the judgment on these minor points." With this concession we agree.

For the reasons above stated, the judgments are affirmed as to each defendant.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

GARRISON v. ROURKE.*

Civ. 7460.

District Court of Appeal, Third District, California.

April 19, 1948.

Hearing Granted June 10, 1948.

1. Elections 🔑300, 303

Elections Code section providing that court in an election contest for purpose of speedy determination "shall" file findings and conclusions within ten days of submission thereof and pronounce judgment immediately thereafter is mandatory, and failure of court to comply by undue delay in filing of findings and premature filing of judgment deprived it of jurisdiction to render judgment against a defendant rescinding his certificate of election. Elections Code, §§ 15, 8100, 8101, 8531, 8550, 8556, 8600(c, d).

> See Words and Phrases, Permanent Edition, for all other definitions of "Shall".

2. Statutes 🔑227

The word "shall" may be construed to be merely directory when the language of the statute fails to indicate that it intended to be mandatory.

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Appeal from Superior Court, Trinity County; W. T. Belieu, Judge.

Proceeding by John N. Garrison to contest the election of John D. Rourke to the office of county assessor of the county of Trinity. From the judgment, defendant appeals.

Judgment affirmed.

Frank E. Carleton, of Los Angeles, for appellant.

Carr & Kennedy, of Redding, for respondent.

THOMPSON, Justice.

This is a contest of primary election for the office of County Assessor of the County of Trinity held November 5, 1946, at which the respective parties were the only candidates for said office. The board of supervisors of said county duly canvassed the returns by the various boards of election of the several precincts, as required by law, and determined that the contestant, John N. Garrison, received 1026 legal votes and that the defendant, John D. Rourke, received 1028 legal votes for said office, and thereupon declared that the latter was duly elected as County Assessor, as required by Section 8100 of the Elections Code. A certificate of election was issued, pursuant to Section 8101 of said code, to Mr. Rourke, who assumed and still retains said office.

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* Subsequent opinion 196 P.2d 884.

This contest of election was filed under Section 8600, subdivisions (c) and (d), of the Elections Code, on the grounds that illegal votes and mistakes in counting ballots for the defendant entitle the contestant to election to said office.

The complaint alleges that seventeen persons who were not legal residents of or registered in Hayfork Precinct were permitted to and did illegally vote for the defendant; that in Lewiston Precinct two persons similarly disqualified, voted for the defendant, and that, in Hyampom Precinct, one person similarly disqualified, voted for the defendant; that ballots which were legally cast for the contestant were erroneously and illegally counted for the defendant; that the election officers of certain precincts permitted voters, including one Herman Albiez who voted for the defendant in Hayfork Precinct, to retire from the polling place after their ballots had been delivered to them, and to subsequently return and mark and deposit their ballots, instead of "forthwith" marking and depositing them, "without leaving the enclosed spaces," as required by Section 5709 of the code, rendering such ballots invalid; that an elector by the name of Benjamin F. Burns, who voted for the defendant in Hayfork Precinct, was illegally assisted in marking his ballot by Mrs. Idell Rourke (the wife of defendant), who was not a member of the election board, contrary to the provisions of Section 5721(b) of the code, rendering his ballot invalid; that absentee ballots were received and counted by the canvassing board in favor of the defendant, which were not marked or voted as required by Section 5931 of the code; that the election returns from Hyampom Precinct were not delivered by the precinct board "without delay" to the county clerk or other designated person, as required by Section 7109 of the Code, but were left at Hayfork in "an unguarded place", and subsequently taken by Walter Glass, who was not authorized to receive or transport them and deposited with the county clerk at Weaverville, rendering the returns from that precinct invalid, and that a correct and lawful tabulation of the ballots cast at that election will show that "J. N. Garrison received the highest number of legal votes given for any person for the office of Assessor of Trinity County, and that he was duly elected to said office and is entitled to have and receive the certificate of election therefor." The complaint prays for judgment accordingly.

A general and special demurrer and motion to strike out portions of the complaint were filed by the defendant. The demurrer was sustained as to two or three paragraphs of the complaint, not heretofore mentioned. It is not necessary to refer to those stricken portions of the complaint, since both parties concede the demurrer was properly sustained in that regard. The demurrer was otherwise overruled and the motion to strike out portions of the complaint was denied.

A list of the challenged illegal votes upon which the contestant relies was served on the defendant as required by Section 8532 of the code. That fact is not disputed.

The defendant answered the complaint, denying the material allegations thereof, and affirmatively setting up certain new matter, which, by stipulation, was deemed to have been denied by the contestant.

The complaint was filed December 21, 1946. The trial was commenced January 14, 1947, and lasted five days. Oral and documentary evidence was adduced. Eight challenged ballots were received in evidence, and marked as exhibits. Those ballots are before this court for consideration. At the close of the evidence, on January 18th, instead of orally arguing the case, the parties were granted fifteen, fifteen and ten days to file briefs. It was then ordered that the cause "be marked submitted upon the filing of the last brief." With the approval of the court, by stipulation dated January 28, 1947, the contestant was allowed to and including February 12th to file his opening brief, the defendant was granted fifteen days thereafter to file his brief, and the contestant was given ten days thereafter to file his closing brief. The briefs were duly filed. The last day allowed for filing briefs expired on March 10th. That time was not extended. We assume the cause was submitted for decision, pursuant to the former order, on March 10th. Findings of fact were required to be filed "within ten days after the submission." (Elections Code, Sec. 8556.) That time for filing findings expired March 20th. The court adopted findings, which are dated April 16th, but they were not filed until April 25th. Judgment, however, appears to have been prematurely filed April 18th. The court did file an elaborate written opinion on April 7th. That opinion may not be construed to constitute the findings of the court. But if it be so construed, it was not filed within ten days after the submission of the cause. The court determined that the contestant, Garrison, received and was entitled to 1027 legal votes for County Assessor of Trinity County, and that the defendant, Rourke, received only 1022 legal votes therefor, and thereupon cancelled the defendant's certificate of election and adjudged the contestant to be the duly elected County Assessor, and directed the issuance of his certificate of election to that office.

The appellant insists that the court lost jurisdiction to render judgment in this case by failing to adopt and file findings, as required by Section 8556 of the Elections Code, within "ten days after the submission thereof." We are of the opinion this contention is correct. On account of the interest which the public has in the election of its public officers and in a speedy determination of election contests (Elections Code, secs. 8531 and 8550; Sweeney v. Adams, 141 Cal. 558, 561, 75 P. 182; 18 Am.Jur. 373, sec. 300), Section 8556 of the code specifically provides that:

> "The court *shall continue in special session* to hear and determine all issues arising in contested elections. After hearing the proofs and allegations of the parties and *within ten days after the submission thereof* the court *shall* file its findings of fact and conclusions of law, and *immediately thereafter* shall pronounce judgment in the premises, either confirming or annulling and setting aside the election. *The judgment shall be rendered immediately thereafter.*" (Italics added.)

[1] Findings were not filed in this case until a month and a half after the submission of the cause. Moreover, the judgment appears to have been prematurely filed before the filing of the findings. The cause was submitted on March 10th, as we have previously stated, and the findings were not signed until April 16th, and they were not filed until April 25th. Certainly that procedure was in conflict with the provisions of Section 8556, unless the language of that section is held to be merely directory and not mandatory. In view of the provisions of Section 15 of the Elections Code, which was adopted in 1939, we are of the opinion it is mandatory. The last mentioned sections declares that the word "shall" is mandatory and "may" is permissive. That section appears to be controlling with respect to the language used in Section 8556 of the same code, which declares that the court shall file its findings "within ten days after the submission". We may assume Section 15 was adopted to render certain the construction of the word "shall" as it is used in Section 8556, in view of the fact that in 1914 the Appellate Court rendered an opinion in an election contest in which it stated, with respect to the construction of the last mentioned section: "We incline to the opinion that the sections of the act governing the court's action upon the trial of proceedings of this character are directory, in the absence of an express provision of the statute declaring them to be mandatory." Bernardo v. Rue, 26 Cal.App. 108, 110, 146 P. 79. The last cited case is the only one upon that subject in election contests which has been called to our attention, or which we have been able to discover in the California reports. We assume the subsequent adoption of Section 15 now leaves no doubt that the word "shall", as it is used in Section 8556, is mandatory, and that the trial court therefore had no jurisdiction to render its judgment against

the defendant in this case rescinding his certificate of election.

[2] It is true that the word "shall", as it appears in certain statutes, has been construed to be merely directory when the language of the statute fails to indicate that it is intended to be mandatory. Thomas v. Driscoll, 42 Cal.App.2d 23, 27, 108 P.2d 43. But all uncertainty in that regard has been removed in the present case by the adoption of Section 15 of the Elections Code.

In view of our conclusion that the trial court was without jurisdiction to render the judgment which was entered in this case determining that the contestant, Garrison, was duly elected as County Assessor of Trinity County by a majority of the valid votes cast at the election, and cancelling the defendant's certificate of election to that office, it becomes unnecessary to consider the other issues presented.

The judgment is reversed.

PEEK, J., and ADAMS, P. J., concur.

85 Cal.App.2d 168

OAKES et al. v. BAKER.

Civ. 7445.

District Court of Appeal, Third District, California.

April 26, 1948.

1. Appeal and error 🔑877(4)

In personal injury action by several plaintiffs, any uncertainty which might exist as to which of several causes of action the verdicts rendered applied to was a matter to be resolved by the various plaintiffs and was not available to defendant on appeal.

2. Damages 🔑171

Generally, admission of evidence of poverty in personal injury and property damage action is error.

3. Appeal and error 🔑1048(5)

In personal injury action, injection of inference of poverty on part of plaintiffs by question, "Were you able financially to do all the things the doctor wanted you to do?" to which objection was made and sustained, and concerning which no evidence was introduced, did not constitute reversible error.

4. Trial 🔑133(3)

In personal injury action, alleged attempt of plaintiffs' counsel to discredit defendant's doctor, by making comparison of amount charged by him for his services and that claimed by plaintiffs as compensation for their physician to which objection was made and sustained, did not warrant reversal.

5. Appeal and error 🔑1060(1)

In personal injury action, alleged remarks of plaintiffs' counsel ridiculing defendant's counsel in argument to the jury did not warrant reversal, where no claim was made that statement exceeded bounds of propriety and trial court was satisfied that no prejudice to defendant could have resulted.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action by Alvin E. Oakes and Lula E. Oakes, his wife, Melvin Oakes by Alvin E. Oakes and Lula E. Oakes, his wife, his guardians ad litem, and James Oakes by Alvin E. Oakes and Lula E. Oakes, his wife, his guardians ad litem, against W. E. Baker, for personal injuries sustained in an automobile collision. From the judgment, defendant appeals.

Affirmed.

Peters & Peters, of Chico, for appellant.

Curtiss E. Wetter, of Red Bluff, for respondents.

ADAMS, Presiding Justice.

This action was prosecuted by Alvin E. Oakes and Lula E. Oakes, his wife, on their own behalf, and as guardians ad litem for their two minor children, Melvin and James, to recover damages sustained by them in an automobile collision alleged to have been due to carelessness and negligence on the part of defendant W. E. Baker.

The complaint sets forth six causes of action: (1) Injury to plaintiff's automobile, (2) personal injury to Alvin E. Oakes, (3) personal injury to his wife, Lula E. Oakes, (4) personal injury to Melvin Oakes, a minor, (5) personal injury to James Oakes, a minor, and (6) moneys expended by the parents for medical expenses on behalf of the minor children, and loss of earnings.

The jury returned five verdicts as follows: In favor of Alvin E. Oakes and Lula E. Oakes in the sum of $2333.33; in favor of Lula E. Oakes in the sum of $1000; in favor of Alvin E. Oakes in the sum of $1000; in favor of Melvin Oakes in the sum of $2500; and in favor of James Oakes in the sum of $2500. Judgment was entered accordingly, and a motion for a new trial having been denied, this appeal was taken, the points on appeal, as stated in appellant's brief, being that matters occurred at the trial which prejudiced the jury, causing it to return the verdicts in the amounts above stated. Appellant specifically sets forth that he does not question liability in the case. Furthermore, it is not contended that the amounts awarded the respective plaintiffs are excessive; but appellant states that the judgment should be reversed and a new trial granted (1) because there is no way to tell from the verdicts upon which cause of action any one of them is rendered, and (2) because of prejudicial statements made in the opening and closing addresses of plaintiffs' attorney, and by reason of certain questions asked by plaintiffs' attorney which it is claimed prejudiced the jury.

[1] As for the first mentioned ground no authority is cited by appellant; and as we see it, any uncertainty which might exist as to which of the causes of action the verdicts apply to is a matter which need not worry the defendant but is one to be resolved by the various parties plaintiff, who make no complaint. See 64 C. J., p. 1076, sec. 880, citing Donk Bros. Coal & Coke Co. v. Stroetter, 229 Ill. 134, 82 N.E. 250, 252.

[2, 3] As for the alleged prejudicial statements of plaintiffs' counsel, though appellant does not claim that each one of them constitutes reversible error, he asserts that all of them jointly resulted in the size of the verdicts rendered. The first is that an "inference of poverty" on the part of plaintiffs was injected into the case, because plaintiff Alvin E. Oakes was asked "Were you able financially to do all the things the doctor wanted you to do?" The record shows that defendant's counsel objected to this question, and his objection was sustained. It also shows that no request was made by defendant's counsel that the court instruct the jury to disregard it. Appellant relies upon Ensign v. Southern Pac. Co., 193 Cal. 311, 223 P. 953; Hodge v. Weinstock, Lubin & Co., 109 Cal.App. 393, 293 P. 80, and Smellie v. Southern Pac. Co., 128 Cal.App. 567, 18 P.2d 97, 19 P.2d 982, as holding that the admission of evidence of poverty in personal injury and property damage actions is error. This rule so stated may be conceded to be correct as a general proposition, but in the case before us such evidence was specifically excluded by the trial court, and plaintiffs' financial status was left unstated. The case, therefore, does not fall within the rule relied upon, but comes within that portion of the decision in Hodge v. Weinstock, Lubin & Co., supra, 109 Cal.App. at pages 401-403, 293 P. at pages 84-85, where the court said that there was no evidence of poverty, and even a statement that the plaintiff was needy did not constitute reversible error where there was no sufficient evidence in the case of such a condition; citing Lawrence v. Southern Pac. Co., 189 Cal. 434, 444, 445, 208 P. 966. Also see Lafferty v. Market St. R. Co., 7 Cal.App.2d 698, 702, 46 P.2d 996; Ashley v. Rivera, 220 Cal. 75, 76, 77, 29 P.2d 199; Woodman v. Peck, 90 N.H. 292, 7 A.2d 251. 122 A.L.R. 1402, pp. 1408-1415.

[4] The second complaint of appellant is that counsel for plaintiffs attempted to discredit the doctor of defendant by making some comparison of the amount charged by him for his services and that claimed by plaintiffs for compensation for their physicians; but again it is admitted that objec-

tion to the question deemed to be objectionable was sustained by the trial court.

[5] Appellant also complains that plaintiffs' counsel ridiculed counsel for appellant in his arguments to the jury; but no authority is cited holding that the statements made in this connection exceeded the bounds of propriety; and since the trial court denied the motion for a new trial, it must have been satisfied that no prejudice to defendant resulted from anything said by plaintiffs' attorney.

Finally, appellant asserts that he was prejudiced by an inference of insurance interjected into the case; but he fails to point out any portion of the record sustaining this contention, and we have found no place therein where insurance is mentioned or even implied.

In view of the fact that liability on the part of defendant is conceded, that the evidence in the case was conflicting, and that it is not contended that the verdicts were excessive, we are of the opinion that the grounds for reversal relied upon by appellant are trivial and fail to show prejudice justifying a reversal of the judgment. And we are constrained to say that the appeal is dangerously near to the frivolous.

The judgment is affirmed.

THOMPSON, J., and SCHOTTKY, Justice pro tem., concur.

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85 Cal.App.2d 88

JAY v. CLARK.

Civ. 7412.

Sac. 5859.

District Court of Appeal, Third District, California.

April 19, 1948.

Hearing Denied June 10, 1948.

1. **Partnership** 🔑244

A liquidating partner has duty to proceed to wind up affairs of firm, pay its debts out of its assets if sufficient and divide residue, if any, among those entitled to it.

2. **Partnership** 🔑244

A surviving partner has full authority to do everything that may be necessary to wind up affairs of partnership, but his power is limited to performance of acts which are indispensable to that end.

3. **Partnership** 🔑244

Liquidation of partnership must be conducted in such manner as to conserve interest of all partners and secure utmost advantage of the concern.

4. **Partnership** 🔑249, 330

A surviving partner must account to executor or administrator of deceased member and pay over such balances as may from time to time be payable to him in right of decedent, and court may order an accounting and enforce the order by attachment on application of executor or administrator.

5. **Partnership** 🔑249

The accounting by a surviving partner must be with personal representative of deceased member and not with the heirs.

6. **Partnership** 🔑244, 249

Under uniform partnership law, surviving partner has duty to wind up affairs of partnership and account to Probate Court. Civ.Code, §§ 2431, 2435(1–3), 2436; Probate Code, § 571.

7. **Partnership** 🔑255(1, 3)

The business of a partnership may be continued after death of partner by agreement between surviving partners and representatives of estate of deceased partner, provided personal representatives have been given by will of decedent the necessary power or agreement is approved by court.

8. **Partnership** 🔑326

The bringing of action by administrator of estate of deceased partner against surviving partner for accounting was notice to surviving partner that administrator was not agreeing to surviving partner's further continuance of the business and that a winding up of partnership affairs was expected. Civ.Code, §§ 2431, 2435(1–3), 2436; Probate Code, § 571.

9. Partnership ⚷316

Since surviving partner had duty under law to settle affairs of partnership without delay, administrator of estate of deceased partner was not required to make demand on surviving partner to perform such duty before bringing action to secure winding up of the partnership. Civ.Code, §§ 2431, 2435(1–3), 2436; Probate Code, § 571.

10. Partnership ⚷317

Surviving partner could not complain that he had not been given a reasonable time to wind up affairs of partnership by administrator of estate of deceased partner, where record showed that surviving partner had not taken any steps to do so at time action was filed five months after death of deceased partner and surviving partner's testimony indicated that he did not intend to do so. Civ.Code, §§ 2431, 2435(1–3), 2436; Probate Code, § 571.

11. Partnership ⚷325(2)

Order appointing receiver to wind up partnership affairs and sell assets upon application by administrator of estate of deceased partner was not an abuse of discretion, where surviving partner had carried on business without consent of administrator or heirs or legatees, and had failed and refused to wind up partnership affairs or render any accounting. Civ. Code, §§ 2431, 2435(1–3), 2436; Probate Code, § 571.

12. Partnership ⚷325(2)

Regardless of general right of surviving partner, a court of equity may, upon proper application, take from him possession and control of partnership assets and appoint a receiver when partnership property is being mismanaged, wasted, improperly commingled with that of survivor, or when survivor is faithless to his duty, as in continuing business for purpose other than to close it, or is delaying unreasonably in closing the affairs.

Appeal from Superior Court, Madera County; Ernest Klette, Judge.

Action by R. L. Jay, administrator with the will annexed of the estate of George A. Clark, deceased, against Howard A. Clark, to secure a winding up of a partnership which had existed between plaintiff's decedent and defendant. From judgment for plaintiff, the defendant appeals.

Affirmed.

Vincent W. Hallinan and James Martin MacInnis, both of San Francisco, for appellant.

David E. Peckinpah, Harold M. Child and L. N. Barber, all of Fresno, for respondent.

ADAMS, Presiding Justice.

Plaintiff, as administrator with the will annexed of the Estate of George A. Clark, deceased, brought this action against defendant to secure a winding up of the business of a partnership which had existed between decedent and defendant, who were engaged in the printing and publishing business in Madera, publishing a newspaper known as the Madera Tribune.

George A. Clark died September 7, 1944. Plaintiff's complaint, which was filed February 9, 1945, and amended March 7, 1945, alleges that at all times since the death of decedent defendant has wholly failed and neglected to wind up the partnership affairs, but has at all times continued and still continues to carry on the said business, has refused to render any account of the interest of deceased therein, has failed to keep true accounts of the partnership business, and is unable to render to plaintiff full information of anything affecting the said partnership, and that plaintiff has been unable to obtain a settlement of partnership affairs and the payment of the sum due to deceased from said partnership. It was prayed that defendant render an accounting, that the partnership assets be sold and the surplus, if any, after payment of partnership liabilities be divided between defendant and decedent's estate, and that a receiver be appointed.

Defendant filed an answer in which he alleged that he had been engaged in winding up the partnership affairs, admitted he had not rendered an account to the heirs of the deceased partner or to the legatees under the will, and asserted that he had no legal obligation to do so; denied he had failed or neglected to keep true accounts or that he was unable to render a true accounting, and alleged that after the payment of partnership debts there was nothing due plaintiff. And in a cross-complaint filed therewith he alleged that he had been winding up the partnership affairs, that there were assets of the copartnership amounting to $11,525.50, and total liabilities of $15,705.00, and that plaintiff therefore owed defendant $2089.75 for which he prayed judgment. Plaintiff replied to the cross-complaint, denying the allegations thereof for lack of information or belief.

The issues framed by the complaint and answer were tried by the court sitting without a jury, on June 11, 1946, the cross-complaint having been stricken out by stipulation. The court filed findings which recited that since the death of decedent defendant had carried on the partnership business without the consent of plaintiff or the heirs or legatees, that he had at all times failed and refused to wind up the partnership affairs or to render any accounting of the interest of deceased therein, and that such an accounting was necessary. An interlocutory judgment was thereupon entered appointing a receiver to take possession of the property and assets of the copartnership, to collect its assets and to sell the business, and to operate it until it could be sold as a going concern. Said judgment also required defendant to file an account with the court within thirty days.

From said judgment defendant has taken this appeal, contending that the judgment unlawfully ousts defendant from possession of the business and deprives him of his right to wind up the same; and that the findings of the trial court (a) that he operated the business without the consent of plaintiff, (b) that he refused to wind up partnership affairs, and (c) that he had refused to account for the interest of decedent, are without support in the evidence.

Considering these points in reverse order we find ample evidence to support the said findings of the trial court. Defendant was called by plaintiff as a witness under section 2055 of the Code of Civil Procedure, and was also examined at length by his own counsel. At no time did he testify that he had ever requested of plaintiff or secured from him consent to continue to operate the business, and we find in the record no evidence of the giving of such consent. That he continued to operate the business after the death of his father, and was still operating it at the time of the trial in June, 1946, must be conceded, and that he refused to wind up the partnership affairs is obvious not only from the fact that he admitted he had not taken steps to do so up to the time of the trial, but from his testimony that he had not advertised or listed the business for sale, that he had no intention of selling it as a whole if he could prevent it, and had no intention of retiring from business; that he never considered selling; that he commenced there as a kid and grew up with it and intended to stay with it. His position as agreed to by his attorney at the close of the trial was that he "intended to keep on doing business at the same old stand"; and the contention of his counsel during the trial was "that upon the death of a partner, all of the partnership assets vest in the surviving partner or partners, and that all that the administrator of the deceased partner's estate has is a chose in action against the surviving partners for the value of the decedent's interest in the partnership assets, which action when it becomes a judgment is only an ordinary creditor's charge against the assets of the corporation." He added: "Now, that is our entire position stated as clearly and simply as I can state it."

That same position is stated before this court in appellant's brief which states that "There can be no question but that Civil Code, Section 2436, affords the exclusive measurement of the rights and duties of the parties. The consent to the continued operation of the business was the exercise of the option to take advantage of the remedy afforded by the terms of that section."

However, appellant also seems to take an inconsistent position, for, tacitly admitting the necessity of an accounting by the surviving partner, and a winding up of the partnership affairs, he argues that he has made such an accounting, that he was engaged in winding up the affairs of the partnership, that no demand was made by the administrator for an accounting, that this action was brought only five months after the death of his father, and, therefore, defendant had not been granted a sufficient time to account and/or wind up the affairs.

Respondent cites section 571 of the Probate Code which provides: "The surviving partner must settle the affairs of the partnership without delay, and account to the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon application of the executor or administrator, the court or a judge thereof, whenever it appears necessary, may order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained." He also relies upon section 2431 of the Civil Code which provides: "Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court."

[1-5] It is said in 20 Cal.Jur. 812, section 108: "It is the duty of a liquidating partner to proceed to wind up the affairs of the firm, pay its debts out of its assets if sufficient, and divide the residue, if any, among those entitled to it. In the case of a surviving partner the statute expressly requires him to settle the affairs of the partnership without delay. The surviving partner has full authority to do everything that may be necessary to wind up the affairs of the partnership, but his power is limited to the performance of acts which are indispensable to that end. Liquidation must be conducted in such a manner as to conserve the interests of all the partners, and secure the utmost advantage of the concern." Also, at pages 816, 817, section 112, it is said: "A surviving partner must account to the executor or administrator of the deceased member and pay over such balances as may from time to time be payable to him, in right of the decedent. On application of the executor or administrator, the court may order an accounting and enforce the order by attachment. The surviving partner must deliver the residue of the partnership property, after payment of debts, to the parties entitled, including the personal representative of the decedent. The accounting must be, not with the heirs, but with the personal representative. The latter is entitled to receive for distribution the whole interest of the deceased partner, even though the survivor has acquired a portion of the decedent's estate, and he may maintain any action which the decedent might have maintained."

[6] We find nothing in section 2436 or any other provision of the Uniform Partnership Law which varies the rule set forth above, or justifies the claim of appellant here that he was under no obligation to wind up the affairs of the partnership and account to the probate court as provided by section 571, supra. Section 2436 of the Civil Code provides: "When any partner retires or dies, *and the business is continued under any of the conditions set forth in section 2435 (1, 2, 3, 5, 6)*, or section 2432 (2b) without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership *may* have the value of his interest at the date of the dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; * * *." (Italics added.)

It appears from the foregoing that the course made possible by section 2436 is dependent upon certain provisions of section 2435, and, as applicable to the carrying on of partnership business and the settlement of partnership affairs on the death of one of the partners, is dependent upon the securing of an assignment from, or, at the very least, the consent of, the personal representative of decedent. See sec. 2435 (1), (2), (3).

[7] It is said in 47 C.J. 1070: "The business of a partnership may be continued

after the death of a partner by agreement between the surviving partners and the representatives of the estate of the deceased partner, provided the personal representatives have been given by the will of decedent the necessary power, or the agreement is approved by the court." Also see Froess v. Froess, 284 Pa. 369, 131 A. 276; Id., 289 Pa. 69, 137 A. 124, holding that under the Uniform Partnership Act, 59 P.S. § 1 et seq., on death of one partner the surviving partner has a duty to settle partnership affairs and all authority on his part ceases except such as is necessary to wind up the business or complete unfinished transactions; and that, while after the death of a copartner the survivor may, by agreement with interested parties, continue the firm, the purpose to authorize further carrying on must clearly appear.

[8-10] Appellant argues in his brief that he was *impliedly* given consent to continue the business of the partnership, apparently because, as he says, no objection to his continuance of the business was made by the administrator. At the same time appellant complains that this action, brought five months after the death of George A. Clark, was improper, as appellant had not been given sufficient time to wind up the affairs of the partnership. However, plaintiff's consent to appellant's indefinite continuance of the business cannot be implied from the lapse of a reasonable time after the death of George A. Clark before bringing this action, since a surviving partner is allowed a reasonable time to wind up the business. But whether or not any demand was made by the administrator prior to suit—which does not appear—the bringing of such action was notice to appellant that the administrator was not agreeing to appellant's further continuance of the business, and that a winding up of the affairs was expected. Furthermore, since the law imposed upon defendant, as the surviving partner, the duty to settle the affairs of the partnership without delay, no reason appears why any demand by the administrator was necessary before defendant took steps to perform this duty. The trial court found, on what we consider sufficient evidence, that defendant had carried on the business without the consent of plaintiff or the heirs or legatees, and that he had failed and refused to wind up the partnership affairs or render any accounting. These findings are conclusive in this court. And as for any complaint that appellant had not been given a reasonable time for such purpose, the record shows conclusively that he had not taken any steps to do so at the time the action was filed, or even when it was tried in June, 1946; and the testimony of defendant indicates clearly that he did not intend to do so.

[11] The only question remaining is whether the trial court erred in authorizing the appointment of a receiver to wind up the partnership affairs and sell the assets. Appellant argues that such order was erroneous, that it ousted him, as the surviving partner, from possession of the partnership assets, and deprived him of his right to wind up its affairs. But in view of the position taken by appellant we cannot see that the trial court abused its discretion or exceeded its jurisdiction in so doing.

[12] It is said in 45 Am.Jur. 42: "It is proper, at the instance of representatives of a deceased partner, to appoint a receiver as against a surviving partner, where he does not act, or, if he does act, is guilty of fraud, waste, or misconduct which puts the assets in danger; otherwise, it is not proper thus to deprive him of his right to the possession of the partnership property." Also see 47 C.J. 1049, sec. 621, which reads: "Regardless of the survivor's general right, a court of equity may, upon proper application, take from him the possession and control of the partnership assets and appoint a receiver when partnership property is being mismanaged, wasted, improperly commingled with that of the survivor, or when the survivor is faithless to his duty, as in continuing the business for a purpose other than to close it, or is delaying unreasonably in closing the affairs, * * *." This is in accord with the text in High on Receivers, 3d Ed., p. 523, sec. 532, where the author says: "And in case of the death of one member of a firm, * * * if the survivor refuses to proceed within a reasonable time to close up the firm business, and continues to manage it in his own name, and for his own benefit, equity will grant an injunction against its continuance

and will appoint a receiver, upon a bill filed by the administrator of the deceased partner."

In Whitley v. Bradley, 13 Cal.App. 720, 110 P. 596, an order appointing a receiver of a partnership business was affirmed, the court saying that such action was one of sound judicial discretion, and would not be disturbed in the absence of a showing of clear abuse. To the same effect see Fox v. Flood, 44 Cal.App. 786, 788, 187 P. 68; Brush v. Apartment and Hotel F. Corp., 82 Cal.App. 723, 727, 256 P. 285; Sunset Farms, Inc. v. Superior Court, 9 Cal.App.2d 389, 405, 50 P.2d 106; Breedlove v. Breedlove Excavating Co., 56 Cal.App.2d 141, 143, 132 P.2d 239; Armbrust v. Armbrust, 75 Cal.App.2d 272, 276, 171 P.2d 75; Weissman v. Henkin, 154 Pa.Super. 12, 34 A.2d 907.

We cannot say that in the case before us there was an abuse of discretion by the trial court. It is said in Jacobson v. Wikholm, 29 Cal.2d 24, 29, 172 P.2d 878, that the relationship of a surviving partner to the administrator of his deceased partner is fiduciary and as such trustee he must exercise his talents and industry honestly and in the highest good faith. From the testimony of defendant and his attitude toward the administrator of the estate of his father, the manner in which he testified and in which he has conducted the affairs of the partnership, the trial court was justified in questioning the good faith of defendant, and in concluding that the appointment of a receiver was necessary. The record shows that while defendant was claiming that the partnership business had a value of from $7000 to $11,000 at the time of his father's death, he admitted that he had had an offer of $20,000 for what would have been the equivalent of a two-thirds interest; and that in 1942 he would have been happy to buy an undivided half interest for $22,500, and take over the accounts and assume all the indebtedness. Also a witness produced by plaintiff testified that at the time of the death of defendant's father the equipment alone could not be replaced for $30,000. Yet we find appellant contending that there was nothing due plaintiff, that he is not only entitled to keep all of the partnership property, but that the estate is indebted to him for some $2089.75.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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85 Cal.App.2d 157

CAPERTON v. MAST et al.

Civ. 7447

District Court of Appeal, Third District, California.

April 23, 1948.

1. Negligence 🔑136(26)

Contributory negligence is ordinarily a fact question.

2. Appeal and error 🔑996, 1010(1)

An appellate tribunal will not disturb trial court's finding on issue of contributory negligence if supported by any substantial evidence or reasonable inference therefrom.

3. Automobiles 🔑168(8), 173(6)

A truck driver was guilty of negligence, proximately causing collision with house trailer standing directly across highway with lights on behind stalled automobile at night, in failing to maintain sufficient observance of highway ahead of him and objects thereon, operating truck at speed which was not reasonable and prudent, and failing to have truck lights on high beam. Vehicle Code, § 648.

4. Automobiles 🔑211

A motorist, failing to stop and drain gasoline tank of his automobile after having trouble with water therein and pulling into intersecting road with attached house-trailer, preparatory to turning around, just before motor, which had been sputtering, died with trailer extending halfway across highway, at night, was not guilty of contributory negligence, barring recovery for damages to trailer as result of being struck by approaching truck, in absence of any indication that motor would die at such time.

5. Automobiles ⚿211

A house-trailer, pulled by automobile, is a "semi-trailer" within statute requiring placing of flares or other warning signals when trailer or semi-trailer is disabled on roadway at night, though defined by later statute as "trailer-coach", and, in any event, was not exempt from such statutory requirement. Vehicle Code, §§ 37, 52, 590.

See Words and Phrases, Permanent Edition, for all other definitions of "Semi-Trailer".

6. Automobiles ⚿245(83)

Mere failure to place flares or appropriate warning signals as required by statute when trailer or semi-trailer is disabled on roadway at night, does not constitute contributory negligence as matter of law under all circumstances. Vehicle Code, § 590.

7. Automobiles ⚿211

A reasonable opportunity to discover that trailer or semi-trailer is disabled on roadway at night and reasonable time to place flares or other warning signals as required by statute must be allowed. Vehicle Code, § 590.

8. Automobiles ⚿226(2)

Failure to place flares or appropriate warning signals, as required by statute, when trailer or semi-trailer is disabled on roadway at night must proximately contribute in some degree to damage to trailer as result of being struck by another vehicle in order to amount to contributory negligence. Vehicle Code, § 590.

9. Automobiles ⚿226(2)

Where driver of automobile, stalled with attached house-trailer extending halfway across highway at road intersection after dark, tried for only two or three minutes to start automobile and, promptly on hearing approaching truck, jumped from automobile and ran up road to stop truck, driver of which saw or should have seen trailer in time to stop before colliding therewith, automobile driver's failure to place flares or other warning signals on highway did not proximately contribute to collision, which, was proximate result of truck driver's negligence alone. Vehicle Code, § 590.

10. Appeal and error ⚿1008(1)

Whether motorist, failing to place flares on highway or signal with flashlight to warn of presence of disabled house-trailer on highway at night as result of automobile motor stalling after he drove automobile and attached trailer, extending into highway, onto side road, with knowledge that motor was likely to stall constituted contributory negligence, barring his recovery for damage to trailer as result of being struck by truck, was fact question for trial court. Vehicle Code, § 590.

11. Negligence ⚿134(9)

One whose violation of statute or ordinance proximately causes injury to another is liable therefor, without other proof of his failure to exercise due care, in absence of evidence showing excuse or justification for such violation.

12. Negligence ⚿121(1)

An act performed in violation of ordinance or statute is presumptively negligent, but such presumption is not conclusive and may be rebuttted by showing that act was justifiable or excusable under circumstances, as in case of emergency or unusual conditions.

13. Negligence ⚿136(14)

Whether violation of statutory requirement was excusable is ordinarily fact question for jury to determine from consideration of surrounding circumstances.

14. Negligence ⚿136(9)

Whether violation of statute or ordinance proximately contributed to violator's injury and was excusable or justifiable are fact questions, unless reasonable men can draw but one inference, pointing unerringly to violator's negligence contributing to injury, from facts.

◆

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Ruben E. Caperton against Ben Mast and another for damages to plaintiff's automobile, house-trailer, and the contents thereof as the result of defendants' truck striking the trailer. Judgment for plaintiff, and defendants appeal.

Affirmed.

Geary & Tauzer, of Santa Rosa, and A. Dal Thomson, of San Francisco, for appellants.

J. A. Ratchford, of Healdsburg, for respondent.

SCHOTTKY, Justice pro tem.

In a trial by the court without a jury, respondent recovered judgment for damages to his Ford automobile, his house trailer and its contents, occasioned when the truck of appellants struck the house trailer of respondent. Appellants appeal from said judgment and the sole ground urged by them for a reversal of the judgment is that the evidence is insufficient to support the finding of the trial court that respondent was not guilty of contributory negligence.

[1, 2] Bearing in mind the familiar rule that contributory negligence is ordinarily a question of fact for the court or jury to determine and that an appellate tribunal will not disturb the finding of the trial court upon that issue if there is any substantial evidence or reasonable inference in support of that finding, we shall give a brief summary of the evidence most favorable to respondent.

About 11 P.M. on May 23, 1945, respondent was driving a Ford coupe, to which was attached a house trailer, in a northerly direction on Highway 101 between Healdsburg and Geyserville. He had been having car trouble, his motor acting as if there were water in his gasoline supply so that the engine would quit and die intermittently. Approximately a quarter of a mile south of Geyserville he passed an auto court on the right hand side of the road, and, after parking his car and trailer on the right hand side of the highway, walked back to the auto court and found he could get accommodations there for the night. He then started his motor and proceeded northerly a few hundred feet and turned left into a "little road" for the stated purpose of turning around after driving up the road. His motor stalled when his Ford car was a short distance up the incline of this road, leaving the trailer extending out into the highway with its rear end about two feet over the center line. Respondent tried for two or three minutes or less to start his motor but was unable to do so. While respondent was attempting to start the motor two cars passed, one from the north and one from the south. Then respondent and his wife heard appellants' truck approaching from the north and respondent told his wife to get the flashlight from the trailer, but she was unable to get it before the impact. Respondent, who was wearing a white shirt, ran up the highway and stood in the middle of the right lane waving his arms in an attempt to stop the truck, but to no avail. The driver of the truck admitted that he saw respondent on the highway before he hit the trailer. The headlights on the Ford and the clearance lights on the trailer were lighted at the time of the collision.

[3] Additional facts shown by the record are set forth in the written opinion filed by the learned trial judge. This opinion states clearly the views of the trial court as to the weight of the evidence and the reasons for the court's decision, and because such opinions are very helpful to an appellate court, we quote from it as follows:

"At the conclusion of the trial, the court stated from the bench that its impression was that the defendant Tull was guilty of negligence proximately causing the collision resulting in plaintiff's damages in that he failed to maintain sufficient observance of the highway ahead and the objects upon it to operate his vehicle under all the circumstances present at a speed which was reasonable and prudent, having due regard for the traffic on, and the surface and width of the highway. There was no car approaching him which required the dimming of his lights. Plaintiff's car and trailer were directly across the highway and I am satisfied, notwithstanding some conflict in the evidence, that the lights on both car and trailer were on. Tull testified that his lights illuminated the highway and objects ahead only for a distance of seventy-five to one hundred feet ahead if on a level and that at the scene of the collision, which he described as on a slight rise, he just barely saw the car and trailer ahead when he was fifty or seventy-five feet from them. It appears that the truck, loaded as it was, could not have been stopped in less than one hundred to one hundred and fifty feet, that to apply the brakes suddenly would tend to 'jackknife' the equipment and load and that actually, after striking plaintiff's vehicles, the truck and trailer combination was brought to a stop about fifty-one steps beyond where it struck plaintiff's vehicles. Under the circumstances, I think it clear that Tull's speed endangered the safety of persons and property and was negligent; and also that reasonable care required him to drive with his lights on high beam, so adjusted as to comply with section 648 of the Vehicle Code, requiring an adjustment which would have revealed persons and vehicles at least 350 feet ahead.

[4] "It is urged in defense that plaintiff was guilty of contributory negligence. He had been having trouble with water in his gasoline between Santa Rosa and Geyserville, but this, in my opinion, was not severe enough to require him, in the exercise of ordinary care, to completely stop and drain his tank. His motor had spluttered some, but there was nothing that indicated it would die just as he pulled into the intersecting road whence he was proceeding preparatory to turning around. I find nothing in this circumstance that convinces me of any contributory negligence.

[5-9] "Whether plaintiff's failure to place flares or signals indicating his disabled vehicles constituted contributory negligence is a close point. Section 590 of the Vehicle Code, as amended in 1937, appears to require the placing of flares or appropriate warning signals when any trailer or semi-trailer is disabled on the roadway or within ten feet thereof, in addition to the requirements that certain commercial vehicles described therein shall be equipped with and shall place such signals when so disabled. Plaintiff's trailer was of the type now defined as a 'trailer coach' in section 52 of the Vehicle Code. It also aptly fits the definition of a 'semi-trailer' as set forth in section 37 of said code. Section 52 was approved by the Governor June 26, 1937, whereas the amendment to section 590 was approved by the Governor May 11, 1937. I think both definitions are broad enough to include plaintiff's type of trailer. In any event, no legislative intent to expressly exempt a 'trailer coach' from the provisions of section 590 appears, especially in view of the fact that when the Governor approved the amendment to section 590 he had not yet approved section 52, which was added as a new section in that year. But even though the statute required the placing of signals, the mere failure to place them under all circumstances, does not constitute contributory negligence as a matter of law. Said section 590 requires the placing of the described signals immediately when the vehicle is disabled as specified. 'Immediately' does not mean in the very twinkling of an eye. A reasonable opportunity to discover that the vehicle is disabled must be allowed, as must a reasonable time to place the signals. Before such failure can amount to contributory negligence, it must appear that it proximately contributed in some degree to plaintiff's damage. Considering all the circumstances here, I am not convinced that the lack of warning signals or failure to place them contributed at all to the collision. Plaintiff tried but for two or three minutes to start his car after the motor died. He was entitled, in the exercise of ordinary care, to a reasonable time to ascertain that his car was disabled. Such time as elapsed in the effort to start was not, under the circumstances, unreasonable. Promptly upon hearing the truck, he jumped from his car, asked his wife to get out the flashlight and ran up the road to stop the truck. I am convinced from the evidence that Tull saw him, or should have seen him, in time to have stopped if he had had his equipment under proper control. Mrs. Caperton had insufficient time to procure a flashlight and by the same token would have had no time to procure signals or flares and place them. I find nothing in these circumstances to indicate that having or attempting to place warning signals would have averted the collision. It appears to me to have been the proximate result of the negligence of the defendant Tull unaided in any degree by any act or omission of plaintiff."

[10] Appellants contend that the respondent is shown by the evidence to have been guilty as a matter of law in failing to place flares on the highway to warn of

the existence of the disabled trailer on the highway. Secondly, it is contended that there was contributory negligence as a matter of law in that the respondent drove the car and trailer onto the side road knowing that he was having car trouble and that it was likely to stall. Thirdly, it is said that the respondent was negligent in failing to signal with the flashlight although he had ample time to secure it from the trailer prior to the accident. These contentions of appellants are discussed and answered in the hereinbefore quoted opinion of the trial court and we believe that the views expressed by the learned trial judge as to law are supported by ample authority. We believe, also, that it was a question of fact for the trial court to determine whether the conduct of respondent constituted contributory negligence under all the facts and circumstances of the instant case, and that the findings in favor of respondent are fully supported by the record.

[11] It is unnecessary to discuss the authorities cited by appellants because in the recent case of Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279, our Supreme Court states the law applicable to the case at bar. The Court there said, in 29 Cal.2d at page 588, 177 P.2d at page 283:

"An act or failure to act below the statutory standard is negligence per se, or negligence as a matter of law. And if the evidence establishes that the plaintiff's or defendant's violation of the statute or ordinance proximately caused the injury and no excuse or justification for violation is shown by the evidence, responsibility may be fixed upon the violator without other proof of failure to exercise due care. [Citing cases.]

[12] "However, in an emergency, or under unusual conditions, it is generally held that circumstances may be shown to excuse the violation. * * * An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, but the presumption is not conclusive and may be rebutted by showing that the act was justifiable or excusable under the circumstances. * * *

"Thus in Rath v. Bankston, [101 Cal.App. 274, 281, 281 P. 1081], supra, where an automobile was parked partly on the highway in violation of the statute, the defendant was allowed to show that despite reasonably careful inspection the gasoline supply became exhausted, and the car stalled. In another case where a collision occurred with a car which had no tail light, evidence that the light was inspected and found in good order a short time before was held admissible to negative the presumption of negligence. (Berkovitz v. American River Gravel Co. [191 Cal. 195, 215 P. 675], supra.) And in Mathers v. County of Riverside, supra, [22 Cal.2d 781, 141 P.2d [419], 422], this court reversed a judgment which followed an instruction to the jury that if the plaintiff violated section 525 of the Vehicle Code which requires driving as close as practicable to the right side edge of the road, she was negligent as a matter of law. 'Under all the circumstances of the case,' said the court, 'it should have been left to the jury whether or not the position of her car with reference to the white line constituted contributory negligence.' 22 Cal 2d at page 786, 141 P.2d at page 422.

* * * * * *

[13, 14] "In the application of this rule each violation of a statutory requirement must be considered in connection with the surrounding circumstances. Ordinarily, the excuse relied upon by the violator presents a question of fact for the jury's determination. As stated in Scalf v. Eicher, supra, 11 Cal.App.2d [44], at page 54, 53 P.2d [368], at page 373; 'Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact except in a case where "the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury."' [Citing cases.]"

In view of the foregoing the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

85 Cal.App.2d 130

PEOPLE v. STODDARD.

Cr. 2502

District Court of Appeal, First District,
Division 1, California.

April 21, 1948.

1. Criminal law 🔑563

Each essential of corpus delicti need not be conclusively proved if the essentials taken together are convincing to a moral certainty and beyond a reasonable doubt of commission of the crime.

2. Forgery 🔑6, 44

Lack of authority to utter, publish or pass an instrument is one of the essentials of forgery and may be proven by evidence of owner or maker of the instrument that authority to perform the particular act alleged as an offense was lacking or, in absence of such witness, lack of authority may be proven circumstantially. Pen.Code, § 470.

3. Forgery 🔑44

Comparison by jury of genuine signature of owner on face of travelers check with his name written at bottom of check plus evidence that owner in person had stopped payment on check could be considered in determining whether check was endorsed without authority from owner as an essential element in proof of corpus delicti of offense of forgery, and such evidence warranted inference that owner had not authorized any one to sign his name on check. Pen.Code, § 470.

4. Criminal law 🔑517(4)

For the purpose of introducing statements of defendant, the corpus delicti need not be established by evidence of a clear and convincing character such as is required to support a conviction.

5. Criminal law 🔑1159(6)

Appellate courts may not interfere with inferences drawn by jury from circumstantial evidence unless such inferences do violence to reason.

6. Criminal law 🔑370, 371(5)

Proof of forgery of travelers check was sufficient to justify admission of evidence, introduced to show guilty knowledge and intent, that defendant had previously forged owner's name to another check of the same series and passed it. Pen. Code, § 470.

7. Forgery 🔑44

Evidence sustained conviction of forgery of owner's indorsement on a travelers check. Pen.Code, § 470.

8. Indictment and information 🔑161(3)

An information may be amended, in the discretion of trial court, at any stage of proceedings after defendant pleads. Pen. Code, § 1008.

9. Criminal law 🔑1202(1)

A prior conviction is not a part of the offense charged but is added to information for the purpose of ascertainment of proper punishment in event of conviction.

10. Indictment and information 🔑159(1), 161(1)

An indictment or information which does not charge all prior felonies may be amended on order of the court. Pen.Code, § 969a.

11. Criminal law 🔑1202(3, 4)

Where defendant admits prior conviction no reference may be made thereto in reading accusation, but if defendant denied such conviction, necessary data may be introduced so that jury may determine truth of charge of prior conviction. Pen.Code, 1158.

12. Indictment and information 🔑161(1)

When truth or falsity of charge of prior conviction becomes an issue, amendment of such charge after denial is discretionary with trial court. Pen.Code, § 1008.

13. Indictment and information 🔑161(4)

Permitting prosecution to amend information after defendant had denied prior conviction of highway robbery while armed so as to charge prior conviction of robbery was not abuse of discretion. Pen.Code, §§ 211a, 969a, 1008.

14. Witnesses 🔑337(5)

Defendant, if sworn as a witness, may be interrogated as to prior conviction as a matter of testing his credibility. Code Civ. Proc. § 2051.

15. Criminal law 🔑1167(4)

Circumstances surrounding amendment of information so as to charge prior conviction of robbery after defendant had denied prior conviction of highway robbery while armed were not prejudicial to defendant, where language of district attorney in referring to prior conviction as originally charged was not used with purpose of prejudicing defendant and trial court admonished jury to entirely eliminate from their minds all consideration of alleged prior conviction. Pen.Code, § 1008.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Vern Stoddard was convicted of forgery and from judgment of conviction and order denying a new trial, he appeals.

Judgment and order affirmed.

Lawrence A. Cowen, of San Rafael, for appellant.

Fred N. Howser, Atty. Gen., and Benjamin B. Knight, Deputy Atty. Gen., for respondent.

WARD, Justice.

This is an appeal from a judgment of conviction entitled "Forgery of Endorsement" with three prior convictions attached to the information, and from an order denying a motion for a new trial.

The body of the information alleges forgery in the usual language of the Penal Code, sec. 470, with the added allegation that the instrument was a " 'B of A' Travelers Cheque No. A1699036," which would be paid when countersigned "Frank S. Moss" in an appropriae space at the bottom. Defendant entered a plea of not guilty and not guilty by reason of insanity. The plea of insanity was withdrawn after the rendition of the verdict. He admitted two of the prior convictions, but denied the third, which charged the offense of highway robbery while armed. On the day of trial the information was read, including the prior which had been denied by defendant. Upon amendment of the third prior to the charge of robbery (in Michigan), during the progress of the trial defendant admitted the third prior.

Defendant claims the judgment is erroneously prejudicial for the following reasons: "(1) That the evidence is insufficient as a matter of law to support the verdict and Judgment. (2) That the Court erred in permitting the prosecution to offer evidence of other offenses. (3) That the jury violated its instructions in rendering a verdict of guilty. (4) That the amendment of the information over objections by appellant was erroneous and prejudicial."

The facts appear as follows: Clifford Marshall, owner of a hotel in Marin County identified defendant as having been present with several other persons at the hotel on the date alleged in the information as the date of the commission of the offense. Marshall testified: "Why, he and two or three other gentlemen and a lady came to my place. One of the men, I had seen two or three times before, the preceding summer. He couldn't—he came in and called me by name and introduced me to two or three of the others. I don't remember whether he introduced me to Mr. Stoddard or not at the time, but he said these are my friends, and then all ordered a drink. While I was making the drinks, they wanted to know if I would cash a travelers' check for them. I believe they just said a check. I told them I wasn't in the habit of cashing checks. They said they needed a few dollars, they didn't have quite enough to go to Willits. They said they were going there. After I—during that time I told them I—if it was all right. Well, while I was mixing the drinks he had the check in front there. I could see it was a travelers' check, and he went through the process of signing the check. I watched him from off at a distance of about 4 or 5 feet. When I got through I was shown a $50 check, and I said I didn't have that much money, I would be short in change for over the weekend. He said they only needed part of it, but they wanted $30. I cut it down, and said I would let them have 15 and the rest when they came back either Sunday or Monday, and they came back on Monday. * * * When they came in there was only two of the fellows, Mr. Stoddard, one of the other fellows, and the lady, and they wanted to get the rest of the money, the $35 and I told them I had the money but it was back in my apartment and I would have to go and get it and they stayed in the bar and I went back and I called the officers and they picked up Mr. Stoddard and the others at that time." In response to the interrogation "Which Frank S. Moss did you see the defendant place upon the paper?" Marshall replied "The one on the bottom.

"Q. The one on the bottom? A. Yes * * * I actually saw him take the pen and apply it to the check. Whether he wrote Moss or what he wrote or whether he just went through the motions or not, I don't know, but he did apply the pen to the check." In answer to the question "Why did you pay the $15.00 if you were suspicious about it?" Marshall replied: "Because it was worth $15.00 to me to catch him for a check [No. A1699040] passed a year before."

An officer of the bank testified that he did not know of his own knowledge whether Frank S. Moss actually lost the checks, which were of the same series, but their loss had been reported to the bank; that the records of the bank showed Frank S. Moss as the owner of the series. The officer of the bank also testified that he knew Frank S. Moss and that the defendant was not such person, and that the report of the loss had been made to the bank "by Frank S. Moss in person." In addition, a witness for the People on cross-examination gave certain hearsay testimony without motion to strike the testimony from the record:

"Q. Did anybody talk to you about it? A. Yes, when the check—when payment was stopped on the check, I came up to the police department and a fellow at the desk told me that the checks were stolen from someone in San Francisco.

"Q. Did you ever discuss this—your answer is yes."

[1-4] Before proceeding further with the narration of the evidence, it may be well to discuss briefly the subject of corpus delicti. The purpose of proof of the corpus delicti is to insure the rights of a defendant against a conviction unless a crime has actually been committed and evidence thereof presented. It is not necessary that each essential of the corpus delicti should be conclusively proved if the essentials taken together are convincing to a moral certainty and beyond a reasonable doubt of the commission of the crime. In proving the offense of forgery, lack of authority to utter, publish or pass an instrument is one of the essentials of proof of the crime. People v. Whiteman, 114 Cal. 338, 46 P. 99. It may be proven by evidence of the owner or maker of the instrument that authority to perform the particular act alleged as an offense was lacking. In the absence of such witness, lack of authorization may be proven circumstantially. People v. Cline, 79 Cal.App.2d 11, 179 P.2d 89. Here, a comparison by the jury of the genuine signature of Frank S. Moss on the face of the check, with the name "Frank S. Moss" written on or near the bottom of the check, plus evidence that Moss in person had stopped payment on the check, are circumstances that may be considered. From this evidence it reasonably may be inferred that Moss did not authorize any one to sign his name to the check. "For the purpose of introducing statements of the defendant, the prosecution is not required to establish the corpus deliciti by evidence of a clear and convincing character such as is required to support a conviction." 4 Cal.Jur., 10 yr. Supp. 746, sec. 303.

Defendant cites People v. Maioli, 135 Cal. App. 205, 26 P.2d 871, where a judgment of conviction of forgery was reversed on the ground that the prosecution failed to show that the defendant had no authority to issue the checks at the time of their utterance. The defendant had previously issued similar checks signed in the name of a business conducted by defendant's brothers. Members of the family had paid the amounts involved in the prior forgeries. Defendant in that case testified: "I knew my folks were going to make it good." 135 Cal.App. at page 207, 26 P.2d at page 872. There was no evidence to the contrary. The appellate court held it could not uphold a conviction on conjecture and suspicion. There is no question of conjecture or suspicion in the present case as the guilt of the defendant is demonstrated to a moral certainty and beyond a reasonable doubt.

On the second day after the passing of the travelers' check defendant returned to obtain the balance of the money. He was promptly arrested and made a voluntary statement to the chief of police, who was subsequently called as a witness and testified: "We showed him this check and asked him if he signed Frank S. Moss and he said he did. He stated that he was over in a bar on Franklin Street and there was a man sitting at the bar in an intoxicated condition and these checks—or the checks had slipped out of his pocket onto the bar.

"Mr. Haley [assistant district attorney]: Out of whose pocket? A. Out of the man's pocket who was laying over the bar.

"Q. At a tavern in San Francisco? A. Yes.

"Q. Did the defendant in this conversation say when this incident in the bar in San Francisco took place? A. You mean —

"Q. When was the person leaning over the bar in San Francisco that you are talking about? A. Around July of 1946.

"Q. Around July of 1946? A. Yes.

"Q. Proceed, please. A. He said the checks had slipped out of his pocket onto the bar and that he, Stoddard, and the bartender put them back into his pocket, and that they kept slipping out and that finally he took the checks and stuck them in his pocket and the man was laying over the bar in a sort of an unconscious, I guess he was —just laying over the bar like he was asleep.

"Q. When you testified that he took them and put them in his pocket, who are you referring to? Who said that? A. Mr. Stoddard.

"Q. The defendant said that he took the package of checks and put them in his pocket? A. In the pocket of—in the pocket of the man laying over the bar, then they slipped out of his pocket again and Mr. Stoddard took it and put it in his, in Mr. Stoddard's pocket.

"Q. Kept them himself? A. That's right.

"Q. What if anything did you ask him or what did he say concerning the passing of the check, the writing of the check and the passing of the check at the Bayview Hotel on April 19 this year? A. I asked him if he had signed that and passed the check at the Bayview Bar and he said yes, he had.

"Q. Did you ask him what name he had signed? A. Yes. During the conversation I asked him if he signed the name Frank S. Moss and he said yes."

[5, 6] Evidence to show guilty knowledge and intent was introduced that approximately twelve months previously defendant had signed the name "Frank S. Moss" to another travelers' check of the same series (No. 1699040) and passed it on a bartender in Marshall's establishment. The defendant likewise admitted signing the name of Frank S. Moss to this check, passing it to the bartender and receiving $50. The testimony of the chief of police was corroborated by another person present during the conversation. Defendant's objection to this point is based upon the claim that the evidence of the forgery of the 1946 check was not admissible unless the corpus delicti of the passing of the check in 1946 was proven to a moral certainty and beyond a reasonable doubt. (People v. Whiteman, supra.) As this point has been previously discussed it is not necessary to make lengthy reference to the subject. The prosecution proved that both checks were forged. The jury has the right to draw inferences from circumstantial evidence. Unless such inferences do violence to reason an appellate tribunal is not permitted to interfere. People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Cline, supra. The fact that Moss stopped payment on both checks, and that defendant admitted that he stole them, does not do violence to the conclusion that the endorsement on each check was false and that defendant lacked authority to sign either of them.

[7] Defendant urges that the court instructed as the law is enunciated in People v. Whiteman, supra, and that the jury failed to be governed by such instructions. The verdict indicates an implied finding that defendant lacked the authority to sign the name "Frank S. Moss." The real ques-

tion to consider in this case is not whether the jury violated the court's instructions, but rather the question of the sufficiency of the evidence to sustain the verdict. In this respect the evidence is convincing beyond a reasonable doubt.

As previously noted the information referred to the offense which resulted in the third prior conviction as "highway robbery while armed." The defendant denied this prior and accordingly the third prior was read to the jury, which required proof on the part of the People. In the opening statement the district attorney outlined in detailed form the evidence which the People expected to introduce. Included in this statement was the proposed offer to prove that defendant had served a term of imprisonment as set forth in the third prior. During the trial of the present offense, outside the presence of the jury, the correctness of the conviction set forth in the third prior was challenged. No proof of the Michigan statute was made in this case. However, Michigan, like California, recognizes the distinction between armed and unarmed robbery. Michigan Stat. 28.797, 28.798, Mich.Penal Code, §§ 529, 530, Comp.St.Mich.1929, §§ 17115-529, 17115-530; Calif.Penal Code, sec. 211a. The court permitted the district attorney to amend the prior so that it charged "robbery," without reference to "highway" or "while armed." The defendant then admitted the third prior.

Previous to the return of the jury the following transpired:

"The Court: Have you any thoughts to express, Mr. Cowan?

"Mr. Cowan [attorney for defendant]: No, your Honor. I am going to leave this entirely in your Honor's hands and I think your Honor can fairly present to the jury the fact that this man was erroneously charged with having committed the crime of highway robbery while armed and that that charge is withdrawn and they are no longer to take it into consideration.

"Mr. Haley: I would suggest you add an admonition that they disregard not only any evidence—there has been none offered—but any reference be completely disregarded." The court instructed the jury: "Ladies and gentlemen, it is necessary for the court to inform you now that the information heretofore read to you has been amended and it will now under this amended information be your duty to disregard anything that has been said in the prior information concerning the previous conviction of this defendant. I want you to eliminate entirely from your consideration and your deliberations any reference to that charge which was heretofore read to you and about which you have been questioned when you were on your voir dire, and perhaps have heard mentioned during the trial. You will entirely eliminate all consideration of this conviction from your minds and we will proceed to trial when we do proceed on the main charge and which now is the only charge to be made, namely the charge of forgery."

On appeal defendant claims that he was materially prejudiced by being originally charged with a prior conviction which could not be proved, and that the information was amended to set forth an offense that could be proved. The reference to the unproven prior in the district attorney's opening statement is the basis of the claimed prejudicial error.

[8-15] An information may be amended, in the discretion of the court, at any stage of the proceedings after a defendant pleads. (Penal Code, sec. 1008.) A prior conviction is not a part of the offense charged but is added to the information for the purpose of the ascertainment of proper punishment in the event of a conviction of the offense alleged in the information. Whenever an information does not charge all prior felonies, the information or indictment may be amended on order of the court. (Penal Code, sec. 969a.) If the defendant admits a prior no reference may be made thereto in reading the accusation of the offense charged—in this case forgery. If the defendant denies the prior, it is proper to introduce the necessary data so that the jury may find the prior conviction true or not true. (Penal Code, sec. 1158.) When the truth or falsity of the prior becomes an issue, the amendment thereof, after "denial," is likewise a matter of discretion with the trial

court. No abuse of discretion may be based upon the amendment in this case, but the circumstances surrounding the order of amendment may give rise to a charge of prejudice. In the present case there was no language used by the district attorney in his opening statement or during the trial that appears to have been used with the purpose of prejudicing the defendant. The trial court correctly admonished the jury to entirely eliminate from their minds all consideration of the alleged conviction. If the defendant had been sworn as a witness he could have been interrogated upon the conviction as a matter of testing his credibility. (Code Civ.Proc., sec. 2051.) This procedure would have negatived possible error in reference to the prior conviction during the trial. People v. Peete, 28 Cal.2d 306, 169 P.2d 924. If the amendment had not been allowed and the district attorney had failed to sufficiently prove the prior, or if the district attorney had offered no evidence to prove the prior and the jury had returned a finding that the third prior was not true, no prejudice could have been claimed. People v. Barry, 119 Cal.App. 574, 6 P.2d 969. There is nothing in the record indicating that defendant was prejudiced by the incident.

People v. Colombo, 70 Cal.App. 489, 233 P. 413, is called to the court's attention by defendant. In that case a prior conviction charge was amended but after evidence of the alleged prior conviction had been introduced. Defendant objected on the ground that the proof showed a different offense than the one charged in the information. The information was amended and as amended the prior conviction introduced in evidence. In the Colombo case the jurors knew that the defendant had been convicted upon a prior and similar charge. In the present case no evidence was introduced though the alleged prior conviction had been read to the jury. However, the jury was specifically admonished that the only charge to pass upon was forgery. The court instructed the jury to eliminate entirely from consideration any reference to the prior conviction "heretofore read to you." In People v. Mock Don Yuen, 67 Cal.App. 597, 600, 227 P. 948, 949, the court said: "In view of the fact that the charge of the previous conviction had been read to the jury and frequently alluded to before the defendant admitted the same, the district attorney's later reference thereo in his cross-examination of defendant, which was probably inadvertent, could not have prejudiced the defendant's rights, especially after the court's admonition to the jury to disregard it."

If it could be determined that the prior conviction should not be amended under the circumstances of this case, still the alleged error in the matter of procedure has not resulted in a miscarriage of justice as is shown by an examination of the entire cause, including the evidence.

The judgment and the order denying the motion for a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

CALIFORNIA COMPENSATION INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 13668.

District Court of Appeal, First District, Division 1, California.

April 22, 1948.

Rehearing Granted May 20, 1948.

1. Workmen's compensation 🔑1939

Whether injured workman was an independent contractor or employee within coverage of Workmen's Compensation Act is ordinarily a question of fact for Industrial Accident Commission. Labor Code, §§ 3351, 3353.

2. Workmen's compensation 🔑1939

Appellate court has no jurisdiction to interfere with a finding of fact of Industrial Accident Commission if such finding is supported by any substantial evidence or by any reasonable inference from such evidence.

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* Subsequent opinion 195 P.2d 880.

3. Workmen's compensation ⚷1935

On writ of review to annul death benefit award of Industrial Accident Board on ground that deceased workman was an independent contractor, insurance carrier had burden of proving absence of any substantial evidence or reasonable inference to support Board's finding as to existence of employer-employee relationship. Labor Code, §§ 3351, 3353.

4. Workmen's compensation ⚷1452

Evidence that hotel manager supervised work and inference from nature of work and method of payment that he could discharge workmen and they could quit sustained finding of Industrial Accident Board that two men employed at stated price per man per hour to clean and replant hotel garden, though they considered themselves partners for the job, were "employees" of hotel within coverage of Workmen's Compensation Act and not "independent contractors." Labor Code, §§ 3351, 3353, 3360, 5705.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

5. Workmen's compensation ⚷1349

Rendition of services for another raises an inference under statute that person rendering service is an employee for purpose of awarding compensation and places burden of proof upon the other to show that he is an independent contractor. Labor Code, §§ 3351, 3353, 5705.

6. Workmen's compensation ⚷295

That workmen employed to clean and replant hotel garden considered themselves partners for the job did not preclude them from being employees of hotel for purpose of awarding compensation. Labor Code, §§ 3351, 3353, 3360.

7. Workmen's compensation ⚷502

Whether average earnings of deceased workman warranted full death benefit was immaterial, where amount of death benefits which had accrued at time of widow's death was less than amount widow was entitled to at time of award under any theory, and adult children of decedent and widow, who were substituted instead of widow, were not dependent on decedent, since under statute children would receive only death benefits which had accrued at time of widow's death. Labor Code, § 4706.

◆

Petition for writ of review by California Compensation Insurance Company to annul death benefit award by Industrial Accident Commission of the State of California, etc., in favor of Mary Laurio. Upon the death of Mary Laurio after the writ issued, Antonio Laurio and others, her children, were substituted as parties to proceeding.

Award, subject to provisions of Labor Code, § 4706, affirmed.

Keith, Creede & Sedgwick, of San Francisco, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondents.

PETERS, Presiding Justice.

Petition for a writ of review.

The petitioner seeks to annul a death benefit award in favor of Mary Laurio, widow of Vincent Laurio, Vincent having died as the result of injuries suffered in an accident while he was performing services as a gardener for the Canterbury Hotel in San Francisco. After the writ issued, Mary Laurio died and the children of the couple have been substituted as parties to this proceeding.

Petitioner is the insurance carrier for the Canterbury Hotel, that company having been found to have been the employer of decedent. The major contention of petitioner is that the evidence, as a matter of law, demonstrates that decedent was not an employee but an independent contractor. There is no doubt that if the employer-employee relationship existed, the accident was industrial, and that it caused the death of Laurio. The trial referee recommended a finding that decedent was an independent contractor, but the panel of the Commission found that the employer-employee relationship existed. The insurance carrier's petition for rehearing was denied, one of the three commissioners dissenting.

[1-4] The evidence on the issue in question is not entirely satisfactory, and

the question presented is a very close one. Normally, of course, whether an injured employee is an independent contractor or an employee is a question of fact, and this court has no power to interfere with a finding of fact of the Commission if such finding is supported by any substantial evidence or by any reasonable inference from that evidence. For petitioner to prevail on this factual issue it is necessary for it to show not only that the evidence preponderates in its favor, but that there is no substantial evidence, and no reasonable inference at all to support the challenged finding. (Riskin v. Ind.Acc.Comm., 23 Cal.2d 248, 144 P.2d 16; Pacific Lbr. Co. v. Ind.Acc.Comm., 22 Cal.2d 410, 139 P.2d 892; Associated Indem. Corp. v. Ind.Acc.Comm., 18 Cal.2d 40, 112 P.2d 615; Schaller v. Industrial Acc. Comm., 11 Cal.2d 46, 77 P.2d 836.) That is a very heavy burden to assume, and while in the present case it may be that the evidence preponderates in favor of petitioner, when the record is read with the statutory background hereafter mentioned in mind, we are of the opinion that there is some evidence and some reasonable inferences from that evidence, that support the finding. This being so, this court has no power to interfere.

The facts are as follows: The garden of the Canterbury Hotel needed cleaning up, weeding and replanting. Howard Hall, manager of the hotel, telephoned to the Sunset Nursery and asked them to do the job. He was told that the nursery could not handle the work but would be glad to recommend a competent man. Shortly thereafter one Chester Christensen and decedent visited the nursery and were informed of the needs of the hotel. It appears that Christensen and decedent were gardeners, and, on occasion, had worked together on various jobs on a fifty-fifty basis. Christensen testified that he then called upon Hall; that he and Hall walked out into the garden and Hall asked how much it would cost to clean up the garden and how long it would take; that he told Hall that he could not give a bid on the job, but that "he and his partner" would do the job for two dollars an hour each, would work eight hours a day, and that he thought the job would take five or six days; that Hall told him that this was all right; that he communicated with Laurio, the decedent, and Laurio agreed to the arrangement; that neither he nor Laurio had a regular or any place of business, and neither had a contractor's license to do gardening work; that several days later he and Laurio started to work, working eight hours a day; that it was part of the arrangement made by Christensen and Hall that Christensen was to purchase whatever plants Hall wanted from the Sunset Nursery where Christensen had an account, and that these sums were to be added to the bill; that a little profit (about 10%) was made on the plants, but the agreement with decedent was that he and Christensen were to share and share alike. Christensen also testified that Hall, during the course of the work, made certain suggestions; that Hall wanted marigolds planted in the center bed of the garden but, upon the witness' suggestion, agreed to other plants; that Hall suggested cutting back the bougainvillia after ascertaining from the witness that this would not adversely affect the plant; that during the several days that he and decedent worked before the accident Hall kept coming out wanting to know when they would be finished. Christensen also testified that Hall did not tell him "how" to do his work, but indicated that he "was interested in the results after the work was finished"; that Hall did not place a specific restriction on the amount of money that was to be expended for plants, but that he, Christensen, always consulted Hall as to what plants to buy; that it was his opinion that Hall wanted the job done in the cheapest way possible; that he called to the attention of Hall that a certain tree was overhanging the garden and Hall suggested that they straighten that tree. It was during this straightening process that decedent fell and suffered the injuries that ultimately caused his death.

Christensen was asked whether Hall had ever "specifically" told him "not to do any specific operation you were doing, give you definite directions about not doing any particular thing?" To this Christensen replied that he wanted to remove two banana trees, but that Hall had ordered them not to be cut, and that he, Christensen, wanted to haul the trash away in his truck but that Hall ordered them to take it to the basement of the hotel for the garbage man to haul away; that he, Christensen, wanted to remove some trees "in the back" but that Hall ordered them left where they were.

Hall testified that his agreement with Christensen was that Christensen agreed to put the garden into shape at a total labor cost of two dollars per hour per man; that Christensen was to supply the plants and materials and charge for them; that he could not recall the conversation with respect to how many men would be engaged on the job, but he would not deny that such a conversation took place; that prior to the accident he had had no conversation at all with decedent except to say "hello"; that he had never instructed decedent as to how the work was to be done; that he did suggest to Christensen that it would be a good idea to straighten the tree, but "at no time did I give him any instructions on how to do it"; that he had merely instructed Christensen to clean up the garden; that there were great masses of vines and dead shrubs that had to be removed; that he had paid the labor and materials bill submitted by Christensen, and that no payroll deductions were made from that sum; that neither the name of Christensen nor of Laurio ever was entered on the hotel payroll record.

That is substantially all of the evidence on the basic issue of whether decedent was an employee of the hotel or an independent contractor. Before discussing the question of the sufficiency of the evidence to support the finding of the employer-employee relationship, certain statutory provisions should be mentioned.

Section 3351 of the Labor Code provides: "'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, * * *."

Section 5705 of that Code provides:

"The burden of proof rests upon the party holding the affirmative of the issue. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them:

"(a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his injury actually performing service for the alleged employer."

Section 3353 provides: "'Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."

[5] Thus, under these sections, the burden of proof is upon the one contending that a person rendering a service for another is an independent contractor. Upon proof of the rendition of service for another the applicant has proved the existence of the employer-employee relationship and the burden is upon the employer to prove that the applicant was an independent contractor. There have been many cases discussing this problem. The rules announced in these cases have been quite uniformly expressed, but the application of those rules to various factual situations has presented considerable difficulty. No useful purpose would be served by analyzing the many cases on this subject. A reference to two recent cases will suffice to indicate the trend of the authorities. In Perguica v. Ind. Acc. Comm., 29 Cal.2d 857, 179 P.2d 812, the case principally relied upon by petitioner, an award of the Commission based upon a finding that the respondent was an employee was annulled, the Supreme Court holding that, as a matter of law, respondent was an independent contractor. The Supreme Court recognized the rule that: "Generally speaking, it is a question of fact to be determined by the commission, from the evidence adduced, whether the essential employer-employee relationship exists, * * * and the commission's finding on that issue will not be disturbed where it is supported by substantial evidence" (29 Cal.2d at page 859, 179 P.2d at page 813), but also recognized that "if from all the facts only a single in-

ference and one conclusion may be drawn, whether one be an employee or an independent contractor is a question of law." (29 Cal.2d at page 859, 179 P.2d at page 813.) The court then attempted to summarize the factors that should be considered in determining whether the particular services fall into one or the other categories involved. After giving the statutory definition of an independent contractor contained in § 3353 of the Labor Code, supra, the court stated 29 Cal.2d at page 859, 179 P.2d at page 813: "The distinction between the status of an independent contractor and that of an employee rests upon several important considerations. A material and often conclusive factor is the right of an employer to exercise complete and authoratative control of the mode and manner in which the work is performed. The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship. [Citing cases.] Strong evidentiary support of the employment relationship is 'the right of the employer to end the service whenever he sees fit to do so.' [Citing cases.] 'An employee may quit, but an independent contractor is legally obligated to complete his contract.' [Citing cases.] There are 'other factors to be taken into consideration,' as stated in Empire Star Mines Co. v. California Employment Commission, 28 Cal. 2d 33, at page 43, 168 P.2d 686 * * *: '(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (Rest., Agency, § 220; Cal.Ann., § 220.)'"

The factual situation involved in the case was as follows: Perguica was constructing a house on his farm. Part of the necessary construction was to have affixed to the outside of the house some wire netting to serve as lathing for the plasterer. One Walker agreed to furnish and to install the netting for fifteen cents per yard. Perguica knew nothing about lathing and did not discuss any of the details of the work with Walker. Payment was to be made after the work was completed according to the number of rolls of wire used. Perguica was to furnish the wire, but Walker was to use his own tools and equipment. Walker suffered fatal injuries in transporting certain materials to the job. No provision was made in the agreement as to how many men Walker was to use on the job, and there was no agreement that Perguica could discharge Walker. Perguica testified that the carpenters on the job were paid by the day and were loafing on the job, and for that reason hired Walker to do the complete job at fifteen cents per yard. The court held that those facts demonstrated "this to be a case of independent contractorship." (29 Cal.2d at page 861, 179 P.2d at page 814).

The respondents place their main reliance on the case of Riskin v. Ind. Acc. Comm., 23 Cal.2d 248, 144 P.2d 16. There the Supreme Court affirmed an award based on a finding that the applicant was an employee. The carrier, as in the instant case, contended that the applicant was an independent contractor. The facts were these: The injured worker and another were hired to "drive" a tunnel. They were to be paid at the rate of $7.00 per foot of tunnel dug, and Riskin gave them specific directions as to the length, size and direction of the bore. Riskin furnished the tools, but the two men furnished the explosives. The court emphasized that Riskin had the right to discharge the two men at any time, and the opinion affirming the award is largely based on this factor.

If these rules be applied to the present case it would appear that there is some evidence, weak it is true, from which it may be deduced that these men were employees of the hotel. There is nothing in the evidence to show whether Hall could have discharged the men, or whether the men could have quit, before completing the job, but it is a reasonable inference from the nature of the work being performed and the method of payment—by the hour and not by the job—that the right of discharge by Hall and the right of quitting existed. That factor, alone, under the Riskin case, supra, supports the finding that the two men were employees. There is also evidence that Hall exercised some control over the work. It is a reasonable inference that Hall had the legal right to tell the gardeners what to plant, what to remove, and how the work should be done. In the very nature of the work it was impossible for Hall and the two gardeners to agree in advance concerning the details of the entire job. The record shows that Hall generally supervised the work as it progressed by giving orders as to what should or should not be planted or removed.

[6] The fact that Christensen and Laurio considered themselves as partners for this job does not help petitioner. Section 3360 of the Labor Code provides: "Workmen associating themselves under a partnership agreement, the principal purpose of which is the performance of the labor on a particular piece of work are employees of the person having such work executed."

It is undoubtedly true that there is evidence, substantial evidence, perhaps a preponderance of the evidence, that would have supported a finding that the men were independent contractors. But that is not the problem here presented. In this case the Commission has found that decedent was an employee. There is no doubt that decedent was rendering services for the hotel. That raises an inference, under the applicable statutes, that decedent was an employee, and places the burden of proof upon the hotel to prove the contrary. Under such circumstances we think that, under the record here presented, the Commission was justified in finding that the petitioner did not sustain the burden placed upon it, and was justified in finding that decedent was an employee.

[7] In the petition as filed in this court the petitioner also challenged the finding that the widow of decedent was entitled to a full death benefit of $6,000, payable at $25 per week, it being contended that the average earnings of the decedent did not warrant the full allowance. Prior to oral argument the widow died, and the adult children of the couple have been substituted as parties. The record shows that none of the children was dependent on decedent. Section 4706 of the Labor Code provides that upon the death of a dependent beneficiary where there is no surviving dependent "the death benefit terminates and does not survive to the estate of the deceased dependent, except that payments of the death benefit accrued and payable at the time of the death of the sole remaining dependent shall be paid upon the order of the commission to the heirs of the dependent * * * without administration." At the oral argument it was admitted that the amount of such accrued benefits at the time of death was less than the amount the widow was entitled to at the time of the award under any theory, if she was entitled to any award at all.

The award, subject to the provisions of § 4706 of the Labor Code, is affirmed.

WARD and BRAY, JJ., concur.

85 Cal.App.2d 240

PEOPLE v. JOHNSON et al.

Cr. 4193.

District Court of Appeal, Second District, Division 3, California.

April 28, 1948.

1. Forgery 🔑44

Evidence by experts that names of payees of checks were in same handwriting as that of fictitious name affixed to check as payor, together with evidence linking defendant with burglary of the blank checks and other articles was sufficient to sustain conviction for forgery of a fictitious name.

2. Burglary 🔑42(3)

Circumstantial evidence that defendant was owner of an automobile used in a burglary, and was seen in it shortly thereafter, and that evidences of materials burglarized were found therein was sufficient to support conviction of burglary.

3. Burglary 🔑46(7)

In prosecution for burglary or receiving stolen property, where accused is shown to have been in possession of property, instruction should be framed upon principle that failure of accused to account for such possession upon a theory inconsistent with his guilt of the offense charged or to show that possession was honestly obtained is itself a circumstance tending to show guilt.

4. Burglary 🔑46(7)
Criminal law 🔑1172(2)

Charge that where goods have been feloniously taken by means of burglary and are immediately found in possession of a person who gives a false account or refuses to give any account, proof of such possession and conduct is "evidence" not only that he stole the goods, but that he made use of means by which access to them was obtained, though improper in use of word "evidence" was not reversible error.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Leroy L. Johnson was convicted of receiving stolen property and two offenses of forgery of a fictitious name, and Henry Ewing was convicted of one offense of burglary and two offenses of forgery of a fictitious name, and he appeals.

Judgments affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

In a jury trial Leroy L. Johnson and Henry Ewing were convicted of three felonies each, Johnson of receiving stolen property and two offenses of forgery of a fictitious name, and Ewing of one offense of burglary and two offenses of forgery of a fictitious name. It was found by the verdicts that Johnson had been convicted of one previous felony, and Ewing of two, as charged in the information. Ewing alone appeals, claiming insufficiency of the evidence and error in the giving of an instruction.

A clothing manufacturing concern known as Capetillo Sportswear was burglarized on the night of April 8, 1947. The proprietors testified that they lost 600 sport shirts, a check book, a check writing machine, some nightgowns, negligees and remnants, all of which they valued at approximately $6,000. They described the collars and material of the shirts, also a light pink thread and a white thread that was used in the manufacture of ladies garments. They described also a sewing machine used for stitching which was not in good repair and made an extremely loose stitch which was not difficult to identify. The checks in the check book were numbered serially and were printed with the name of Capetillo Sportswear. Pearl buttons were used on the shirts and also certain custom made shoulder pads, which came in a cardboard box on which appeared the name of the manufacturer. Only a few of the garments were recovered. Some of the stolen checks were filled out in typewriting and were cashed. One typewriter was used on some of the checks, another one on the remainder. Defendant Johnson admitted cashing two of the checks but denied the burglary. Ewing denied both the burglary and the writing or cashing of the checks, but made admissions with reference to both the burglary and the forgeries which tended to connect him with the commission of both offenses.

There was, in our opinion, sufficient evidence to support the convictions of appellant. It will not be necessary to set it out at great length. Gabriela Capetillo, one of the proprietors, testified that about a week or week and a half prior to the burglary a colored man came into her place inquiring about work and that she talked with him for about three minutes and later saw him outside of a nearby beer hall; that while in the shop the man kept looking around the place, "sizing it up." She was almost sure that appellant was this man. She identified threads which were found in appellant's car as those which were used and which had been through her overlapping machine and which contained a loose stitch, and she also identified some of the shirts and some shoulder pads that had been recovered by the police, as hereinafter noted. She testified that certain checks that were recovered by the police from the defendants had been taken from her check book, and that the name signed thereto, Charles Rosser, was not that of any one in her employ. Also, that the payees of the checks, Ben E. Brown and Vernon J. Carter, were not employees.

Appellant was purchasing a 1941 Cadillac sedanette, with license No. 7X9887. He was driving the car at the time of his arrest, shortly after the burglary. Defendant Johnson and a third man, Thompson, were with him. A number of checks taken from the stolen check book were found under the front seat of the car and in the rear a typewriter which, according to the expert testimony, had been used in writing portions of seven of the checks which were received in evidence. In the trunk of the car were found particles of thread of various colors and these were identified by expert testimony with the threads used in making up the stolen articles, and in the sewing machine which, as stated, made loose stitches. Others of the checks were filled out in part on a typewriter which appellant had borrowed from his landlady, Lydia Hayne. She and appellant both testified that about 1:00 o'clock in the morning appellant had awakened her and borrowed her typewriter which he took up to his room and kept for only 10 or 15 minutes, when Miss Hayne required him to return it. Appellant's explanation of this incident was that he borrowed the typewriter at the request of Johnson, that he left his room shortly after receiving the typewriter and did not return until Miss Hayne had taken the machine away. Police officers testified that they endeavored to get information from appellant as to what had become of the stolen goods and that appellant told them that there were not 600 shirts, but only 45 or 48. Defendant Johnson took the officers to a sewer opening in the southwest part of the city, and they recovered therefrom several of the stolen shirts, coat hangers and other material. Appellant's brother-in-law, Thompson, testified that shortly before the arrest, while riding with appellant and Johnson, he saw checks on the seat of appellant's car and also an identification card, and that during the course of the ride appellant asked him whether he had ever cashed any checks, and he replied that he had not. Appellant's automobile was impounded by the police and appellant offered, if the car were released to him, to try to locate the shirts and return them. When asked what he had done with the check protector he told the officers he had thrown it down a storm drain. His explanation of these statements was that he was merely repeating information he had received from Johnson. He and Johnson admittedly were close friends and appellant testified that on occasions he allowed Johnson to use his car. This is substantially the evidence tending more or less directly to connect appellant with the burglary. However, his later activities in connection with the cashing of the checks furnished an unsatisfactory explanation of the fact that the stolen checks were found in his car. He offered no denial of the testimony that threads from the stolen shirts were found in the car, but only expressed surprise to the officers that they had thought to look for such things.

[1] Johnson admittedly cashed one check with a check cashing agency and another at a store where he purchased some trousers, shirts and gloves, receiving the balance of the check in cash. Another man cashed a check with the check cashing agency payable to Vernon J. Carter. The cashier, testifying as a witness, identified appellant as the man who cashed this check. The proprietor of the store, where Johnson purchased the articles, was a witness and identified him as the purchaser. Johnson was wearing some of the articles after his arrest. The witness testified that after Johnson left the store he saw appellant across the street sitting in a Cadillac car. He had his brother call up the Capetillo Sportswear about the checks, notified the police, drove to the address that Johnson had given, which he found to be a fictitious one, and drove by the Cadillac car several times with the thought in mind of asking appellant if he had seen where Johnson had gone when he left the store. He did not make this inquiry but observed the Cadillac parked there for about 15 minutes with appellant sitting at the wheel. In the meantime one Davis, who was also charged with forgery but had not been brought to trial, was purchasing some merchandise in a nearby food market where he cashed a check for $43.50, payable to the order of Vernon J. Carter and signed, Charles Rosser. One Kaplan, proprietor of the market, becoming suspicious, followed Davis and saw him join appellant in appellant's car. He wrote down the license number, admittedly that of appellant's car, and then called the police. Police officers questioned appellant who denied the burglary or the cashing of the checks. He was accused of having stooges cash checks for him, and said to the officers, "you can't blame me for that." There was evidence that the names of the payees of the checks that were cashed were fictitious. It consisted of expert testimony that the names, Ben E. Brown and Vernon J. Carter, were in the same handwriting as the name Charles Rosser.

[2] It is unnecessary to recapitulate the evidence which pointed to defendant's guilt of the offenses of which he was convicted. The circumstantial evidence which we have stated, and the defendant's admissions, furnish sufficient evidence to support his conviction of the burglary. There was convincing evidence that he aided and abetted others in cashing the checks, if he did not in fact cash one of them himself.

[3, 4] Appellant criticizes the following instruction, given at the request of the people: "Where goods have been feloniously taken by means of a burglary and they are immediately or soon thereafter found in the possession of a person who gives a false account or refuses to give any account of the manner in which he came in their possession, proof of such possession and guilty conduct is evidence, not only that he stole the goods, but that he made use of means by which access to them was obtained." Such an instruction was approved in People v. Corral, 60 Cal.App.2d 66, 140 P.2d 172. This language originated in People v. Lang, 142 Cal. 482, 76 P. 232, in discussing the sufficiency of the evidence to support a conviction of burglary. We do not believe the principle is well stated for use in an instruction. For the court to classify actions of the accused as "guilty conduct" in discussing the sufficiency of the evidence, as was done in the cases cited in People v. Corral, is quite apart from instructing the jury that such actions constitute "guilty conduct." Moreover, to instruct that certain acts of the defendant furnish evidence of his guilt is little short of instructing that they constitute sufficient evidence to warrant a verdict of guilty. The criticized instruction should not be given. A correct statement of the law will be found in People v. Russell, 120 Cal.App. 622, 625, 8 P.2d 209, 210. In a prosecution for burglary, or receiving stolen property, where the accused is shown to have been in possession of the property, instructions should be framed upon the principle that "the failure of the accused to account for such possession upon a theory inconsistent with his guilt of the offense charged, or to show that the possession was honestly obtained, is itself a circumstance tending to show guilt." See also People v. Taylor, 4 Cal.App.2d 214, 217, 4 P.2d 870; People v. Russell, 34 Cal.App.2d 665, 669, 94 P.2d 400. To say that it is "evidence" of guilt, rather than a circumstance tending to prove guilt, is to magnify its weight, which

should not be done, lest there be raised in the jurors' minds a doubt whether the acts of the accused should be considered merely as an incriminating circumstance, or as sufficient evidence of guilt. But although we disapprove of the giving of the instruction, we do not regard the error as one which requires a reversal of the judgments. From a consideration of the entire evidence, as applied to the burglary charge, the error in the instruction does not appear to have resulted in a miscarriage of justice.

The judgments are affirmed.

WOOD, J., and VALLÉE, Justice pro tem., concur.

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85 Cal.App.2d 71

ISAACSON et al. v. G. D. ROBERTSON & CO., Inc., et al.

Civ. 16105.

District Court of Appeal, Second District, Division 1, California.

April 19, 1948.

Rehearing Denied May 7, 1948.

Hearing Denied June 10, 1948.

1. Contracts 🔑316(1)

A contracting party may waive provisions placed in a contract solely for his benefit.

2. Specific performance 🔑10(1)

Where vendor stood upon agreement by which it was not required to convey anything except in event rezoning of lots took place within specified period, and refused specific performance on ground that no rezoning had taken place, no question of defective title was involved and purchaser was not entitled to compel vendor to convey such title as it had.

3. Vendor and purchaser 🔑16(1)

Where contract for sale of lots provided for "ipso facto" termination within a certain period in case lots should not be rezoned, vendor's letter prior to expiration of such period requesting purchaser to sign agreement and deposit receipt was not a new offer to enter into a binding contract without regard to zoning conditions, where letter contemplated execution of a sales agreement and deposit receipt by vendor's agent after return of signed agreement and purchasers did not commence payments which would be due under such theory.

4. Specific performance 🔑61

Under contract for the sale of lots containing a clause providing for "ipso facto" termination of contract unless lots which were in a residential zone should be rezoned for business purposes within a certain period, contract, when construed as a whole in accordance with statutory requirements, was not intended to be solely for benefit of purchasers alone so as to permit them to waive the clause and seek specific performance of the contract after the period expired without a change in zoning. Civ.Code, §§ 1641, 1650.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Carl F. Isaacson and another against G. D. Robertson & Company, Inc., and another for specific performance of a contract for sale of realty. From an adverse judgment, plaintiffs appeal.

Affirmed.

Ernest W. Pitney and Robert M. Newell, both of Los Angeles, for appellants.

Chandler & Wright, of Los Angeles, for respondents.

WHITE, Justice.

Plaintiffs brought an action for specific performance of a contract for the sale of real estate. After trial before the court upon an agreed statement of facts, judgment was entered for the defendants, from which judgment plaintiffs prosecute this appeal. The sole question presented is whether certain provisions for termination of the contract were for the benefit of plaintiff purchasers alone and could be waived by them, or whether such provisions were for the benefit of the sellers as well.

The facts are as follows:

Defendant Title Insurance & Trust Company, as trustee, was the owner of the property in question, a vacant lot on Crenshaw Boulevard in Los Angeles, and also owned as such trustee, adjacent lots in the block on Crenshaw Boulevard between 39th Street and Coliseum Place. Defendant G. D. Robertson & Co., Inc., was the exclusive agent for the property. On May 4, 1945, plaintiffs, husband and wife, delivered a cashier's check for $4,320.00 payable to Title Insurance & Trust Company, to an employee of the agent, G. D. Robertson & Co., Inc., and received a "deposit receipt" reading as follows:

"May 4th, 1945

"Received from Carl F. and Hazel K. Isaacson the sum of $4,320.00 (Four Thousand Three Hundred Twenty Dollars and no/100), issued in the name of the Title Insurance and Trust Company, down payment on Lot 15, tract 12120.

"The total purchase price of this lot is $21,600.00 (Twenty One Thousand Six Hundred Dollars and no/100). The balance is to be paid at the rate of $100.00 or more per month, due and payable in five years.

"Sales agreement will be given in lieu of this deposit receipt.

"G. D. Robertson & Co.,
"By, T. F. Doran."

A few days after the execution of the deposit receipt, the following language was indorsed thereon by the agent, with the knowledge and approval of plaintiffs: "This sale has been made subject to Lot 15 Tract 12120 being zoned for business. T.F.D.G.D. Robertson & Co."

On August 17, 1945, Title Insurance & Trust Company transmitted to plaintiffs a "Sales Agreement and Deposit Receipt" and an "Agreement of Sale," with the request that if the documents were satisfactory the plaintiffs execute and return them, whereupon the title company would forward the "Sales Agreement and Deposit Receipt" for execution by the agent and would return to plaintiffs a copy of the "Agreement of Sale" after its execution by the title company. Plaintiffs executed and returned the documents, and the agent executed the "Sales Agreement and Deposit Receipt," but the title company never executed the "Agreement of Sale."

The "Sales Agreement and Deposit Receipt" executed by plaintiffs and defendant agent, and dated May 5, 1945, contained the following provisions:

"2. By their written acceptance of this sales agreement and deposit receipt, which acceptance shall be in duplicate, purchasers acknowledge that they enter into this agreement with the knowledge that the above described real property is now zoned 'RDO' (meaning subject to a Los Angeles residence zoning ordinance), but purchasers are desirous of having the property rezoned into 'C–1' (business) or its equivalent. The purchasers are also aware of the fact that certain municipal authorities for the City of Los Angeles have prepared and are preparing new zoning maps covering property in the City of Los Angeles, and contemplate enacting certain zoning ordinances in connection therewith. The purchasers are also aware of the fact that the maps which are now in the course of being prepared include at the present time a proposal for the rezoning of the property hereinabove described from its present zoning of 'RDO' to zone 'C–1' or its equivalent.

"3. In view of the facts above set forth with reference to such zoning procedure, and in view of the uncertainties which exist in connection therewith, it is understood and agreed that in the event the above described property has not definitely been zoned 'C–1' or its equivalent by the proper municipal authorities of the City of Los Angeles, through a valid, effective ordinance duly and regularly adopted by the City Council of the City of Los Angeles as provided by law, within six (6) months from the date hereof, this agreement shall ipso facto cease and terminate, in which event neither party shall be under any further obligation to the other hereunder, excepting that G. D. Robertson & Company shall refund to purchasers any amounts theretofore paid to G. D. Robertson & Company by said purchasers, including the sum of $4,320.00 heretofore paid as above set forth."

"5. In the event this agreement is not terminated upon the expiration of six months from the date hereof as hereinabove provided, the Title Insurance and Trust Company will, upon the expiration of said six months period, issue to the purchasers, a contract purchase agreement in form substantially as set forth upon the document attached hereto, made a part hereof and marked exhibit A, and purchasers agree that if this agreement is not terminated as hereinabove provided within six months from the date hereof, that upon presentation of such contract purchase agreement they will execute the same and fulfill the terms hereof, in default of which, this agreement shall terminate and be of no further force or effect, and neither party hereto shall be under any further obligation one to the other."

The six months' period referred to in the above-quoted paragraph 3 expired November 5, 1945, and on that date the property had not been rezoned. In October, 1945, plaintiffs advised defendants that they were satisfied with the zoning as it stood and requested that the title company execute the "Agreement of Sale." This defendants declined to do, and on November 9, 1945, the agent returned to plaintiffs the cashier's check for $4,320 theretofore deposited by them, advising plaintiffs that the contract "ipso facto terminated upon the expiration of six months from May 5, 1945." Plaintiffs thereupon commenced the present action.

Appellants submit that the judgment should be reversed upon the grounds (1) that the termination clause was inserted in the contract for the benefit of the vendees, who expressly waived its provisions, thereby continuing the contract in effect; (2) that a vendee may compel a vendor to convey such title as he may have, though it be less than that contracted for; (3) that the title company, by transmitting the "Sales Agreement and Deposit Receipt" and "Agreement of Sale" on August 17 and requesting their execution by the vendees, made an offer of a new contract which was accepted; and (4) that one who has been offered all the benefits he bargained for under a contract cannot withhold his own defective performance if such performance is acceptable to the other party.

[1] It is, of course, well settled that a contracting party may waive provisions placed in a contract solely for his benefit. 25 Cal.Jur. 929. Appellants stress the language in paragraph 2 above quoted that "purchasers are desirous of having the property rezoned into 'C–1' or its equivalent." Opposed to the conclusion that might be drawn from these words alone, however, is the language used in the ensuing paragraph to the effect that unless the property be rezoned within six months the agreement should terminate "ipso facto." The provisions of the agreement are clear and explicit, leaving no room for interpretation, that upon the expiration of six months, if rezoning had not been accomplished, it should terminate automatically, and not at the option of either party. And it is further clear, from paragraph 5 of the agreement, that the occurrence of the event, to-wit, rezoning within six months, was a condition precedent to the issuance by the title company of a "contract purchase agreement." It would seem reasonable to assume that if the rezoning provisions were for the purchasers' sole benefit the agreement would have provided for termination at their option.

In interpreting a contract, the whole is to be taken together, so as to give effect to every part, if reasonably practicable (Civ. Code, sec. 1641), and particular clauses are subordinate to the general intent (Civ. Code, sec. 1650). In considering the agreement here in question we find, in addition to the paragraphs hereinabove quoted, that paragraph 6 provides that if the condition of rezoning be met, the purchasers will agree with the owners of other properties fronting on Crenshaw Boulevard in the same block to limit the use of the lots to business buildings, to fix the depth of the buildings on the respective lots, and in paragraph 7, to lease the vacant portions of such lots to a non-profit corporation, which corporation would improve such vacant area with alleys and sidewalks and parking areas for the benefit of all the lot owners in the block, the various owners to contribute to the cost of such improvements and the expenses of the non-profit corporation. It thus appears that the sellers contemplated a uniform development of the block in which this lot was situated, and that such development could proceed only if the area was rezoned. This is further borne out by the recitals in paragraph 3 that in view of the "uncertainties" in connection with the zoning the agreement should terminate "ipso facto" if rezoning was not accomplished within six months.

[2] Appellants seek to draw a parallel between the situation here and those cases in which the vendee under a contract of sale can compel the vendor to convey such title as he has, even though that title be defective. But there is a clear distinction between those cases and the case at bar. There is no question here of defective title. The vendor stands upon the terms of the agreement by which it was not required to convey anything except in the event rezoning took place within the specified period.

[3] Appellants urge that the title company's letter of transmittal of August 17, 1945, was an offer of a new contract which was accepted by appellants. The letter of the title company contained this language: "If the Sales Agreement and Deposit Receipt (1) and Agreement of Sale (2) are satisfactory to you, you will please have the signature of yourself and wife affixed to each of the documents, in duplicate, and return them to us so that we may forward the Sales Agreement and Deposit Receipt (1) to the G. D. Robertson & Company and this Company execute the Agreement of Sale (2) and return a duly executed copy of the Agreement of Sale (2) to you after it has been signed by this Company. The G. D. Robertson & Company will hand you an executed copy of the Sales Agreement and Deposit Receipt (1) after they have signed it." Appellants' argument is that by tendering the "Agreement of Sale" and requesting its execution by the purchasers before the expiration of the six months' period the title company offered to enter into a binding contract of sale without regard to the zoning conditions, which contract was accepted by the purchasers when they signed and returned it. It is obvious, however, that such a result was not intended by any of the parties, for then there would be no reason for preparing and executing the "Sales Agreement and Deposit Receipt." The purchasers did not commence the monthly payments which would be due on such a theory.

[4] Taking into consideration the whole of the contract now before us, giving effect to every part thereof, so far as reasonably practicable, and remembering the object which the document as a whole was meant to secure, as disclosed by the record, we are satisfied that the "ipso facto" termination clause was not intended to be solely for the benefit of appellants. Such being the case, it could not be waived by them alone.

The conclusions at which we have arrived are decisive of all questions presented by this appeal, including those raised for the first time by appellants in their reply brief.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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85 Cal.App.2d 146

HINCHMAN, ROLPH & LANDIS v. GOLDING et al.

Civ. 13601.

District Court of Appeal, First District, Division 1, California.

April 22, 1948.

1. Negligence 🔑44

A contractor was liable for fire loss caused when heat from a boiler installed by it set fire to an unprotected wooden floor, where the evidence established that boiler was negligently installed in violation of ordinance because of lack of proper insulation between boiler and the floor.

2. Negligence 🔑136(9)

Contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists, and, where there are different inferences that may be drawn, one for and one against, the one against will be followed, and, before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion.

3. Negligence ⚷65

Care plaintiff must exercise must be judged in the light of all of the surrounding circumstances.

4. Negligence ⚷136(26)

Where occupant of premises relied upon judgment of contractor, engaged in business of installing boilers, to make a safe boiler installation but boiler was improperly installed causing a fire, occupant could not be held guilty of contributory negligence as a matter of law barring recovery from contractor for fire loss, since occupant was misled into a feeling of safety by contractor's negligent acts.

5. Appeal and error ⚷110

Order denying a new trial is not appealable.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Hinchman, Rolph & Landis, a copartnership, against Ira Golding, doing business under the firm name and style of Cleaning Equipment & Repair Company, and others, to recover for fire loss allegedly caused by defendants' negligence. From an adverse judgment and from an order denying defendants' motion for new trial, defendants appeal.

Judgment affirmed, and appeal from order dismissed.

Morris M. Grupp, of San Francisco, for appellants.

A. Brooks Berlin and Alvin A. Lobree, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment ordering that plaintiff Hinchman, Rolph & Landis, a corpartnership, recover from defendant Ira Golding, individually and doing business under the firm name and style of Cleaning Equipment and Repair Company, the sum of $2,554.30, with interest and costs.

The complaint herein sets forth that one Sholaam Barash, doing business under the name of Ideal Hat and Novelty Company, 767 Market St., San Francisco, suffered a fire loss on December 5, 1945, "by reason and as the proximate result of the negligent and careless installation" of a boiler unit installed on or about August 14, 1945, by defendant "in that the wooden floor of said premises in and upon which said boiler was set and underneath and at the base of said boiler was not covered or protected by any sheet metal, tiling, concrete, brick or any other adequate insulating material, thereby resulting in a lack of protection from and against the heat coming from and generated by the use of said boiler. * * * the heat from said boiler set fire to said unprotected wooden floor under and at the base of said boiler." The complaint further set forth that the value of the stock so destroyed was $3,525.14, and that as at the time of the fire Barash had in full force and effect three policies of insurance issued by National Liberty Insurance Company of New York, which said corporation paid Barash $2,554.30 in full settlement and Barash subrogated his action for the fire loss to said corporation. Plaintiff as general agent for the insurance company brought suit.

As a second cause of action a violation of the San Francisco Municipal Code, sec. 1536 of Part II of Chapter 1 (referred to as the Building Code), was set forth. It reads as alleged in the complaint: "Boilers exceeding 10 H. P., used for generating steam for heating or motive power, and large furnaces, shall not be placed on any floor above the cellar of any building, unless the same are set on metal beams and arches and such beams shall be built into the walls. Every steam boiler shall be provided with a tank or other receptacle of sufficient capacity to hold at least a sufficient supply of water to last six (6) hours.

"Whenever steam boilers, water heaters, large cooking ranges, furnaces, candy kettles, laundry stoves set in brick, or other structures in which fire is maintained, are set on any wooden floor, such floor shall be protected by a continuous sheet metal bearing plate not less than three-sixteenths

(3/16) of an inch thick, all joints of which shall be securely riveted, and the top of such plate shall be covered with not less than seven (7) inches of brick or concrete." It was further alleged "that at the time of the installation of said boiler, and at all times thereafter, defendants above named failed and neglected to comply with the provisions of said City Ordinance in that said floor upon which said boiler was placed, and particularly underneath and at the base thereof was not protected by any sheet metal, concrete, brick, tiling or any similar or substitute materials."

A demurrer was not filed but the answer alleged "That plaintiff has no legal capacity to sue. * * * That the said Sholaam Barash has no legal capacity to sue." That Sholaam Barash has no legal capacity to sue was not an issue in the case. Barash was not named as a party to the action. Plaintiff, Hinchman, Rolph & Landis, had capacity to sue as alleged in the complaint. This issue appears to have been settled by the parties during the trial. The following appears in the transcript: "[Attorney for defendant]: Well, we are willing to stipulate that the plaintiff is a partnership, and that the insurance in question was issued. We are willing to stipulate that some insurance was paid. Of course, the question of proof as to how much is a question of fact. *We are willing to stipulate that the subrogation claim has been assigned to the plaintiffs.*" (Emphasis added) In the opening brief the following appears: "Since the chief issue raised by this appeal is the contributory negligence of respondents' subrogor, appellant will confine his statement of the facts to the testimony of respondents' witnesses."

The issues raised by defendant is that "the subrogor Sholaam Barash was himself careless and negligent" and that he advised defendant he had obtained the necessary authorization (sec. 1536, San Francisco Municipal Code), and that Barash "further was himself careless and negligent in and about the matters and things complained of in that he left the premises wherein said boiler was located without turning off the fuel supply from said boiler and permitting said boiler to remain lighted for a period of approximately nine and one-half hours without any one in the premises in attendance, thus causing a fire to occur at 2:30 A. M. and that such carelessness and negligence on the part of the said subrogor contributed to and were direct and proximate causes of the alleged damage, if any such there were." Barash testified to the contrary. Whether Barash assumed the duty of obtaining a permit or whether defendant failed to obtain one is not the real question in this case. Defendant installed a boiler "exceeding 10 H. P." contrary to the terms of the ordinance.

[1] Irrespective of the protective measures set forth in the ordinance, defendant admits, at least for the sake of argument, that the base was improperly insulated, defective and not properly prepared. There is evidence to prove that this admission was in fact true. A person in the business of installing boilers is negligent if, as the evidence shows in this case, "it was not properly insulated between the boiler and the floor. * * * The installation was not such as to keep the heat from the boiler from penetrating the floor." The trial court found "that said boiler unit was then and there improperly insulated and negligently installed on said premises by said Ira Golding, doing business as aforesaid, in that the wooden floor of said premises in and upon which said boiler unit was set, and the wooden flooring underneath and at the base of said boiler was not covered or protected by any sheet metal, tiling, concrete, brick, or any adequate insulating material, thereby resulting in a lack of protection from and against the heat coming from and generated by the use of said boiler unit."

Defendant relies primarily upon the claim that "Barash [as subrogor] was guilty of contributory negligence." It may be assumed, so far as this case is concerned, that the employee who was directed to turn off the heating instrument was the agent of Barash and that his observations made from time to time were in fact the observations of the employer. 1 Cal.Jur. 848, sec. 126. The subrogor, Barash, in response to the question: "And prior to this fire did you note as to whether or not there was any insulation, or any insulation materials under the boiler in question to insulate it from the floor?" answered: "As far as I know, we had the brick underneath the boiler.

"Q. You don't know the extent of the brick, do you? A. No, I don't.

"Q. Was there any asbestos mat, or any other properties that you know of, under the boiler? A. As far as I can remember, there was not.

"Q. There was no sheet metal there underneath it, or anything? A. No, I know there was no sheet metal.

"Q. Now the floor of the plant itself was of what material? A. Wood."

It is reasonable to draw an inference that the milliner Barash relied upon the judgment of the boiler contractor to make a safe installation.

Defendant cites three cases in which the appellate court ruled that contributory negligence as a matter of law was the proximate cause of accidents involved due to the injured party's heedless disregard of precautions for his own safety. Kauffman v. Machin Shirt Co., 167 Cal. 506, 140 P. 15; Globe Indemnity Co. v. Hook, 46 Cal.App. 700, 189 P. 797; Hontz v. San Pedro, etc., R. Co., 173 Cal. 750, 161 P. 971. These cases appear to involve well known dangers in face of which one must use ordinary care to avoid the peril, and that only where no inference other than contributory negligence can be drawn from the facts is the question of contributory negligence one of law.

[2] Fairly recent opinions are indicative of the new and prevailing attitude in the matter of a plaintiff's contributory negligence as a matter of law. In Anthony v. Hobbie, 25 Cal.2d 814, at page 818, 155 P.2d 826, 829, judgment on a directed verdict for defendant was reversed, the court stating: "* * * cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; * * * that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. [Citing 18 cases.]" This language is quoted in Kirk v. Los Angeles Ry. Corp., 26 Cal.2d 833, at page 838, 161 P.2d 673, 675, 164 A.L.R. 1, where a judgment nonsuiting plaintiff was reversed, the court stating: "Plaintiff was justified in leaving the east curb of Broadway inasmuch as the traffic signal was in her favor. Whether or not she should have observed that the streetcar had started forward at that time, and if it had, she was aware of the danger, was for the jury to decide."

[3, 4] From the foregoing it appears that Barash was not guilty of contributory negligence as a matter of law. The care a plaintiff must exercise must be judged in the light of all of the surrounding circumstances. If Barash was misled into a feeling of safety by defendant's own negligent acts, he cannot be held guilty of contributory negligence as a matter of law.

[5] The appeal is from the whole of the judgment and from the order denying defendant's motion for a new trial. The order denying a new trial is not appealable and therefore is dismissed. The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

85 Cal.App.2d 198

OUCHIDA et al. v. POTTER et al.

Civ. 13541.

District Court of Appeal, First District, Division 2, California.

April 27, 1948.

1. Automobiles ⟹173(5)

Requirement of Vehicle Code was met if flares were placed so that, in fact, they gave warning of presence of parked service vehicle on highway, even though primary purpose of placing flares was to give warning of a different traffic hazard. Vehicle Code, §§ 582 et seq., 592.1.

2. Automobiles ⟹245(17)

Whether flares were so placed as to give warning of presence of parked service vehicle on highway was question for jury in action against owner and operator of service vehicle and operator of tractor-trailer for injuries and death resulting from collision with tractor-trailer after it had passed parked vehicle. Vehicle Code, § 592.1.

3. Automobiles ⟹246(55)

Evidence that flares were so placed as to give warning of presence of parked vehicle warranted instruction as to inapplicability to service vehicles of Vehicle Code restrictions on parking though primary purpose of placing flares was to give warning of a different traffic hazard. Vehicle Code, §§ 582 et seq., 592.1.

◆

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Y. Ouchida, a minor, by and through Isaac Shingai, guardian ad litem, and others against Earl Potter and others to recover damages for personal injuries and death sustained in automobile collision. From judgment against named defendant, he appeals.

Judgment affirmed.

Garth V. Lacey, of Salinas, for appellant Potter.

Rosendale, Thomas & Muller, of Salinas, for plaintiff and respondent Y. Ouchida.

A. E. Worth, of Salinas, and Hoge, Pelton, & Gunther, of San Francisco, for defendant A. Teichert & Sons, Inc., and Seaton.

Hauerken, Ames & St. Clair, of San Francisco, for plaintiff in intervention J. A. Folger & Co.

OGDEN, Justice pro tem.

This appeal is based solely upon asserted prejudicial error in the giving of two instructions to the jury at the request of appellant's codefendants. The record on appeal, having been prepared pursuant to the provisions of Rule 4(b) of the Rules on Appeal, consists of the Clerk's Transcript, the Reporter's Transcript of the testimony of one witness, two photographs of the scene of the accident and the two instructions complained of. We have not been favored with any briefs except the opening brief of appellant.

The action was brought to recover damages for the death of one and personal injuries to another of the occupants of an automobile involved in a collision with a large tractor and semi-trailer operated by the appellant. The accident occurred in the evening "as it was getting to be dusk" on state highway 101, approximately eight miles north of the city of Salinas. Plaintiffs' automobile was travelling in a northerly and appellant's tractor and semi-trailer in a southerly direction. The two vehicles came into collision at a point close to where a "pick-up" truck was parked, facing south and partially on the paved portion of the westerly side of the highway. Both the appellant and the operator of the parked truck and his employer were joined as defendants, the complaint alleging that the accident was caused by the joint and concurrent negligence of the operators of both vehicles. A complaint in intervention was filed against all the parties to the original action to recover the property damage to the freight contents of the semi-trailer. The verdict of the jury was against appellant and in favor of his codefendants, the operator of the parked truck and his employer.

The testimony of the operator of the parked truck, one Seaton, which is the only testimony before us, shows the following. In the course of his duties as foreman and safety man employed by the construction firm engaged in doing highway construction work he was placing lighted flares at points along the highway made dangerous to traffic by reason of the new construction. At the point where the accident occurred, there extended alongside and parallel to the westerly portion of the highway for approximately 225 feet, a mound of earth, or berm, varying in height from one to two feet. On the far side of this berm was the excavation for a new road bed, five feet deep and 30 feet wide. For the purpose of placing flares to warn traffic of this hazard, Seaton, who was proceeding in a southerly direction, parked his truck as close as possible to the berm. The proximity of the berm to the highway did not permit his truck to clear the paved portion and the left side of his truck extended two feet inside the edge of the pavement. The highway, at this point, consisted of two paved lanes of ten feet each in width and six feet of asphalt shoulder on each side. His truck was painted yellow and the headlights and tail light were lighted. He placed two lighted flares, one about 30 feet and the other between 10 and 12 feet to the north and rear of his truck. After returning to his truck he observed, through the rear-view mirror, the tractor and semi-trailer approaching and waited for it to pass. The collision of the latter with plaintiffs' automobile occurred after the tractor and semi-trailer had passed the parked truck and at a point 65 to 75 feet to the south of it.

The first instruction to the jury which appellant calls to our attention is one to the effect that if the truck operated by Seaton was a vehicle used in the service of his employer in connection with and pursuant to the construction, or repair, or alteration, or improvement, or maintenance of a state highway, or any portion thereof, then said vehicle is what is known as a service vehicle owned and operated by a utility. We note that this instruction is endorsed by the trial judge as "Refused—Given in Substance Elsewhere". However, since it is not vital to this appeal, we may assume that an instruction similar to the one before us was actually given. Although appellant, in a caption of his brief, cites this instruction as error, he offers no criticism of it in his argument and his contention of error is in no way pointed to it. We assume that it is made a part of his record on appeal solely because it is preliminary to the instruction which he does criticize.

The latter instruction reads as follows: "I have heretofore or will hereinafter instruct you as to the provisions of the motor vehicle act as contained in chapter 13 of the said California Vehicle Code regulating the conduct of motorists in stopping, standing or parking their vehicles on the highways outside of a business or residence district. In this connection, you are hereby instructed that the restrictions as to parking contained in said chapter 13 shall not apply to the driver or owner of any service vehicle owned or operated by a utility or public utility, whether privately, municipally, or publicly owned, used in the construction, removal or repair of utility or public utility property or facilities, when such vehicle is stopped, standing, or parked at the site of work involving the construction, removal or repair of such utility or public utility property or facilities upon, in, or under a street or highway, provided that when such service vehicle is so stopped, standing or parked, there shall be placed not less than two warning flags or barriers during daylight and not less than two warning lights or flares during the time from a half hour after sunset to a half hour before sunrise and at any time when there is not sufficient light to render clearly discernible any person or vehicle on the highway at a distance of 200 feet, said flares or warning lights to be not less than 10 feet and more than 50 feet in advance of and to the rear of such public or private utility vehicle."

The foregoing instruction is criticized, not as an incorrect statement of the law, but solely as being inapplicable. Appellant's contention is stated in his brief as follows: "Appellant contends that the jury was misled and confused and as such rendered a verdict not sustained by the facts. The confusion was caused by the

Court in giving Section 592.1 Motor Vehicle Code as being applicable to the facts. Notwithstanding the fact that two flares were set out within the required distances of the truck pursuant to said section, it is apparent that the flares (1) were set out to show a berm or mound of dirt along the west side of the highway, as over 20 flares had been set out over two miles north of the scene in the same manner; (2) the flares were not on the highway indicating a public utility truck was illegally parked on the highway. It is contended that the jury reached its verdict of finding the appellant negligent, because of the erroneous instruction of said section of the Motor Vehicle Code, for by the position of the flares, the jury believed the pickup truck of the defendant, A. Teichert & Son was legally parked on the highway."

[1] The principal fallacy of appellant's contention, as we interpret it, is in the importance he attaches to the purpose or motive in placing the warning lights or flares. If the flares were placed so that, in fact, they gave warning of the presence of the parked service vehicle, the requirement of the Vehicle Code was met, even though the primary purpose of so placing them was to give warning of another and different hazard to traffic. Except as to the distance from the parked vehicle, Section 592.1 of the Vehicle Code prescribes no position on the highway for the flares to be placed. The obvious intendment is that they be placed in such a position as will give warning of the parked vehicle to oncoming traffic.

[2, 3] It does not appear from the record before us that the flares placed by the defendant Seaton did not give the required warning. His testimony is silent as to where with reference to the highway they were placed, whether on top of the adjacent berm or on the shoulder of the highway and directly behind his vehicle. It was for the jury to determine whether the flares were so placed as to give warning of the presence of the parked service vehicle. From a consideration of his entire testimony and from the description of the scene of the accident as furnished by the photographs, the jury was entitled to believe that the flares did in fact give the required warning. The instruction given was therefore applicable.

Since we find no error in the giving of the instruction complained of, it is not necessary to here consider whether it could have prejudiced the appellant, even though it had been erroneous.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

STANLEY v. COLUMBIA BROADCASTING SYSTEM, Inc.*

Civ. 16090.

District Court of Appeal, Second District, Division 2, California.
April 19, 1948.

Rehearing Denied May 5, 1948.

Hearing Granted June 10, 1948.

1. Trial 🔑343

Jury's verdict for plaintiff was an implied finding that allegations of plaintiff's complaint were true.

2. Literary property 🔑9

In action by writer against radio broadcasting company to recover on an alleged implied agreement of company to pay writer for radio program allegedly originated by writer, evidence sustained jury's implied finding that company became obligated by implied agreement to pay writer the reasonable value of his program idea.

3. Literary property 🔑9

In action by writer against radio broadcasting company to recover on an alleged implied agreement of company to pay writer for radio program allegedly originated by writer, evidence established that there was no substantial difference between writer's proposed program which was entitled "Hollywood Preview," and which had for its purpose the securing of public opinion concerning the feasibility of making various stories into moving pictures, and company's actual program which was also entitled "Hollywood Preview," and which had the same purpose.

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* Subsequent opinion 208 P.2d 9.

4. Literary property 🔑2

Courts will not protect property in an idea not reduced to concrete form, but there may be property that will be protected, in a particular combination of ideas.

5. Literary property 🔑2

Where writers submitted to radio broadcasting company a fully developed and completely written and recorded program which was entitled "Hollywood Preview," and which consisted of the production of a play for purpose of obtaining public's opinion as to advisability of making the story into a moving picture, program was a "concrete idea" rather than an "abstract idea" and subject to protection as a property right.

See Words and Phrases, Permanent Edition, for all other definitions of "Abstract Idea" and "Concrete Idea".

6. Literary property 🔑2

Where an idea takes concrete form, in differentiation from a mere abstract idea, it is a property right subject to sale, may become the subject of an implied agreement, and is within protection of the courts against piracy.

7. Literary property 🔑9

In action by writer against radio broadcasting company to recover on an alleged implied agreement of company to pay writer for radio program allegedly originated by writer, question of originality of writer's program was not one of law for court but was one of fact for jury where program which was orignated in 1941, was entitled "Hollywood Preview" and was based on idea of producing various plays in order to determine public's opinion as to advisability of making the stories into moving pictures.

8. Literary property 🔑2

To entitle a writer to protection it is not necessary that his work or materials therein be entirely new and that they have never been previously used, but true question is whether same plan, arrangement and combination of materials have been used before for same purpose or for any other purpose.

9. Literary property 🔑2

Even though an author may have borrowed materials from others, if he has combined them in a different manner, his composition will be protected.

10. Copyrights 🔑12

Material used in a composition may be old and in the public domain, but a copyright thereof will protect the particular plan, arrangement, and combination of the author.

11. Copyrights 🔑57

Ideas, though in copyrighted book or play, may be copied and used, but the form, sequence or manner in which the idea is developed, treated or expressed cannot be appropriated.

12. Literary property 🔑7

Fact that radio program originated by writer was not copied verbatim by radio broadcasting company, or that company did not use exact expressions or arrangements of words found in writer's material, did not relieve company from liability to writer on an alleged implied agreement to pay writer for the program.

13. Literary property 🔑1

The disguising of source from which literary material was derived, does not defeat the protection provided for originator of the work.

14. Literary property 🔑9

In action by writer against radio broadcasting company to recover on an alleged implied agreement of company to pay writer for radio program allegedly originated by writer, whether company appropriated author's idea, plan and arrangement of program was for jury.

15. Trial 🔑139(1), 142

It is within jury's province to draw reasonable inferences from the evidence, to judge the weight of the evidence, and to reject evidence if jury is not convinced of its truth.

16. Literary property 🔑9

In action by writer against radio broadcasting company to recover on an alleged implied agreement of company to pay writer for radio program allegedly originated by writer, if similarities of writer's program and program given by company were shown to extent that they justified inference that writer's material was copied or imitated, proof that substantial part of writer's program was appropriated, was sufficient to render company liable.

17. Literary property ⚷9

In action by writer against radio broadcasting company to recover on an alleged implied agreement of company to pay writer for radio program allegedly originated by writer, evidence authorized finding that company's employees who incorporated contest idea in company's program in same manner that writer did in his program, had access to writer's work.

18. Literary property ⚷8

The common law prohibits any kind of unauthorized interference with or use of an unpublished work on ground of an exclusive property right.

19. Literary property ⚷5

"General publication" of a literary work is effected by communicating or dedicating it to the public.

See Words and Phrases, Permanent Edition, for all other definitions of "General Publication".

20. Literary property ⚷5

A "limited publication" of a literary work is one that communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public.

See Words and Phrases, Permanent Edition, for all other definitions of "Limited Publication".

21. Literary property ⚷5

Where a literary work is exhibited for a particular purpose, or to a limited number of persons, it does not thereby become "publici juris," and author retains ownership until he relinquishes it either by contract or by an unequivocal act indicating an intent to dedicate it to the public.

See Words and Phrases, Permanent Edition, for all other definitions of "Publici Juris".

22. Literary property ⚷5

The making of a recording of writer's proposed radio program in the presence of an invited, limited audience was not a "general publication" of the program to extent of abandoning it to the public with right to reproduce it, but was merely a "limited publication."

23. Literary property ⚷5

The rendering of a performance before a radio microphone is not an abandonment of ownership of the literary property or a dedication of it to the public at large.

24. Literary property ⚷5

A public performance of a dramatic or musical composition is not an abandonment of the production to the public.

25. Literary property ⚷5

The test in determining whether there has been an abandonment of ownership of literary property or a dedication of it to the public at large, is whether exhibition to public is under such conditions as to show dedication without reservation of rights or only right to view or inspect it without more.

26. Literary property ⚷5

Exhibition of a moving picture without charge to a number of audiences in public places does not constitute a "publication" dedicating the picture or any material contained in it to the general public.

See Words and Phrases, Permanent Edition, for all other definitions of "Publication".

27. Literary property ⚷2

A scenario and synopsis for a photoplay is a production of intellectual labor and is protected against piracy.

28. Literary property ⚷5

Delivery of copies of a poem to members of a literary committee to enable them to decide whether it was suitable for their acceptance and presentation at a public meeting is not a "publication" of the poem so that there has been an abandonment of ownership.

29. New trial ⚷108(3)

In action by writer against radio broadcasting company to recover on an alleged implied agreement of company to pay writer for radio program allegedly originated by writer, denial of company's motion for new trial on ground of alleged newly discovered evidence that idea contained in writer's radio program had been originated by a third person, was not an abuse of discretion.

30. Literary property ⚷9

In action by writer against radio broadcasting company to recover on an alleged implied agreement of company to pay writer for radio program allegedly originated by writer, it was no defense to company that source of company's program similar to writer's program was allegedly in the public domain, where such source was unknown to company and was not used by it.

31. Appeal and error ⚷977(3)
New trial ⚷6

A motion for new trial is to a large extent addressed to the trial judge's discretion, and the granting of the motion is so completely within his discretion that an appellate court will not disturb the ruling unless it is manifest that a gross or unmistakable abuse of discretion appears.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Jack Stanley against the Columbia Broadcasting System, Incorporated, a corporation, to recover on an alleged implied agreement of defendant to pay plaintiff for a radio program allegedly originated by plaintiff. From a judgment for the plaintiff for $35,000, and from order denying defendant's motion for judgment notwithstanding the verdict, the defendant appeals.

Judgment and order affirmed.

O'Melveny & Myers, Homer I. Mitchell, W. B. Carman, Jr., and Deane F. Johnson, all of Los Angeles, for appellant.

Harold A. Fendler, of Beverly Hills, and John W. Preston, of Los Angeles, for respondent.

WILSON, Justice.

This action was brought to recover on an alleged implied agreement of defendant to pay plaintiff for a radio program which plaintiff claims to have originated. The case was tried to a jury. A verdict for $35,000 in favor of plaintiff was rendered upon which judgment was entered. Defendant made a motion for a judgment in its favor notwithstanding the verdict and a motion for a new trial. Both motions were denied. The appeal is from the judgment and from the order denying defendant's motion for a judgment notwithstanding the verdict.

1. The Pleadings. Plaintiff's allegations in his complaint are as follows: During the year 1941 he originated and caused to be prepared, composed and written an original script for a radio program entitled "Walter Wanger Presents," and a program format entitled "Preview Parade" or "Hollywood Preview." About September 1, 1941, plaintiff caused the script of his radio program to be recorded upon records for the purpose of submission to prospective sponsors, advertising agencies and broadcasting companies. Plaintiff has at all times retained full ownership of the program and has never licensed nor authorized its use. During the years 1942, 1943 and 1944 plaintiff submitted to defendant his original radio program and the script, format and recording thereof at defendant's special instance and request for the sole purpose of having defendant determine whether or not it desired to purchase or license the right to use it. Pursuant to an implied agreement that if defendant used the program it would pay plaintiff the reasonable value thereof, and in the event defendant did not secure from plaintiff a license to use the program it would remain inviolate in each and every part, about May 1, 1945, and each week thereafter for one year, defendant produced and presented a radio program substantially copying, embodying and using plaintiff's program and radio format without the knowledge, authority or consent of plaintiff. The radio program produced by defendant was entitled "Hollywood Preview" and was broadcast regionally over the Pacific Network of Columbia Broadcasting System, originating at Station

KNX in Los Angeles. The reasonable value of the unauthorized use of plaintiff's program was alleged to be the sum of $100,000.

Defendant denied all allegations of plaintiff's complaint except that it admitted that a radio program entitled "Hollywood Preview" had been produced since about May 1, 1945, originating at Station KNX.

[1, 2] 2. Sufficiency of the evidence. The verdict of the jury is an implied finding that plaintiff's allegations are true. Defendant contends that the evidence is insufficient to sustain the implied finding that defendant became obligated by an implied agreement to pay plaintiff the reasonable value of the latter's radio program idea.

The principal features of the program originated by plaintiff and communicated by him to defendant are as follows:

1. The announcer introduced a prominent motion picture personality as master of ceremonies thus: "Walter Wanger presents Hollywood Preview. Hollywood Preview! Hollywood Preview!—And here is Hollywood's distinguished producer Walter Wanger."

2. The master of ceremonies, Mr. Wanger, (a) welcomed the listeners to "our Hollywood Preview Parade"; (b) stated that the purpose of the program was to give the radio audience a voice in what pictures Hollywood should produce in the months to come; (c) stated that producers do not always know what the public wants, and "this is the reason for this 'Preview Parade'"; (d) asked the listeners to send in their opinions as to whether the drama presented on the radio each week would make a good film, and to suggest players for the leading roles; (e) announced that the sponsor would give cash prizes for the best letters; (f) introduced the announcer.

3. The announcer (a) referred to the master of ceremonies as one of Hollywood's most progressive film leaders and the producer of outstanding films (naming them); (b) stated that the master of ceremonies each week would select a story which he felt should be made into a picture; (c) asked listeners to send their opinions; (d) stated that a prize would be given each week for the best letter and if a sufficient number voted for the play it would be produced as a motion picture; (e) again presented the master of ceremonies.

4. The master of ceremonies (a) announced the title of the play to be presented on that evening's program and the names of the authors of the play; (b) asked "Do you think it should be made into a motion picture?" (c) named quests present in the studio who would later give their opinions of the play; (d) named the composer of the music.

5. The drama was presented.

6. The master of ceremonies (a) asked the listeners if they liked the drama and if they would like to see it made into a picture; (b) stated that the real idea of the program was that each week a story would be presented which "we think would be a good motion picture;" (c) asked the listeners to write to Mr. Wanger telling him whether they would like the play made into a picture and why; also to name their choice of stars to play the leading roles; (d) stated that the writer of the best letter would receive a prize; (e) stated that "Hollywood is waiting for your answer"; (f) stated that the listeners' letters had helped in a decision to make the drama of the previous week into a picture.

7. The board of experts (guests above mentioned) were interviewed and gave their opinions of the play that had just been produced.

8. The master of ceremonies thanked the experts and asked the listeners if they agreed with the opinions of the quests.

9. The announcer gave the name of the composer of the music for the program and the names of the actors who took part in the play.

Defendant's program as broadcast weekly from its studio in Hollywood for a year is substantially in the following form:

1. The announcer (a) named the sponsor of the program "Hollywood Preview"; (b) introduced the master of ceremonies "as an eminent star of radio, stage and screen" who "brings you another Hollywood Preview of a motion picture of the

future;" (c) named the play about to be presented.

2. The master of ceremonies (a) announced another "Preview Night here in Hollywood"; (b) invited listeners to share in the excitement; (c) referred to the enthusiasm prevailing over the radio version of Hollywood Preview; (d) named the play to be presented and said it was "now being prepared for filming" by one of the leading studios in Hollywood; (e) introduced the star.

3. The drama was presented.

4. The announcer said "So ends tonight's Hollywood Preview story," and called the star of the radio play to be interviewed.

5. The master of ceremonies interviewed the star.

6. The announcer (a) asked the studio audience to fill out cards "giving their comments and indicating their favorites for the picture version" of the play; (b) gave a commercial announcement; (c) named the producer of "Hollywood Preview," the director of the radio play and the composer of the music; (d) announced the name of the play to be produced the following week by "Hollywood Preview" and the name of the star who would appear.

[3] A comparison of the foregoing outlines will reveal that there is no substantial difference between the formats of the two programs. In each the program was entitled "Hollywood Preview"; the title was repeated and emphasized throughout the production; the announcer introduced the master of ceremonies; the latter was prominent in motion pictures; he stated the title of the play and the name of the star; the drama was presented; it was a play not previously seen in motion pictures; its authors were named; listeners were asked to express their opinions of the play.

The principal differences are these: (1) In plaintiff's format all hearers of the program, both the studio audience and those listening on the radio, were asked to present their opinions, while in defendant's program the expression of opinion was limited to the persons in the studio. (2) In plaintiff's program prizes were offered for the best letters commenting on the play, but defendant offered prizes for only a short period. (This feature will be referred to later.) (3) Plaintiff proposed to use dramatic material that was suitable for producing a picture, while on the program presented by defendant it was stated that the play was "now being prepared for filming." (4) In plaintiff's program a board of experts or critics gave their opinion of the play. This feature did not appear in defendant's program.

Not only were the idea, plan and material of plaintiff's program copied but the elements of the program appear in the same order of sequence in defendant's presentation.

The dissimilarities between the program prepared by plaintiff and that presented on the radio by defendant are trivial and superficial and are so unimportant as to be persuasive that defendant based its program on plaintiff's fully developed idea and format and on his completely prepared program which he had reduced to writing in minute detail, and that the slight digressions were carefully planned and designed with the intent, purpose and hope of avoiding the charge of appropriating plaintiff's property. By its verdict the jury adopted this theory and we find nothing in the record or in the argument upon which to base a disagreement with its implied finding to that effect.

The omission from defendant's program of the opinions of the board of experts or critics is of no consequence as a distinguishing characteristic. Whether the expression of opinion invited from the public was limited to the studio audience or extended to the radio listeners is not a real variation. It is a difference only in degree. The similarity was in obtaining the opinions of listeners and whether they were present in the studio was immaterial. In neither program was the radio drama based on a motion picture that had already been produced—in one case it might be and in the other it was about to be filmed. The offering of prizes was an item of plaintiff's program. The same feature was introduced into defendant's broadcast for six weeks and was abandoned after defendant received notice from plaintiff claiming infringement.

Plaintiff began the preparation of his program in 1937 or 1938 and worked on it for four years. He prepared a complete radio script for a half-hour production. He made an audition recording of it before an audience in the National Broadcasting Company's studio in which Walter Wanger was master of ceremonies and other actors appeared. The audition recording was produced for submission to advertising agencies, radio network officials and their clients for sale. In January, 1942, plaintiff met Russ Johnson, Pacific Coast KNX program director, at the general office of defendant in Los Angeles where he submitted to and left with Johnson the script, format and recording of the program. Two weeks later Johnson informed plaintiff that he liked the program but that defendant could not use it at that particular time since defendant's prospective clients had no immediate need for the show. Plaintiff then spoke to Ben Paley, defendant's program operations manager, who heard the recording and read the script of the format. Paley arranged for plaintiff to meet Larry Berns and Hal Hudson. Berns had come from New York to build or select new programs for defendant. Hudson became defendant's western program director. The recording was played for Berns who also read the script. Later plaintiff left the recording with Hudson who, some time later, told plaintiff there was no immediate need for the program.

Defendant's employees denied some of plaintiff's testimony and there are conflicts in the evidence as to the sequence of events—the submission of plaintiff's program to Berns and Hudson, the transmission of the proposed "Hollywood Preview" program by Hudson to defendant's New York office, and other matters. There were contradictions of parts of the testimony of some of defendant's employees by other employees. Since the jury has, by its implied findings, determined such conflicts and contradictions as appear in the record a statement of the evidence of the various witnesses would serve no purpose except to lengthen this opinion.

[4] 3. Plaintiff's program—an abstract or a concrete idea. Defendant maintains (1) that this action is predicated "solely upon an alleged improper use of an abstract idea"; (2) that an abstract idea is not property; (3) that there can be no implied contract to pay for an abstract idea; (4) that if defendant used plaintiff's idea he is not entitled to recover compensation therefor. If we were able to agree with the first contention we would be compelled to apply the other three and to reverse the judgment, for there is no property right in a mere abstract idea. Courts will not protect property in an idea that has not been reduced to concrete form. Bowen v. Yankee Network, Inc., D.C., 46 F.Supp. 62, 63; Stone v. Liggett & Meyers Tobacco Co., 260 App.Div. 450, 23 N.Y.S.2d 210, 212; Williamson v. New York Cent. R. Co., 258 App.Div. 226, 16 N.Y.S.2d 217. Such a right exists only in the arrangement and combination of the ideas—in the form, sequence and manner in which the composition expresses the idea. Bowen v. Yankee Network, Inc., supra.

[5] Although there is no property right in an idea there may be property in a particular combination of ideas. (Johnston v. Twentieth Century-Fox Film Corporation, 82 Cal.App.2d 796, 187 P.2d 474; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 561, 90 P.2d 371. It is not merely an idea on which this action is based but a combination of ideas that have been reduced to concrete form.

Contrary to defendant's contention this action is not based on the appropriation or improper use of an abstract idea. Plaintiff submitted to defendant a fully developed, completely written, concrete program,[1] the salient features of which were

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[1] Plaintiff's complete program is as follows:

Announcer: "Ladies and gentlemen, Walter Wanger Presents Hollywood preview! Hollywood Preview! Hollywood Preview!

"And here is Hollywood's distinguished producer, Walter Wanger."

Wanger: "How do you do, ladies and gentlemen. Welcome to our Hollywood Preview Parade, a radio show designed for your pleasure and to give you a voice used in defendant's broadcasts weekly for an entire year, save only the drama which of course was to be a different one each week. His composition was his property.

[6] When an idea takes concrete form or, as phrased in some of the decisions, when the material is the expression of an idea or a concrete combination of ideas and elements, in differentiation from a mere abstract idea, it is a property right subject to sale. It may become the subject of an implied agreement and is within the protection of the courts against piracy. This rule is illustrated by the following examples: Material suitable for radio broadcasts and motion pictures (Yadkoe v. Fields, 66 Cal.App.2d 150, 152, 151 P.2d 906; a scenario and synopsis for a photoplay (Thompson v. Famous Players–Lasky Corporation, 3 F.2d 707); a phrase, scheme, picture or slogan originated for advertising purposes (Ryan v. Century Brewing Co., 185 Wash. 600, 55 P.2d 1053, 104 A.L.R. 1353; Liggett & Meyer Tobacco Co. v. Meyer, 101 Ind.App. 420, 194 N.E. 206, 210; Healey v. R.H. Macy & Co., 277 N.Y. 681, 14 N.E.2d 388, affirming 251 App.Div. 440, 297 N.Y.S. 165); a detailed plan for the manufacture, design, packaging and labeling of candy tablets (American Mint Corporation v. Ex-Lax, Inc., 263 App.Div. 89, 31 N.Y.S.2d 708); a plan as to form and substance of newspaper interviews (Jenkins v. News Syndicate Co., Inc., 128 Misc. 284, 219 N.Y.S. 196); an idea evolved into a basic radio program. Cole v. Phillips H. Lord, Inc., 262 App.Div. 116, 28 N.Y.S.2d 404.

"Abstract" is defined as "considered apart from any application to a particular ob-

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in what pictures Hollywood shall produce in the months to come. Hollywood is very interested in giving you motion pictures you want to see. Unfortunately producers do not and cannot always know just what you do want. This is the reason for this 'Preview Parade.' Each week we plan to present a radio story we think will make a good film. We ask you to send us your opinion and suggest players for the leading roles. Our sponsor will give worthwhile cash prizes for the best letters, but more about that later.

"Of the five stories we have so far presented this series, three will be made into motion pictures largely because of your voting.

"Now allow me to introduce Mr. True Boardman."

Boardman: "This is the sixth program of the new series, 'Walter Wanger Presents.' Your host is one of Hollywood's most progressive film leaders, the President of the Academy of Motion Picture Arts and Sciences, and producer of such outstanding films as Foreign Correspondent, Blockade, Long Voyage Home, Stagecoach, Algiers, and currently Sundown.

"Each week Mr. Wanger selects a story which he feels should be made into a picture. You are asked to write to Mr. Wanger and give him your opinion. The sponsors pay $500 for the best letter written by one of our listeners and if enough of you vote for it our play will be produced as a motion picture.

"And now, once again, Walter Wanger."

Wanger: "Thank you, Mr. Boardman. Tonight our play is entitled 'So Gallantly Gleaming.' It has been written by Harvey Thew, Peter Ordway, and Sonya Levien. The radio adaptation is by Hector Chevigny.

"'So Gallantly Gleaming' tells a thrilling and romantic story of a great explorer, his beautiful wife, and the acquisition of California. Listen closely. Do you think it should be made into a motion picture? Your votes will decide.

"Our guests who will later give their opinion are Miss Joan Bennett, Hector Chevigny and Henry Hathaway. Music is by Robert Armbruster."

(Drama)

Boardman: "Thank you ladies and gentlemen. Did you like 'So Gallantly Gleaming'? Would you like to see it as a motion picture? The story of John Charles Fremont, I think, is one that deserves retelling. In a moment we will hear the opinion of our three Hollywood guests, Joan Bennett, Hector Chevigny, and Henry Hathaway, and then have an opportunity to compare their opinions with yours.

"Now again a word as to the real idea behind this program. Each week Walter Wanger Presents brings you a story which we think would be a good motion picture. And here is your part in the program. We ask you to write to Mr. Wanger, telling him whether or not you would like to have this play made into a motion picture, and why. Also include your choice of stars to play the leading roles. The best letter received each week will receive an award of $500 from our sponsor. The award is based not on the style of your letter, not on brilliant writing, but entirely on the reasons you set ject." (Webster's New International Dict., 2d Ed., p. 10.) "Concrete" means "belonging to actual things or events; real; specific." (Id., p. 555.) Plaintiff's abstract idea as originally conceived, that is the idea without application to anything in particular, might have been stated thus: An announcer and a master of ceremonies; performance of a drama; listeners invited to say whether they would like to see the drama in a motion picture; prizes for best letters; drama criticised by a board of judges or critics. Such an idea, if disclosed to others, could have been used by them without hindrance from plaintiff and without liability to him for compensation. But plaintiff did not offer his idea to defendant in that abstract form. He developed it until it became real, specific and actual. Every part of the idea was embodied and narrated in a complete, sequential recital. As produced and recorded in the studio it made a half-hour program, which was the time plaintiff intended it to consume on the radio. The same period was occupied by defendant's simulation of plaintiff's material.

Plaintiff did not propose to defendant merely a plan or an outline of an idea such as those found in the Bowen, Stone and Williamson cases above cited. He composed and wrote the words of the entire show save only each week's drama and the spontaneous comments which the critics would make. He left nothing to be inserted, nothing to be altered. His program was as concrete, definite and specific as could be devised by the use of words.

In its opening brief defendant raised the defense now being discussed, that plaintiff had formulated only an "abstract idea." However, in its closing brief defendant concedes that "plaintiff's treatment, development, and expression of its [sic.] ideas *resulted, of course in the creation of a piece of literary property as evidenced by his script and audition recording* * * * By reason of such treatment, development and expression of ideas there was also formulated a 'plan' or 'system' for the presentation, intended to be used not only on the particular audition recording but on succeeding programs in a series." (Emphasis added.) This admission relieves us of a

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down as your opinion. And believe me, Hollywood is waiting for your vote. Whether or not you win a prize, your vote will help decide whether or not to film 'So Gallantly Gleaming.' The American picture-going public has long said it wished a voice in the choice of stories presented on the screen. Here is the chance for you to have that voice and make it heard across the nation. Write your letter now, tonight. Address Walter Wanger, Hollywood, California.

"Last week Mr. Wagner presented 'Out of the Night,' the sensational novel which has attracted such nationwide comment. A storm of argument was aroused. 68,000 letters have been received to date, and we are happy to announce that Warner Brothers Studio have arranged to make this startling story into a film in the near future. So, thanks to your letters, you have helped Warner Brothers to their decision to film 'Out of the Night.'

"Last week's best letter was from Mrs. William Wentworth of Brockton, Massachusetts. Congratulations, Mrs. Wentworth! Your check for $500 goes forward immediately.

"Now, Mr. Wanger, I think we are all anxious to hear the opinions of our guests about tonight's show."

(Interview With Board of Experts)

Wanger: "Thank you. Thank you very much. Thank you, Joan Bennett, Henry Hathaway, Hector Chevigny. Do you ladies and gentlemen, agree with the opinions of our guests? Do you agree that 'So Gallantly Gleaming' should become a motion picture? And who do you think should play the leading roles? Won't you write and tell us. Remember that whether your letter is best and wins the prize or not, you are helping Hollywood decide on what to give you on the screen. Next week we will have something totally different for you, a story called 'Two Arabian Knights.' Until then, this is Walter Wanger saying, Good night."

Announcer: "Walter Wanger Presents is brought to you at this same time each week by our sponsor. Original music for tonight's show was written and directed, as always, by Robert Armbruster. The cast included Hollywood's outstanding radio stars—Lurene Tuttle, Lou Crosby, Norman Field, Elliott Lewis, Lou Merrill, Frederick Shields, Paul Whitley, Norene Gamille, Gayne Whitman.

"This is John Hiestand hanging out the 'Goodnight' sign until we meet again next week at this same time. This is the National Broadcasting Company."

further examination of this phase of the appeal. In connection with this concession defendant asserts that it "claims no right to use that literary property." Notwithstanding this disclaimer it has appropriated and used for its own profit both plaintiff's literary production and his concrete program idea. This will be discussed in a subsequent portion of this opinion.

4. Newness and novelty of plaintiff's idea. Defendant contends that plaintiff is not entitled to recover for the reason that his performance was neither new, novel, nor unique and that no enforcible agreement to pay for an idea can be implied unless the idea is new and novel since there would then be no consideration for the contract. Defendant refers at length in its brief to the pitter-patter that is heard daily and hourly on the radio and to the similarity of the programs and the manner of their presentation in an apparent effort to induce the belief that nothing new in the form of a radio program can be devised. Some of the features of plaintiff's program may not have been new but there was a combination and sequence of elements which the jury impliedly found to be novel and to have been originated by plaintiff.

[7] The question of originality of plaintiff's program is not one of law to be determined by the court but is one of fact for the jury's decision. Yadkoe v. Fields, 66 Cal.App.2d 150, 159, 151 P.2d 906; Dezendorf v. Twentieth Century-Fox Film Corporation, 9 Cir., 99 F.2d 850, 851; New York Belting & P. Co. v. New Jersey etc. Co., 137 U.S. 445, 450, 11 S.Ct. 193, 34 L. Ed. 741, 743. In Cole v. Phillips H. Lord, Inc., 262 App.Div. 116, 28 N.Y.S.2d 404, 409, the court held that a property right exists with respect to "a combination of ideas evolved into a program" and whether plaintiff was entitled to recover on an implied contract was a question for the jury. The judgment of dismissal was reversed and the case remanded for a new trial. We have been furnished with a copy of the unreported opinion rendered by the trial judge on the second trial. It has no bearing on the instant case. The court did not discuss any question of law with which we are now concerned but found from the evidence that the plaintiff's idea or formula for his program was not new or novel and that he was not entitled to recover damages by reason of defendant's use of a similar program.

[8, 9] To entitle plaintiff to protection it is not necessary that his work or the materials therein be entirely new and have never been used before, or even if they have been used it is not necessary that they have never been used for the same purpose. "The true question is, whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose." Even though he may have borrowed materials from others, if he has combined them in a different manner his composition will be protected. Emerson v. Davies, Fed.Cas. 4,436, 8 Fed.Cas. 615, 618; Edwards & Deutsch Lithographing Co. v. Boorman, 7 Cir., 15 F.2d 35, 36.

[10] To be original does not contemplate that every feature must be new. If this were the test for originality and uniqueness it would be difficult to obtain a copyright for a book, song or play, since plots, materials, ideas and circumstances are constantly repeated but in a different form or combination. Materials used in a composition may be "old and in the public domain," but a copyright thereof will protect "the particular plan, arrangement, and combination" of the author. Edwards & Deutsch Lithographing Co. v. Boorman, supra. Originality is attained by "taking commonplace materials and acts and making them into a new combination and novel arrangement." Universal Pictures Co., Inc. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354, 363.

Defendant contends that the lack of newness and novelty of plaintiff's idea is shown by defendant's evidence that its Transcontinental Program Director, Mr. Vanda, before he heard of plaintiff and his program, considered using an idea similar to plaintiff's in a program to be entitled "Search for Stories." It does not appear that Vanda's idea was developed nor does it appear that such a program was ever produced on the radio by defendant or by any other broadcasting company. There was evidence that Hudson, also in defendant's program department, without knowledge of plaintiff's program, conceived an idea of dramatizing stories written for new pictures and presenting them on the radio with some form of listener participation in judging the value of the stories for motion picture purposes. Notwithstanding this evidence, the fact was for the determination of the jury who were the sole judges of the weight of the evidence and were not bound to accept any testimony as true if they did not believe it. Barsha v. Metro–Goldwyn–Mayer, 32 Cal.App.2d 556, 561, 90 P.2d 371; Yadkoe, Dezendorf and New York Belting Co. cases, supra.

Defendant refers to the facts that the presentation of a large number of plays of various kinds over the radio each day has made that feature commonplace; that the term "Hollywood Preview" has been used for many years in the showing of motion pictures; that listener praticipation is not new; that prize competitions of different character are a part of several radio shows. From these facts defendant deduces the argument that plaintiff's radio program is wanting in originality. In the instant case there is a combination of features and a method of their combination which, insofar as the record discloses, had not been presented in a radio program prior to its conception by plaintiff and its submission by him to defendant. "Hollywood Preview" had never before been used as the title of a radio program. The title, the request that listeners state their preference for stories to be dramatized and produced in motion pictures and that they suggest the names of stars for the principal parts, the offer of cash prizes for the best letters, were combined into one radio show.

There is evidence that radio programs were previously presented entitled "Hollywood Startime," "Hollywood Playtime," "Hollywood Players" and "This Is Hollywood," but plaintiff was the first person to designate a radio program as "Hollywood Preview," and was the first to combine that name with the features appearing in his program.

We must apply the rules found in the cases above cited, to wit, that the work or materials need not be entirely new but may be in the public domain or have been borrowed from others, that a new or different combination of old ideas will be protected against piracy, that originality does not demand that every feature be new, that commonplace materials may be made into a novel arrangement, and finally that the question of originality is one of fact for the jury to determine. The application of these rules, together with evidence of a substantial character sustaining the implied finding of the jury that the form of plaintiff's program and the "plan, arrangement and combination of materials" were new and novel in radio production, precludes a reviewing court from ignoring the verdict insofar as it determines this feature of the appeal.

5. Defendant's appropriation of plaintiff's idea, plan and arrangement. Defendant contends that there is no substantial evidence that it appropriated features of plaintiff's program. Much of what we have already said is applicable to this contention. The similarity of the two programs is shown by the outlines which we have set out.

[11] Ideas, though in a copyrighted book or play, may be copied and used but the form, sequence or manner in which the idea is developed, treated or expressed cannot be appropriated.

[12, 13] The fact that the radio program originated by plaintiff was not copied verbatim by defendant or that it did not use the exact expressions or arrangement of words found in plaintiff's material does not relieve it from liability. Changes made in the original plan of the program or "omissions from or additions to the original" do not excuse an unlawful appropriation. Barsha v. Metro–Goldwyn–Mayer, 32 Cal.App.2d 556, 562, 90 P.2d 371; Nutt v. National Institute, 2 Cir., 31 F.2d 236, 237; Sheldon v. Metro–Goldwyn Pictures Corporation, 2 Cir., 81 F.2d 49, 56; Boosey v. Empire Music Co., D.C., 224 F. 646, 647. "Copying is not confined to a literary repetition, but includes various modes in which the matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration." Disguising the source from which the material was derived does not defeat the protection provided for the orig-

inator of the work. King Features Syndicate v. Fleischer, 2 Cir., 299 F. 533, 535.

[14-16] The issue is whether defendant appropriated and used plaintiff's idea, plan and arrangement as a model and made colorable alterations and variations to disguise their use, and that issue was for the jury to decide. Barsha v. Metro–Goldwyn–Mayer, supra, 32 Cal.App.2d at page 560, 90 P.2d at page 373. It was within their province to draw reasonable inferences from the evidence, to judge the weight of the evidence, and to reject evidence if they were not convinced of its truth. 32 Cal. App.2d at page 561, 90 P.2d at page 374. If similarities of the two programs be shown to the extent that they justify an inference that plaintiff's material was copied or imitated, proof that a substantial part of plaintiff's program was appropriated is sufficient to render defendant liable. Barsha case, 32 Cal.App.2d at page 561, 90 P.2d at page 374; Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56, 60. Where the only similarity between the two songs was the copying of one phrase an injunction was issued restraining the sale of the song last published. Boosey v. Empire Music Co., supra.

[17] Defendant invokes the rule that in order that a plaintiff recover damages he must prove that the defendant had access to the plaintiff's work (citing Echevarria v. Warner Bros. Pictures, D.C., 12 F. Supp. 632, 638; Dezendorf v. Twentieth Century-Fox Film Corporation, D.C., 32 F.Supp. 359 [reversed 9 Cir., 99 F.2d 850]; and Columbia Pictures Corporation v. Krazna, Sup., 65 N.Y.S.2d 67, 69), and contends that its offering of prizes for six weeks could not have been copied from plaintiff's program because there is no evidence that the individuals who incorporated the contest idea in defendant's program had had access to plaintiff's composition; in fact, says defendant, the evidence is conclusive that those individuals had no knowledge of plaintiff's program. To say that defendant did not have access to the program is to deny or ignore the positive evidence to which we have referred that at least three persons in defendant's program department had read plaintiff's script and had heard the playing of the recording long before defendant began the broadcasting of its program. It is of no importance whether or not the persons who actually prepared defendant's production or those who created the contest idea in it had had access to plaintiff's material, since other responsible employees who had charge of program production admitted on the witness stand that they had read plaintiff's script, had heard his recording, and that they knew all the details of his plan. The jury had a right (1) to draw the inference that those of defendant's employees who knew the details of the program had suggested its duplication or had related the details of the plan to other employees who adopted and produced it; (2) to disbelieve the testimony that the writers of defendant's show had not had access to plaintiff's program.

6. Effect of public production of plaintiff's program. Prior to plaintiff's offer of his program to defendant he presented it before a selected audience of 400 persons in a studio of the National Broadcasting Company in Hollywood and at the same time had a recording made of it. Such presentation was in the same form as read and played to the jury. Defendant contends that the disclosure of plaintiff's idea to the studio audience was such a voluntary and intentional publication of it as to dedicate it to the public, thus authorizing defendant or any other person to copy and to reproduce it, citing section 983[2] of the Civil Code, in connection with which section 980[2] must be considered.

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[2] Sections 980 and 983 of the Civil Code as enacted in 1872 and as they read until the 1947 amendment, (Stats.1947, ch. 1107) read:

Sec. 980. "The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession."

Sec. 983. "If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned."

While counsel have discussed the amendments to these sections adopted in 1947, the reason for their adpotion and the effect of the sections as amended we shall not discuss them since plaintiff's cause of action arose, the case was tried and judgment rendered prior to the effective date of the amendments.

Defendant maintains that an agreement will not be implied on its part to pay for the "idea" which it contends any one had a right to use without consideration. It is agreed by counsel for both litigants "as far as ideas are concerned the California statute is simply a codification of the common law."

It is argued with emphasis that since this action is based on an "idea" (which defendant subsequently conceded resulted in the "creation of a piece of literary property") and since the idea (with the literary property) was presented to a studio audience plaintiff thereby abandoned such property right as he possessed in it and dedicated to the public the right to copy it and to reproduce it on the radio or otherwise.

We have pointed out that plaintiff is not suing to recover damages for the appropriation by defendant of a mere idea. The complaint alleges that plaintiff "originated and caused to be prepared, composed and written an original script for a radio program;" that he caused the script of his program to be recorded upon records; that he submitted his "original radio program and the script, format and records thereof" to defendant; that defendant produced and presented a radio program substantially copying and using "plaintiff's radio program and radio format." Plaintiff not only prepared and produced an "idea" but he prepared a completely written program (now admitted by defendant to be literary property) setting forth every word that was to be said on the radio with two exceptions: (1) the drama which he could not have written because a new drama was to be presented each week; (2) the interview with the experts or critics which could not be prepared in advance because the questions asked of them and their answers were to be spontaneous, extemporaneous and unrehearsed, each critic expressing in individual language his or her observations as to the worth of the drama as the basis of a motion picture.

[18] "The common law prohibits any kind of unauthorized interference with, or use of, an unpublished work on the ground of an exclusive property right." 18 C.J.S., "Copyright and Literary Property," § 2. This statement "is consistent with the rule of law as to literary property embodied in section 980 of the Civil Code." Yadkoe v. Fields, 66 Cal.App.2d 150, 160, 151 P.2d 905, 911.

[19-22] Publication of a literary work is effected by communicating or dedicating it to the public. This is known as a "general publication." There is also a "limited publication" which is one that "communicates a knowledge of its contents under conditions expressly or impliedly precluding its dedication to the public." Werckmeister v. American Lithographic Co., 2 Cir., 134 F. 321, 324. "When a literary work is exhibited for a particular purpose, or to a limited number of persons" it does not thereby become publici juris and the author retains ownership of the work until he relinquishes it either by contract or by an "unequivocal act indicating an intent to dedicate it to the public." Palmer v. De Witt, 47 N.Y. 532, 543, 7 Am.Rep. 480; Werckmeister v. American Lithographic Co., supra, 134 F. at page 326; American Tobacco Co. v. Werckmeister, 207 U.S. 284, 299, 28 S.Ct. 72, 52 L.Ed. 208, 217, 12 Ann.Cas. 595. The making of a recording of plaintiff's program in the presence of an invited, limited audience was not a publication of the program to the extent of abandoning it to the public with the right to reproduce it. Nutt v. National Institute, 2 Cir., 31 F.2d 236, 238; Thomas v. Lennon, C.C., 14 F. 849, 851; Press Pub. Co. v. Monroe, 2 Cir., 73 F. 196, 198. In Ferris v. Frohman, 223 U.S. 424, 435, 32 S.Ct. 263, 56 L.Ed. 492, 497, the court held that the public presentation of an unpublished dramatic composition does not deprive the owner of his common-law right of protection and that at common law the public performance

of a play is not an abandonment of it to the public use.

[23-28] The rendering of a performance before a radio microphone is not an abandonment of ownership of the literary property or a dedication of it to the public at large. Uproar Co. v. National Broadcasting Co., D.C., 8 F.Supp. 358, 362. This decision was affirmed in 1 Cir., 81 F.2d 373, where the court held (81 F.2d at page 376) that the author retained his exclusive rights in the literary material whether or not he had licensed the right to broadcast it by radio. A public performance of a dramatic or musical composition is not an abandonment of the production to the public. McCarthy & Fischer, Inc. v. White, D.C., 259 F. 364. Public exhibition is not necessarily a publication merely because the public generally is given access to the work. The test is whether the exhibition to the public is "under such conditions as to show dedication without reservation of rights or only the right to view or inspect it without more." The exhibition of a motion picture without charge to a number of audiences in public places does not constitute a publication dedicating the picture or any material contained in it to the general public. Patterson v. Century Productions, Inc., 2 Cir., 93 F.2d 489, 492. A scenario and synopsis for a photoplay is a production of intellectual labor and protected against piracy. Thompson v. Famous Players-Lasky Corp., D.C., 3 F.2d 707. The delivery of copies of a poem to members of a "literary committee" to enable them to decide whether it was suitable for their acceptance and presentation at a public meeting was not a publication of the poem and did not prejudice the owner's common-law rights. Press Pub. Co. v. Monroe, supra.

Since plaintiff is asserting a property right in his idea plus the fully developed, written composition concretely expressing the idea, the cases cited by defendant to the effect that mere ideas and plans are not subject to protection have no bearing on the issues involved in this action. In Downes v. Culbertson, 153 Misc. 14, 275 N.Y.S. 233, the plaintiff sought an injunction to restrain the defendants from using a method of teaching the game of bridge alleged to have been invented and originated by the plaintiff. The court held, 275 N.Y.S. at page 242, that neither the method of teaching nor the arrangement of materials is a subject of property rights and that they may be fully used and copied. In Glazer v. Hoffman, 153 Fla. 809, 16 So.2d 53, the plaintiff, who was a magician, had originated and developed a new trick in magic. The court refused to enjoin the defendant from copying and producing it publicly, holding, 16 So.2d at page 55, that the plaintiff's performance was not within the copyright statute and that the public exhibition given by him was a dedication of his act to the public. Affiliated Enterprises, Inc. v. Gruber, 1 Cir., 86 F.2d 958, involved a plan and procedure for "bank night" designed to increase attendance in theatres. The plan was held to have became common property when it was publicly presented "without the protection of a patent." These and other cases cited by defendant were tort actions, in none of which did the plaintiff claim any rights under contract, express or implied.

8. Defendant's motion for a new trial. The motion was made on three grounds: (1) newly discovered evidence, (2) excessive damages, appearing to have been given under the influence of passion or prejudice, (3) insufficiency of the evidence to justify the verdict and that the verdict is against law.

The second and third grounds have already been discussed and determined adversely to defendant's contentions.

[29] The newly discovered evidence is set forth in the affidavit of one James Allen. He states that in 1935 he conceived the idea of a radio program which would dramatize stories and present them to the listening public as a "show case" of possible literary material for the legitimate stage; a "show case" is a presentation of literary material to radio listeners, giving the author the opportunity of having his material heard and approved or disapproved by the public; he registered his radio program idea in 1935 with "Billboard," a theatrical publication, in New York City; in 1939 he conceived the plan of directing his radio program idea to motion pictures instead of to legitimate

stage plays; the idea was to present dramatization of scripts, books, scenarios and plays which had never been produced as motion pictures but which might be suitable therefor and to present them to the radio public so that they might submit comment as to whether they would like to have the dramatizations made into motion pictures; on May 22, 1939, he registered his radio program idea with the Screen Writers' Guild; he conceived the two titles "Play Preview" and "Preview Parade" as suitable titles for the program.

Allen included only one title, "Play Preview," in his registration. He did not have as a part of his program a request for letters from listeners or the offer of prizes. His idea was to direct the author's material "to the attention of stage and screen producers," not to the public generally. He states that plaintiff had nothing whatsoever to do with the origination or development of the idea and that plaintiff's only connection with the program was that Allen employed him as musical director in June, 1939, while Allen was preparing the script for an audition recording of a program based upon his idea. There are affidavits of other persons tending to corroborate the statements contained in Allen's affidavit.

The affidavits filed in opposition to the motion for a new trial create the same amount and character of conflict as that presented by the evidence offered at the trial.

Plaintiff states in his affidavit that "Hollywood Reporter," a motion picture publication, contained an article in its issue of March 8, 1938, referring to the mediocre character of pictures then being produced and stating that audience participation would be enlisted with the expectation of criticisms addressed to the nearest Warner's exhibitor. Based on the ideas in the Hollywood Reporter and similar articles in other trade papers, plaintiff states, he conceived the idea of combining in a single radio program all the elements contained in the various news articles together with ideas of his own; that in May, 1938, he had completed a tentative format for his program including tentative titles of "Hollywood Preview," "Preview Parade" and "Hollywood Preview Parade:" participation by the radio listening audience in the selection of motion picture material by the solicitation of letters from the public commenting upon the prospective use in motion pictures of such radio material and suggesting stars and leading players whom the radio public would like to see portrayed in the motion picture roles; he included in his format a committee of experts to judge the letters and award cash prizes each week for the best letters submitted; he states the names of three friends with whom he discussed this idea of entertainment in the summer of 1938. These persons submitted affidavits corroborating plaintiff as to his discussions of his program with them. Plaintiff states that in May, 1939, he was notified that the radio station with which he had been connected was to be sold, and in seeking other employment he met James Allen about June 1, 1939; he was told that he would be employed to compose and conduct the music that would be specially written for each of Allen's programs which the latter was then contemplating; he participated in a series of conferences with Allen and others at which the title, format and details of Allen's proposed new program were formulated; he made several suggestions as to the content, composition and format of Allen's program and suggested to Allen the titles "Preview Parade" and "Hollywood Preview Parade;" he also suggested that the listening audiences comment upon the suitability of the material and name the stars they would like to see portrayed if the radio material should eventually be seen on the screen; Allen adopted that idea. Plaintiff states that he never received from Allen or from many of his associates any part of the program idea which he, plaintiff, conceived in 1938, the audition recording and format of which were introduced in evidence at the trial of this action. He further states that he never disclosed to Allen his idea of awarding cash prizes for the best letters submitted or the title "Hollywood Preview." Affidavits were filed corroborating many portions of plaintiff's statements.

In June, 1939, Allen prepared a prospectus setting forth his "idea" of his proposed program but did not disclose in the prospectus any part of the program itself or any "concrete idea" thereof. Plaintiff was named on this prospectus as the musical director. The printed prospectus was distributed to numerous persons who Allen thought might be interested in the program and to advertising agencies and radio stations.

Defendant contends that Allen's proposed program and those of Vanda and Hudson, to which we have referred, together with Stanley's, were the ideas of four different persons each claiming to have originated the idea. The Vanda annd Hudson programs were before the jury at the trial. The court had that evidence, Allen's affidavit and plaintiff's affidavit before it for consideration on the motion for a new trial and had a right to determine whether Allen's claim was sufficient to warrant a new trial. The court determined adversely to defendant's contention and we do not find from the entire record that there was any abuse of discretion in the ruling of the court.

Defendant further contends that since Allen publicly distributed his printed prospectus containing a defective notice of copyright his idea was dedicated to the public and that defendant therefore was privileged to use it. It is not contended that Allen's prospectus ever at any time came into the possession of defendant, or any of its agents or employees; on the contrary defendant's motion for a new trial is based upon the assertion that it had no knowledge of Allen's program ideas until after the judgment was entered in this case. Furthermore defendant does not contend that its program was identical with that of Allen, and the fact is that there are many differences between the two programs.

[30] Even though Allen's program was proclaimed to the public with a defective notice of copyright it is no defense that the source of defendant's program was in the public domain if that source was unknown to defendant and was not used by it. Sheldon v. Metro-Goldwyn Pictures Corporation, 2 Cir., 81 F.2d 49, 53, 54; Detective Comics, Inc. v. Bruns Publication, Inc., 2 Cir., 111 F.2d 432, 433; Fred Fisher, Inc. v. Dillingham, D.C., 298 F. 145, 150. In the Sheldon case it is held that prior art is relevant only as bearing on the question whether the alleged infringer has copied or taken his material directly from the work of the author of the prior art. In the Fisher case it is held that if the alleged infringer claims the rights of the public he may use them but he cannot use the work of the copyright owner whether the latter's composition be old or new.

[31] The motion for a new trial is to a large extent addressed to the discretion of the trial judge, and the granting of the motion is so completely within his discretion that an appellate court will not disturb the ruling unless it is manifest that a gross or unmistakable abuse of discretion appears. Fennessey v. Pacific Gas & Electric Co., 10 Cal.2d 538, 544, 76 P.2d 104; Whitfield v. Debrincat, 18 Cal.App.2d 730, 733, 64 P.2d 960; Mazzotta v. Los Angeles Ry. Corporation, 25 Cal.2d 165, 169, 153 P.2d 338.

In passing upon the motion for a new trial the court was confronted with affidavits that conflicted as to many if not all the material facts, and he had before him the outlines of Allen's program as well as plaintiff's complete production whereby he could determine both the similarities and dissimilarities of the two programs. We find no abuse of discretion in the denial of the motion for a new trial.

The judgment and the order denying defendant's motion for a judgment notwithstanding the verdict are and each of them is affirmed.

MOORE, P. J., and McCOMB, J., concur.

85 Cal.App.2d 151

WRIGHT et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 13744.

District Court of Appeal, First District,
Division 2, California.
April 22, 1948.

Hearing Denied June 17, 1948.

1. Prohibition 🔑10(2)
Venue 🔑80

Where action for declaratory relief and for specific performance of alleged agreement to execute renewal lease of realty was commenced in county where realty was located as required by Constitution, fact that action was, by stipulation of counsel, transferred to another county for trial, did not deprive court of jurisdiction, and therefore only remedy open to defendants was by appeal from judgment and not by prohibition. Const. art. 6, § 5.

2. Prohibition 🔑10(2)

Objection that court had no jurisdiction of persons of defendant executrixes in their individual as well as in their representative capacity in action for declaratory relief and for specific performance of alleged agreement by testatrix to execute renewal lease, was not jurisdictional, and alleged error in refusing to dismiss executrixes as defendants in their individual capacity, if error, was error in exercise of jurisdiction not reviewable on prohibition.

3. Executors and administrators 🔑224

A claim based on an action pending against deceased at time of his death need only be filed if action falls within class that could not be commenced and prosecuted against executor or administrator after deceased's death without presentation of a claim. Probate Code, § 709.

4. Executors and administrators 🔑224

Where action was begun against testatrix shortly before her death for declaratory relief and specific performance of alleged agreement to execute a renewal lease, and after testatrix' death executrixes were substituted as defendants, superior court was not deprived of jurisdiction over executrixes because no claim was presented under probate code. Probate Code, § 709.

5. Executors and administrators 🔑224

Statutory requirement of presentation of a "claim" against a deceased's estate as a condition precedent to maintenance of an action against personal representative, applies only to such causes of action as result from debtor-creditor relation in which claimant asserts right to recover a money judgment. Probate Code, § 709.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim".

6. Executors and administrators 🔑250

A probate court has no jurisdiction to determine claims asserted by strangers to an estate.

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Prohibition proceeding by Nellie Swall Wright and others against the Superior Court of the State of California, in and for the City and County of San Francisco, and others.

Alternative writ discharged and prayer for peremptory writ denied.

Earl C. Berger, of San Francisco, for petitioners.

Jos. A. Brown and Harry Gottesfeld, both of San Francisco, for respondent.

DOOLING, Justice.

Petitioners herein both individually and as executrices of the last will of Ellen G. Swall, deceased, are defendants in an action pending in the superior court in and for the City and County of San Francisco, in which the respondent Mary Kaliterna is plaintiff. The action is one for declaratory relief and for specific performance of an alleged agreement to execute a renewal lease covering a parcel of real property in Santa Clara County. The action was commenced in Santa Clara County against the decedent shortly before her death. Subsequently by order of the superior court in that county the petitioners herein as executrices were substituted as defendants. Later an order was made permitting the joinder of petitioners as defendants in their individual capacity. By stipulation of counsel the action was ordered transferred to the City and County of San Francisco for trial. The action has now gone to judgment in plaintiff's favor but findings were not filed until after the entry of judgment. We issued an alternative writ of prohibition, conceiving that it was still in the power of the trial court to correct this irregularity and that prohibition might for this reason lie if the court was, as alleged, acting in excess of its jurisdiction.

We have now concluded that the court has jurisdiction both of the parties and the subject matter and that the only remedy open to petitioners is by an appeal from the judgment. (21 Cal.Jur. 583.)

[1] Petitioners' claim that the action is a local one triable only in Santa Clara County because the real property is located there is not tenable. The action was commenced in Santa Clara County which is all that the constitution requires. (Const. of Calif., sec. 5, Art. VI.) The action having been commenced in the county wherein the real property is situated may subsequently be transferred to the superior court of another county for trial. (25 Cal. Jur. 862.)

[2] The point that the court has no jurisdiction of the persons of petitioners as individuals is based on the claim that an action of this character may not be maintained at the same time against defendants both in their representative capacity as executrices and in their individual capacity. The objection if good (a question that we need not decide) is not jurisdictional. There may be a misjoinder of parties or of causes of action but the court has jurisdiction of both. Its action in not dismissing petitioners as defendants in their individual capacity if error is error in the exercise of jurisdiction not properly reviewable on prohibition. (21 Cal.Jur. 584.)

Petitioners insist that the superior court is without jurisdiction over them as executrices of the will of the decedent because no claim was presented under Probate Code section 709, which provides:

"If an action is pending against the decedent at the time of his death, the plaintiff must in like manner file his claim with the clerk or present it to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof is made of such filing or presentation."

[3, 4] This section is found in the same chapter and article providing generally for the presentation of claims against decedents' estates. It has been construed to take color from those other sections, so that a claim based upon an action pending against the decedent at the time of his death need only be filed if the action falls within the class that could not be commenced and prosecuted against the executor or administrator after the decedent's death without the presentation of a claim. (Hibernia Savings & Loan Soc. v. Wackenreuder, 99 Cal. 503, 506, 508, 34 P. 219; Millar v. Millar, 51 Cal.App. 718, 728, 729, 197 P. 811.)

[5] It is equally settled that the general provisions requiring the presentation of a claim against the estate of a decedent as a condition precedent to the maintenance of an action against the personal representative apply only to such causes of action as result from the debtor-creditor relation in which the claimant asserts the right to recover a money judgment. (11A Cal.Jur. p. 651.) The provisions of our present Probate Code requiring the presentation of claims against the estate of decedents find their origin in a statute "To Regulate the Settlement of the Estates of Deceased Persons" adopted in 1851. (Stats. 1851, p. 448, at 464 et seq.) The pattern laid down in that early statute in the matter of the presentation of claims against decedents' estates has been continued with remarkable consistency to the present day. In Gray v. Palmer, 9 Cal. 616, the court after an analysis of the provisions of the statute above cited concluded 9 Cal. at page 636:

"It would seem to be clear, from the different sections of the act, taken and construed together, as well as from the nature and reason of the case, that the words claimant and claim are used as synonomous with creditor and legal demand for money, to be paid out of the estate."

This rule has been consistently followed for the ninety years which have passed since that decision was rendered, the latest judicial expression which we have found occurring in Tanner v. Best's Estate, 40 Cal.App.2d 442, at pages 445, 446, 104 P.2d 1084, at page 1087, where the court says tersely:

"A 'claim' refers to a debt due the claimant. 11A Cal.Jur. 485. It is a money demand."

The relief claimed in the action here sought to be prohibited is not of that character and no claim was required to be filed or presented.

[6] The jurisdiction to determine the rights of the plaintiff in the action below is not in the probate court. We recently had occasion to reaffirm the settled rule that the probate court has no jurisdiction to determine claims asserted by strangers to the estate. In re Estate of Kurt, 83 Cal.App.2d 681, 189 P.2d 528.

Other claims of error in procedure are asserted by petitioners. We need notice them only to point out that they do not affect the jurisdiction of the superior court.

The alternative writ is discharged and the prayer for a peremptory writ is denied.

NOURSE, P. J., and GOODELL, J., concur.

MARVIN et al. v. HODGSON et al.*

Civ. 15942.

District Court of Appeal, Second District, Division 1, California.

April 22, 1948.

Rehearing Denied May 11, 1948.

Hearing Granted June 10, 1948.

Master and servant ⚷69

Where employer engaged in supplying guards for ships of War Shipping Administration during wartime, reduced wages without approval of National War Labor Board, reduced rate was illegal and original rather than the reduced rate was the regular rate of pay for the purposes of computing overtime under the Fair Labor Standards Act. Stabilization Act of 1942, §§ 1–11, 50 U.S.C.A.Appendix, §§ 961–971; War Labor Disputes Act, §§ 1–11, 50 U.S.C.A. Appendix, §§ 1501–1511; Fair Labor Standards Act of 1938, §§ 1–19, 7, 16(b), 29 U.S.C.A. §§ 201–219, 207, 216(b); Executive Order No. 9017, 50 U.S.C.A.Appendix, § 1507 note; Executive Order No. 9250, 50 U.S.C.A.Appendix, § 901 note.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit by Jack Marvin and Bert E. Williams against William E. Hodgson and Lucille H. Hodgson, also known as L. H. Hodgson, individually, and doing business under the firm name and style of Guards Association, and others, to recover overtime wages due to plaintiffs pursuant to a contract of employment. From a judgment for plaintiffs, named defendant appeals.

Judgment affirmed.

Herbert R. Lande, of San Pedro, for appellant.

J. Paul Madsen, of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an appeal by defendant William E. Hodgson from a judgment in favor of plaintiffs for wages.

It appears from the record herein that prior to July 16, 1944, appellant was the sole shareholder, as well as the general manager, secretary and treasurer of a corporation known as Guards Association Inc., which was in the business of supplying guards and watchmen for certain of the ships of the War Shipping Administration while they were in port at Los Angeles or Long Beach. These guards, among whom were respondents, were paid a basic wage rate of 92½¢ per hour for all hours worked with no increase for overtime. On July 15, 1944, appellant, doing business under the firm name and style of Guards Association, became the successor of Guards Association, Inc., a corporation; and at a meeting called by him on that day, appellant told the guards that he had been ordered by the National Labor Board to pay overtime wages after eight hours a day or forty hours a week; that he could not continue the 92½¢ rate, plus overtime, and stay in business because he received from the War Shipping Administration only $1.05 per hour for guard service upon the ships, consequently, he would pay henceforth 70¢ per hour with time and a half for overtime and double time for hours worked on the seventh consecutive day.

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* Subsequent opinion 202 P.2d 1.

Respondents worked at the reduced rate of 70¢ from July 16, 1944, to October 31, 1945, and on November 6, 1945, commenced the instant action, alleging as a basis for their cause of action that the reduction of rate from 92½¢ to 70¢ was made without the approval of the National Labor Board and therefore void, that the regular rate of pay must as a matter of law be 92½¢ per hour and that they were entitled to one and one-half times such rate of 92½¢ for all hours worked over forty per week. Respondents also alleged that a violation of the Fair Labor Standards Act 29 U.S.C.A. § 201 et seq., thus occurred, and included a prayer for liquidated damages and attorney's fees.

The trial court found, among other things, that the change of the basic rate from 92½¢ to 70¢ per hour was made without the approval of the National War Labor Board; that such approval was necessary under "General Order No. 6 and other rules and regulations of the National War Labor Board, the regulations of the Director of Economic Stabilization, the executive orders of the President, and the Stabilization Act of 1942"; that the basic wage rate of 70¢ as changed and paid by appellant to respondents was contrary to and in violation thereof; and concluded that the said change in respondents' basic wage rate from 92½¢ to 70¢ per hour on and after July 16, 1944, by appellant, "was illegal and void and the applicable rate under the provisions of the Fair Labor Standards Act of 1938 in determining the regular rate at which plaintiffs were employed by said defendant from July 16, 1944 to October 31, 1945, was the rate of 92½¢ per hour thereunto paid to plaintiffs by the corporation, Guards Association, Inc." Accordingly, judgment was entered in favor of each respondent for unpaid wages, being the difference between the amount figured at the lowered rate and that figured at the previous rate, as prayed for, together with an equal sum as liquidated damages and $150 attorneys' fees.

Appellant admits that he violated certain provisions of the Stabilization Act of 1942 (50 U.S.C.A.Appendix, secs. 961–971), the War Labor Disputes Act of 1943 (50 U.S.C.A.Appendix, secs. 1501–1511), Executive Order No. 9017 (50 U.S.C.A.Appendix, § 1507 note) and Executive Order No. 9250 (50 U.S.C.A.Appendix, § 901 note), when he changed the rate of pay without approval of the National War Labor Board, but he asserts that such acts and orders do not affect any legal relations nor do they create any justiciable rights between employer and employee for the reason that "the rules and regulations and directive orders of the National War Labor Board, made under and by virtue of the authority of the foregoing acts and executive orders, are advisory only."

Respondents concede that the directives of the National War Labor Board "were in truth advisory only and were also criminally unenforceable", but urge that the payment by appellant of any wage rate less than 92½¢ per hour being in violation of the Stabilization Act, supra, such payment was illegal and void; hence, only the 92½¢ rate can be deemed the "regular rate" under the Fair Labor Standards Act.

The instant suit is primarily for the recovery of wages due to workmen pursuant to a contract of employment modified by statute, to-wit: the Fair Labor Standards Act of 1938 (29 U.S.C.A. secs. 201–219), section 207 of which directs that no employer shall employ any of his employees for a work-week longer than a specified number of hours "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Section 216(b) of said act provides that "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarily situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarily situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Executive Order No. 9250, supra, Providing for the Stabilizing of the National Economy, recites in Title II—Wage and Salary Stabilization Policy: "1. No increases in wage rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decreases in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board, and unless the National War Labor Board has approved such increases or decreases." Also, in Title III, thereof—Administration of Wage and Salary Policy, it is provided: "4. In order to effectuate the purposes and provisions of this Order and the (Stabilization) Act of October 2, 1942, (sections 961–971 of this Appendix), any wage or salary payment made in contravention thereof shall be disregarded by the Executive Departments and other governmental agencies in determining the costs or expenses of any employer for the purpose of any law or regulation * * * or for the purpose of calculating deductions under the Revenue Laws of the United States or for the purpose of determining costs or expenses under any contract made by or on behalf of the Government of the United States."

Section 946 of the Stabilization Act of 1942, supra, provides that "No action shall be taken under authority of this Act with respect to wages or salaries, (1) which is inconsistent with the provisions of the Fair Labor Standards Act of 1938, as amended, or the National Labor Relations Act (Title 29, §§ 151–166) * * *."

Section 1507 of the War Labor Disputes Act of 1943, supra, defining the functions and duties of the National War Labor Board, which was established by Executive Order No. 9017, supra, provides in subsection (a)(2) thereof that such Board shall have the power to decide labor disputes and "provide by order the wages and hours and all other terms and conditions * * * governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended * * *."

In Employers Group etc. v. National War Labor Board, 79 U.S.App.D.C. 105, 143F. 2d 145, 146, 148, a suit to annul and enjoin a "directive order" of the National War Labor Board increasing wages of employees, the court upheld a judgment dismissing the complaint, stating: "It is clear and undisputed that no statute authorizes review of the War Labor Board's Orders. * * * The Inflation Control Act provides that 'No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act.' (50 U.S. C.A.App., sec. 965.) The regulations promulgated by the President in Executive Order 9250 forbid the adoption, without the Board's approval, of a new wage scale. But neither Executive Order 9250 nor any other regulation forbids adherence to an old wage scale after the Board has approved a new one. Appellants will not, by declining to adopt the new scale, subject themselves to the penalties which the Inflation Control Act provides for violation of its provisions, or to any other penalties."

In Wernhardt v. Koenig, D.C., 60 F.Supp. 709, an action brought under the Fair Labor Standards Act of 1938 (29 U.S.C.A. sec. 201 et seq.) for overtime pay, it was held:

"It appears from the complaint that the plaintiffs are employees of the defendants and are engaged in interstate commerce. It further appears from a letter from the National War Labor Board, dated March 4, 1944, which by agreement of the parties was considered by the Court as though incorporated into the pleadings, that the hourly rates, upon the basis of which this claim for overtime is made, were the result of a wage adjustment made by the employers without securing the approval of the National War Labor Board, in violation of the

Wage Stabilization Law and regulations promulgated thereunder. Therefore, this complaint shows on its face that the recovery sought is based on an illegal contract. The Wage Stabilization Law provides in 50 U.S.C.A.Appendix, § 965:

> " 'No employer shall pay, and no employee shall receive, wages or salaries in contravention of the regulations promulgated by the President under this Act.' This section makes plain the intent of Congress that such contracts are illegal and the Court can not and will not lend itself to the enforcement of a contract made to perform an act which is expressly forbidden by a law of the United States and arises from an illegal contract. Such a contract is not only unenforceable but void. Fitzsimons v. Eagle Brewing Co., 3 Cir., 107 F.2d 712, 126 A.L.R. 681. The result is that these plaintiffs can not base any claims on such agreements."

Under the foregoing authorities, appellant's claim that the 70¢ rate was the regular rate of pay for the purposes of the Fair Labor Standards Act, supra, cannot be sustained. Since no regulation forbids adherence to an old wage scale, the original 92½¢ wage scale must be deemed the regular rate, as that term is used in the Fair Labor Standards Act.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

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85 Cal.App.2d 214

OLDHAM v. ATCHISON, T. & S. F. RY. CO. et al.

Civ. 16033.

District Court of Appeal, Second District, Division 3, California.

April 27, 1948.

1. Appeal and error 🔑927(3)

On review of judgment of nonsuit, every favorable inference and presumption fairly rising from evidence must be considered as facts proved in plaintiff's favor.

2. Appeal and error 🔑927(3)

On review of nonsuit, view most favorable to plaintiff must be taken, where evidence is fairly susceptible of two constructions.

3. Appeal and error 🔑927(3)

On review of nonsuit, relevant evidence must be given its full probative strength, and any question arising from variation between testimony of witnesses cannot be considered.

4. Trial 🔑139(1)

Motion for nonsuit must be denied where plaintiff establishes prima facie case.

5. Negligence 🔑136(14)

Ordinarily, question of negligence is for jury.

6. Negligence 🔑32(1, 2)

Railroad conductor, who was injured while spotting railroad car on spur track on defendant's property, was a "business invitee" of defendant, working on its premises for its benefit, and it was defendant's duty to use ordinary care to furnish him a safe place within which to work.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Invitee".

7. Negligence 🔑32(1)

Generally, owner or occupier of premises, who by invitation induces or knowingly permits workmen to enter for performance of mutually beneficial duties, must use reasonable care to furnish reasonably safe appliances and place to work.

8. Negligence 🔑136(15)

Evidence presented question for jury as to whether injury sustained by railroad conductor while alighting from moving freight car during course of spotting car on spur track on defendant's property was caused by stepping on piece of plaster board negligently left by defendant's employees, so as to render defendant liable for conductor's injury on ground that it did not use ordinary care to furnish conductor a reasonably safe place within which to work.

9. **Master and servant** ⚿304

Where evidence shows that condition which caused injury of business invitee was created by owner's employees, or evidence is such that a reasonable inference can be drawn that condition was created by owner's employees, owner is charged with notice of the dangerous condition.

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Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Samuel Moore Oldham against the Atchison, Topeka & Santa Fe Railway Company and the United States Gypsum Company to recover for personal injuries. From judgment in favor of the United States Gypsum Company, the plaintiff appeals.

Reversed.

Hildebrand, Bills & McLeod and D. W. Brobst, all of Oakland, for appellant.

Leo E. Sievert, Charles L. Ewing, and William F. Brooks, all of Los Angeles, for respondent Atchison, T. & S. F. Ry. Co.

Lyndol L. Young, of Los Angeles, for respondent United States Gypsum Co.

VALLEE, Justice pro tem.

Appeal by plaintiff from a judgment for defendants, The Atchison, Topeka & Santa Fe Railway Company (referred to as "Santa Fe"), and United States Gypsum Company (referred to as "Gypsum Company"), entered upon the granting of their respective motions for a judgment of nonsuit in an action for damages for personal injuries. Plaintiff has dismissed his appeal from the judgment in favor of the Santa Fe.

Viewing the evidence in the light most favorable to the plaintiff, indulging in all reasonable inferences in his favor and disregarding all conflicting and contradictory evidence, the facts are these: The accident occurred on February 25, 1945, at about 6:30 a. m., as plaintiff, a conductor, stepped off a freight train, causing him to slip and sustain the injuries complained of. The Gypsum Company maintains a large plant at Midland, California, where it manufactures gypsum plaster, fertilizer and plaster board. One part of its plant is known as the board plant. It maintains a number of spur tracks at its plant and on its property. The accident occurred in front of door No. 37 of the board plant of the Gypsum Company and opposite its spur track No. 3. Spur track No. 3 runs in a southeasterly direction from the main line of the Santa Fe and between the Gypsum Company's board plant (which is immediately adjacent to track No. 3 to the east) and its warehouse and mill (which is immediately adjacent to track No. 3 to the west). Box cars are "spotted" for loading and unloading on spur track No. 3. The floor of the board plant building is set level with the floors of "spotted" box cars. Door No. 37 is located "about twenty-two feet north of the south end of the board plant." When box cars are loaded a ramp is placed from the floor of the building into the box cars. Between track No. 3 and the outer wall of the board plant there is a pathway about three and one-half feet wide. The ground slants downward from the board plant building to the tracks. Freight cars are brought in and out of the Gypsum Company plant every night on the spur tracks by employees of the Santa Fe. On the morning of the accident the Santa Fe was engaged in taking loaded cars from, and in "spotting" empty cars in, the Gypsum Company plant.

At the time of the accident, plaintiff, an employee of the Santa Fe, was engaged in "spotting" thirteen freight cars on spur track No. 3 in front of the board plant of the Gypsum Company. The thirteen cars were being shoved by an engine in a southerly direction. The train originated at Blythe, California, and left there some time before midnight of February 24, 1945. It arrived at Midland shortly after midnight. At the time of the accident it "was just breaking day. It wasn't quite light to work without lamp signals." There were no lights alongside the board plant building. Plaintiff was on the "lead" car—the farthest from the engine—going southerly on track No. 3. He was on the side of the car next to the board plant. The train was going "four to six miles an hour." It was plaintiff's duty to spot the door of freight car 6 opposite door No. 37 of the board plant so that the car could be loaded right out of the plant. To do so, it was his duty to get off the lead car in the space between the board plant building and the tracks as the lead car passed door No. 37, stand there, and when the sixth car from the engine was opposite door No. 37, give the proper signal to stop the train. Upon reaching door No. 37 plaintiff turned his hand loose from the grab irons of the car to step off. He noticed that he was hitting a piece of plaster board in the pathway between the board plant and the tracks, but he had released himself from the side of the car so far that he could not regain his hold and he stepped on the piece of plaster board. He stumbled over some timbers and pieces of plaster board and rubbish that lay between the tracks and the board plant. His foot slipped and he was thrown against the board plant building. When he hit the building he was thrown back against a moving car which knocked him to the ground. The heel of his right foot caught under a wheel of the box car. He was rendered unconscious and sustained severe injuries.

Plaster board is very slick and slippery and of the same general color as the ground between the board plant and the tracks. The loading, unloading and cleaning of freight cars at the Gypsum Company plant was done exclusively by employees of the Gypsum Company. The Gypsum Company maintained a clean-up crew for the purpose of cleaning around the tracks and the yard and, in addition, one man was assigned the particular duty of cleaning the board plant warehouse and adjacent tracks. These men worked the same shifts as the loading crews and they all ceased work at 3:30 every afternoon. It was the duty of the clean-up crew to daily clean the tracks on the Gypsum Company property, including track No. 3.

[1-5] The rules governing our review of the evidence upon an appeal from a judgment of nonsuit are stated in Bosqui v. City of San Bernardino, 2 Cal.2d 747, 760, 43 P.2d 547, 553, as follows: "'Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given, it must be disregarded. In re Estate of Arnold, 147 Cal. 583, 82 P. 252. The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in the light most favorable to plaintiffs' claim. Anderson v. Wickliffe, 178 Cal. 120, 172 P. 381. Evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. The evidence must be taken most strongly against the defendant, and, if the plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of his complaint, the motion, if made upon the close of the case, should be denied.'" Ordinarily the question of negligence is for the jury. Under the evidence we have recited, we are of the opinion that the question should have been submitted to the jury.

[6, 7] Appellant was a business invitee of the Gypsum Company, working on its premises for its benefit, and it was its duty to use ordinary care to furnish him a safe place within which to work. The Gypsum Company's duty in this behalf is stated in Miller v. Pacific Constructors, Inc., 68 Cal.App.2d 529, 545, 157 P.2d 57, 65: "The general rule in that regard is that an owner or occupier of premises, who, by invitation express or implied, whether the invitation is pursuant to a written contract or otherwise, induces, or knowingly permits, a workman to enter the premises for the performance of duties mutually beneficial to both parties, is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work and to furnish and maintain appliances in connection therewith which are reasonably safe for the purposes embraced therein. Mayes v. Splitdorf Electrical Co., 94 N.J.L. 460, 111 A. 10." See, also, Hinds v. Wheadon, 19 Cal.2d 458, 460, 121 P.2d 724; Edwards v. Hollywood Canteen, 27

Cal.2d 802, 809, 167 P.2d 729; Rest.Torts, sec. 332, 343.

[8] From the evidence that the premises where the accident occurred and the material which caused the accident were all in the exclusive management and control of the Gypsum Company, and that the loading, unloading, and cleaning of the freight cars and the tracks and the pathway between the tracks and the board plant building was done exclusively by employees of the Gypsum Company, the jury reasonably could have inferred from the presence of plaster board and other debris in the pathway (1) that the Gypsum Company failed in its duty to properly clean the space between the tracks and the board plant building where trainmen were required to work in their regular switching duties in the plant, (2) that the plaster board and other debris had been negligently placed and left there by no persons other than employees of the Gypsum Company, (3) that it did not use ordinary care to furnish appellant a reasonably safe place within which to work, and (4) that the Gypsum Company's negligence in that respect was the proximate cause of the injuries sustained by the plaintiff.

[9] Respondent urges that in the absence of evidence that it had actual or constructive notice of the condition of the pathway, appellant failed to make out a prima facie case. The contention is devoid of merit. Where the evidence shows, as it does in this case, that the condition which caused the injury was created by the employees of the respondent, or the evidence is such that a reasonable inference can be drawn that the condition was created by employees of the respondent, then respondent is charged with notice of the dangerous condition. The rule is stated in Hatfield v. Levy Brothers, 18 Cal.2d 798, 806, 117 P.2d 841, 845: "Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him. Saunders v. A. M. Williams & Co., 155 Or. 1, 62 P.2d 260." See, also, Lorenz v. Santa Monica City High School District, 51 Cal.App.2d 393, 401, 124 P.2d 846.

In our opinion there is evidence of sufficient substantiality to support a verdict in favor of appellant.

Judgment reversed.

SHINN, Acting P. J., and WOOD, J., concur.

31 Cal.2d 701

HEESY v. VAUGHN et al.

L. A. 20368.

Supreme Court of California, in Bank.
April 28, 1948.

1. War 🔑4

Where plaintiff's third cause of action alleged defendants' violation of Emergency Price Control Act by reason of their demand upon plaintiff for amount in excess of O.P.A. price listing for automobile sold to plaintiff, and defendants' answer thereto was in form of general denial, defendants' violation of law as charged was directly put in issue, and burden was upon plaintiff to prove such elements. Code Civ.Proc. § 1981; Emergency Price Control Act of 1942, §§ 1–306, 205(e), 50 U.S.C.A.Appendix, §§ 901–946, 925(e).

2. War 🔑4

In action by buyer of automobile against sellers to recover treble damages upon ground that sale was over ceiling price, where plaintiff proved O.P.A. ceiling price for cash sale of automobile and price stipulated under her conditional sales contract with defendants, but failed to establish that financing charges which made latter price higher than former price were more than they customarily had been, plaintiff failed to make prima facie showing of an overcharge. Code Civ.Proc. § 1981; Emergency Price Control Act of 1942, §§ 1–306, 205(e), 50 U.S.C.A.Appendix, §§ 901–946, 925(e).

3. Evidence 🔑94

Fact that defendants offered evidence on issue raised by plaintiff's pleading and simply traversed in defendants' answer did not shift burden of proof to them on such issue. Code Civ.Proc. § 1981.

4. Evidence 🔑98

If there is no evidence upon an issue, finding should be against party who has burden of proof.

5. War 🔑4

The Emergency Price Control Act giving buyer cause of action for treble damages is penal in nature, and burden is upon plaintiff seeking to bring action thereunder to plead and prove a violation of the Act, even to the extent of negativing the statutory exceptions. Emergency Price Control Act of 1942, §§ 1–306, 201(d), 205(e), 50 U.S.C.A.Appendix, §§ 901–946, 921(d), 925(e).

6. War 🔑4

In action by buyer of automobile against sellers to recover treble damages on ground that sale was over the ceiling price, where plaintiff's theory was that real transaction was a cash transaction and that she signed conditional sales contract upon false representation that it was only a formality, evidence supported finding that true transaction was as evidenced by the conditional sales contract. Emergency Price Control Act of 1942, §§ 1–306, 205(e), 50 U.S.C.A. Appendix, §§ 901–946, 925(e).

CARTER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Mary Heesy against Richard E. Vaughn and another, individually and doing business as Vaughn's, and others, to recover possession of automobile, for damages for breach of contract for sale of automobile to plaintiff and for treble damages and attorney's fees for alleged sale at price above O.P.A. ceiling price. From that portion of judgment for defendants which denied claims for treble damages and attorney's fees, the plaintiff appeals.

Affirmed.

Prior opinion 183 P.2d 942.

Cantillon & Glover, of Los Angeles, for appellant.

Albert G. Bergman, of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff appeals from a judgment denying her claims for relief as correlated with her three purported causes of action against defendants: (1) for possession of an automobile; (2) for damages for breach of contract for the sale of the automobile; and (3) for treble damages and attorneys' fees for the alleged sale at a sum in excess of the

OPA ceiling price. Conceding that "there was a substantial conflict in the evidence" in connection with her "first two causes of action," plaintiff makes "no attack" upon their determination, but she confines her ground of complaint here to the propriety of the court's adverse disposition of her "third cause of action." A review of the record bearing upon the challenged phase of the adjudication furnishes no support for plaintiff's position and compels an affirmance of the judgment.

It appears that plaintiff on or about November 24, 1944, entered into negotiations for the purchase of a 1940 Cadillac automobile at the Vaughn Auto Lot. The parties are in dispute as to the terms of the transaction. In giving her version at the trial, plaintiff stated that "it was a cash deal" of $2250.00 for the car, pursuant to the OPA certificate of available price markup; that she at that time made a down payment of $766.67 and took possession of the car, with the understanding that she could pay the balance "at any time within 30 days"; that within a few days she tendered the sum of $1540.58—as the balance of the purchase price of $2250.00, plus $56.25 sales tax and $1.00 transfer fee—which amount was refused by defendants upon the ground that plaintiff had signed a "conditional sales contract," which called for $766.67 cash and fifteen monthly payments of $154.03 each, or a total purchase price of $3077.12. Plaintiff had, in fact, signed such a time contract and moreover, she had written upon it at the dictation of the salesman the following matter: "I understand my deal to be as follows: My deal is $766.-67 down and fifteen payments of $154.03 each the cash selling price acceptable to Vaughns was $2250.00. I was not required to buy on time. I was not required to finance with Vaughn's or Vaughn's Finance Co. Mary Heesy." Defendants were agreeable at all times to accepting the sum of $2310.45, the balance of the installment purchase price, but not plaintiff's offer of only the balance of the cash price. However, plaintiff was unwilling to pay the difference of $827.12, and the present litigation ensued.

This account of plaintiff's financial dealings with defendants coincided with the theory underlying her alleged third cause of action and on which she mainly relied in presenting her case for redress: that while defendants knew that she was intending to make "a cash deal" on the automobile, she was induced to sign the installment contract by false representations and promises that she could have it at the cash price, and that such practice by defendants—inducing cash buyers to execute installment contracts and then insisting on payment of the full price as therein recited—was a device to evade the Emergency Price Control Act and the regulations thereunder. The findings on this issue were against plaintiff; they were made on conflicting evidence, and they may not be disturbed. But then plaintiff raises the question, assuming that she did voluntarily sign the installment contract, whether the nature of her purchase and the price charged were such as to render the sale one made in violation of the Emergency Price Control Act of 1942. 56 U.S.Stats. at L. 23, 50 U.S.C.Appendix, secs. 901–946. Section 925(e) of the Act creates a statutory cause of action against any person selling a commodity in excess of the prescribed maximum price for that commodity. The cause of action runs in favor of the buyer if the purchase was "for use or consumption other than in the course of trade or business"; otherwise, it runs in favor of the Price Administrator only on behalf of the United States.

The court made findings (1) contrary to the allegations essential to plaintiff's recovery under authority of the Emergency Price Control Act, as the issue of violation of the law was tendered by her third cause of action and defendants' answer in general denial thereof; and (2) in favor of defendants' counterclaim and cross-complaint interposed in reliance upon plaintiff's execution of the conditional sales contract. Thus, the court found that "it [was] not true * * * that plaintiff did not purchase said Cadillac Automobile for use in her business or trade"; that "the maximum ceiling and selling price" of the automobile was $2250.-00, on a cash basis," that is, "full payment * * * in cash at the time of purchase"; that "it [was] true" that defendants "demanded of plaintiff" the sum of $3077.12—"$766.67 already paid by plaintiff" and

"$2310.45"—and that "the difference between" the sum demanded and "the maximum ceiling price for which" the automobile "could be sold for cash" amounted to $827.12; that "defendants * * * knew that the maximum ceiling price * * * for which" the automobile "could be sold for cash was the sum of $2250.00, and further knew that a sale in excess of such ceiling price for cash constituted a violation of the laws of the United States Government," but that the "demand made upon plaintiff as herein alleged was not made in violation of said laws"; that "it [was] not true * * * that defendants * * * wilfully or in any manner violated the terms and provisions of the Emergency Price Control Act of 1942 * * * or that, in accordance with the terms and provisions of said act, defendants are liable in damages to plaintiff in an amount equal to three times the amount asked and charged" ($2481.36), or "in any sum," or "for attorneys fees or costs incurred by plaintiff in the prosecution of this action." The court further found in accord with defendants' counterclaim and cross-complaint: that "defendants * * * sold to and delivered the said Cadillac automobile to plaintiff under [the] terms and conditions set forth in [the] conditional sales contract, for [a] total consideration of * * * $3077.12"—"$766.67 paid * * * at the time of the signing of the aforesaid contract" and "the balance * * * to be paid" in fifteen monthly payments of "$154.03," beginning "on the 1st day of January, 1945"; that "plaintiff has failed and refused to pay any sum or installment whatever accruing under the terms of said contract * * *," and "has made no payment whatsoever on account of said conditional sale contract other than the down payment of * * * $766.67 * * * therein provided and set forth"; that "prior to the commencement of [this] action * * * defendants made demand, in writing, upon plaintiff for the payment of the sum and installment of * * * $154.03 * * * agreed * * * to be paid on the 1st day of January, 1945, * * * but that plaintiff has failed and refused * * * to pay said installment"; and that plaintiff's failure "to comply" with the terms of the contract "terminated" her rights thereunder and defendants, as legal owners of the car, were entitled to the "possession" thereof. Accordingly, judgment was entered in favor of defendants.

It is apparent from the above findings that the court, in disposing of plaintiff's third cause of action, decided the matter against her on two primary points: (1) the absence of her right to maintain the action because she was not a purchaser "for use or consumption other than in the course of trade or business"; and (2) her failure to establish the sale as one in violation of the law. Since the record sustains the trial court's ruling on the second point, it will be unnecessary to consider plaintiff's arguments on the first point.

The significant consideration is the fact that the sale in question was made on a time rather than on a cash basis. The automobile could have been sold without a warranty for $1800.00—the "base price"—or if warranted by the seller, as it was here, the permitted mark-up was twenty-five per cent or $450.00, making the price $2250.00. However, this OPA price listing applicable to a cash transaction did not preclude the negotiation of an installment purchase at a greater amount. On the contrary, Regulation 540 of the Price Administrator, issued under authority of section 921(d) of the Emergency Price Control Act and in furtherance of the purposes thereof, recognized the place of the time contract in the national economy but specified the operative limitations: that a seller was not permitted to require the purchaser to make an installment purchase or to finance a purchase through any particular lending agency or to make "the terms and conditions of sale more onerous to purchasers than they have customarily been, except to the extent allowed by this regulation." So pertinent is the observation in Wilson v. J. E. French Co., 214 Cal. 188, at page 190, 4 P.2d 537, at page 537, in regard to the economic premise of the price disparity prevailing under a conditional sales contract: "The cash price and the term sale price may logically differ. In an automobile transaction, where the article sold is depreciating, it is perfectly legitimate, if not necessary, that a rather wide margin exist between the cash price and the term price, especially where the down payment is small and the possession of the car is given to the purchaser."

In challenging the sufficiency of the evidence to sustain the finding that the sale of the automobile for $3077.12—$827.12 over the cash price listing of $2250.00—was not in violation of the law, plaintiff cites the failure of defendants to establish the validity of their accepted contract price under OPA Regulation 540. It is true that the record is wholly devoid of any evidence as to defendants' customary financing charges prior to the enactment of the price control legislation. While during the trial defendants sought on several occasions to show that the excess of the installment sales price over the cash price represented only their customary business practice for credit transactions, they did not succeed in their undertaking. Thus, defendant Richard A. Vaughn, after testifying that "there is no prohibition [in Regulation 540] for the sale of an automobile over the cash ceiling price; no limit on ceiling price for time with the exception that you may not charge more than you did prior to the time there was a regulation," was asked these questions: "Did you, Mr. Vaughn, in selling this car on a time basis, violate the Office of Price Administration Regulation No. 540 in any respect?" and "To your knowledge does the total amount of the monies to be paid by Mrs. Heesy as the purchaser under that contract violate Regulation 540 in any respect whatsoever?" To each of these questions plaintiff's counsel successfully interposed the objection "as calling for a legal conclusion." Counsel for defendants then made an offer to prove "by the testimony of this witness" that the carrying charge on the sale of the automobile to plaintiff was "not in excess of the differential charged before the effective date of [OPA] limitation but is way under." At that juncture, plaintiff's counsel interjected these observations: "I am inclined to agree with [defendants' counsel] that it would be a defensive matter for his client to show that he was within that regulation. In other words, we make a prima facie showing that he was without the regulation. That, then, as a defensive matter he would be able to show that before ceilings went on cars that he got this much when he made a time deal. * * * if * * * the witness [should] testify orally on that subject then * * * the only way I could deny it would be by subpoenaing in his books and records to refute that claim of the witness." In reply to these comments as to "the matter of [defendants'] custom, with reference to requirements of the Office of Price Administration," the court said: "I have already sustained [the] objection [of plaintiff's counsel] to that proof." And in rejecting the offer of proof, the court added: "It [defendants' custom] is not pleaded and I do not think it is material." By this statement the court was apparently referring to the premise of plaintiff's third cause of action, which was drawn to allege, not a conditional sale the terms of which were "more onerous" than "they [had] customarily been," but rather the negotiation of an installment contract as a fraudulent device whereby an actual cash sale would be made for an amount in excess of the cash ceiling price. With such reminder from the court that its exclusion of the proffered testimony was in accord with the stand maintained by plaintiff's counsel, the latter made no effort to withdraw his objection, to amend the complaint, or to introduce in evidence defendants' "books and records" to establish the "more onerous" terms of the contract in question. Moreover, during the discussion with the court, defendants' counsel said nothing to indicate whether he agreed with the position of plaintiff's counsel that plaintiff had made "a prima facie showing" of an overcharge or that the offered proof was necessary defensive matter. With the record standing in that condition, the trial proceeded to its conclusion.

[1-4] The rule is that the burden of proof lies upon the party presenting "the affirmative of the issue," the one "who would be defeated if no evidence were given on either side." Code Civ.Proc., sec. 1981. Plaintiff's third cause of action alleged defendants' violation of the law by reason of their demand upon plaintiff for an amount in excess of the OPA price listing for the automobile in question, and defendants' answer thereto was in the form of a general denial. Such pleadings put directly in issue the matter of defendants' violation of the

law as charged, and the burden was on plaintiff to produce the evidence material to the proof of this essential element of her cause of action. Plaintiff proved the OPA ceiling price for a cash sale of the automobile and the price stipulated under her conditional sales contract with defendants, but she did not establish that the financing charges which made the latter price higher than the former price were more "than they customarily [had] been." In the absence of proof on this latter point, plaintiff did not make out a violation of the law incident to defendants' negotiation of the sale on a time basis. The fact that defendants offered evidence on the matter of their customary financing charges over the years did not shift the burden of proof to them on an issue raised by plaintiff's pleading and simply traversed in defendants' answer. Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 543, 81 P.2d 533. As the above recital of the record shows, plaintiff's counsel was aware that defendants' denial of a violation of the law would require "subpoenaing in [the] books and records to refute that claim," yet he made no effort in that direction nor did he withdraw the objection blocking defendants' introduction of testimony as to "the differential charged." While plaintiff's counsel claimed a "prima facie showing" on the evidence before the court, defendants' counsel did not indicate agreement with such statement nor admit the "burden of going forward with proof" of lack of violation of the law before the affirmative of the issue was established. The record, therefore, is silent upon a material fact going to the merits of plaintiff's case. In such situation the court properly determined the point in defendants' favor, for "if there is no evidence upon an issue, the finding should be against the party who has the burden of proof." Ellenberger v. City of Oakland, 59 Cal.App.2d 337, 339, 139 P.2d 67, 68; see, also, Rancho Santa Margarita v. Vail, supra, 11 Cal.2d 501, 543, 81 P.2d 533; Rusconi v. California Fruit Exchange, 100 Cal.App. 750, 755, 281 P. 84; Holwick v. Walker, 6 Cal.App. 2d 669, 672, 45 P.2d 374.

[5, 6] In conclusion, and for the purpose of further clarifying the situation presented by the record before us, certain additional observations should be made. The issue presented by cases of this kind is whether there has been a violation of Regulation 540 of the Price Administrator, issued under the authority of section 921(d) of the Emergency Price Control Act. This act is highly penal in nature, and the burden is upon the plaintiff to plead and prove a violation, even to the extent of negativing the statutory exceptions. Lightbody v. Russell, 293 N.Y. 492, 58 N.E.2d 508. It is entirely clear that the regulation contemplated both cash and installment sales; that the stated prices governed cash sales only; and that the only prohibition as to terms and conditions on installment sales was that they could not be "more onerous to purchasers than they [had] customarily been". Section 9. In other words, a plaintiff cannot be said to have made out a prima facie case of a violation by merely pleading and proving an installment transaction, evidenced by a conditional sales contract, at a price higher than the stated price, which stated price obviously governed only cash sales. Plaintiff in the present case was entirely aware of this situation. Throughout the pleadings and during the trial, plaintiff adhered to the theory that the real transaction here was a cash transaction at a price above the cash ceiling price; that she signed the conditional sales contract upon the false representation that it was only a formality; and hence she claimed that "said conditional sales contract is not or was not the contract of purchase and sale between the parties." The trial court found against plaintiff upon the claim that the transaction was a cash transaction, and further found that the true transaction was evidenced by the conditional sales contract. There was abundant evidence to sustain those findings. The trial court also found against plaintiff's claim that there had been a violation of the act. Having proceeded in the trial court upon the sole theory that the true transaction was a cash transaction, at a price above the stated cash ceiling price, rather than a conditional sales transaction, and having lost her case upon conflicting evidence relating to that theory, plaintiff now seeks a reversal upon an entirely different theory which she neither pleaded nor proved. No claim was ever

made in the trial court that if the conditional sales contract evidenced the true transaction, the defendants had violated the act by making the terms and conditions "more onerous to purchasers than they [had] customarily been." It was undoubtedly for this reason that the trial court deemed the testimony offered by defendants regarding their customary practices to be immaterial. Its ruling in exclusion of such evidence was therefore proper under the circumstances. Plaintiff's belated suggestion on this appeal that perhaps she might have been able to prove a violation of the act upon another theory, based upon different pleadings and proof, does not justify a reversal.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR and SCHAUER, JJ., concur.

CARTER, Justice.

I dissent.

The issue in this case is whether a used automobile was sold for a price in excess of that fixed by the Office of Price Administration. It is said in the majority opinion that the car was sold under a conditional sales contract for a total sale price of $3077.12, consisting of a down payment of $766.67 and 15 monthly installments of $154.03 each. It is conceded that that sale price is above the OPA ceiling price. It is claimed, however, that such price cannot be said to be excessive because the sale was on time rather than for cash, unless the seller charged more interest and carrying charges than had been his custom and usage prior to the effective date of the price regulation authorized by the Emergency Price Control Law, 50 U.S.C.A.Appendix, sec. 901 et seq. The majority holds, by assumption, and without discussion, that the burden of proving the prior usage with relation to such charges *rested upon the buyer* rather than the seller. This assumption is based on fundamental fallacies.

It was prima facie a violation of the OPA ceiling price regulation to sell for an excessive price whether the sale was by contract on time or for cash. There is nothing in the Emergency Price Control Law, 50 U.S.C.A.Appendix, sec. 901 et seq., to the contrary and the regulation promulgated by the office of price administration (regulation 540) includes both kinds of sales. In that regulation it is first recited that the "prices" for used cars shall be as set forth in the annexed schedule. It is declared that said regulation applies to "*all* sales by dealers and other persons of used passenger automobiles." Reg. Art. I, sec. 1. [Emphasis added.] And that "No person shall sell or deliver any used car at a price higher than the maximum price permitted by this regulation." Art. I, sec. 2(1). A *sale* "includes sales, dispositions, exchanges, and other transfers and contracts and offers to do any of the foregoing. It includes *conditional sales* and sales under rental contracts, lease agreements or other agreements." Art. I, sec. 15(c). [Emphasis added.] It follows, therefore, that a conditional sale for an over-ceiling price, which is the situation we have here, is prima facie a violation of the regulation. The only indication that there is any relaxation from the foregoing provisions appears in the section on "evasions" listing *specific prohibitions* in *addition* to selling at a price above that fixed by the regulation. This section provides that it is a violation of the regulation to charge a price above the maximum, and that the "seller is prohibited from providing for purchase of the used car by a lessee under a rental contract at an agreed valuation which together with the amount paid for the rental is higher than the applicable maximum price at the time the rental contract is entered into, and from the making the terms and conditions of sale more onerous to purchasers than they have customarily been except to the extent allowed by this regulation." Art. I, sec. 9. The regulation makes no provision authorizing the seller to add carrying charges to the maximum sale price when the sale is made on time under a conditional sales contract or otherwise. From all that appears in the conditional sales contract here involved, the price quoted is the *sale price* of the car, nothing is said about any other charges. There is no basis for assuming that any such charges, if made, are the same as the seller previously made. How then can it possibly be said that the buyer did not prove enough when he established that there was a sale, the amount of the sale price, and that such price was over the ceiling? If the seller had any justification for the prima facie overcharge he had the burden of showing it.

It should be remembered that the Emergency Price Control Law must be liberally construed to effectuate its remedial purposes. Automatic Fire Alarm Co., v. Bowles, Emp., Em.App., 143 F.2d 602; Bowles v. Sago, D.C., 65 F.Supp. 178; Pfalzgraf v. Voso, 184 Misc. 575, 55 N.Y. S.2d 171; Bowles v. Haymond, D.C., 59 F.Supp. 482. In furtherance of that policy it has been held that the *seller* has the *burden* of proving that his overcharge was not wilful and not the result of failure to take practicable precautions (Duffy v. Howell, 73 Cal.App.2d Supp. 990, 166 P.2d 411; Monahan v. Jacbos & Politi, 187 Misc. 332, 66 N.Y.S.2d 207); that he sold a different variety of the product for the year involved (Bowles v. Chamberlain, D.C., 65 F.Supp. 245), and that he had a ceiling price different than other manufacturers. Bowles v. Leventhal, D.C., 61 F.Supp. 144. These rules are in harmony with the general principle that the burden of proof rests upon the one who is in a superior position to bear it. 31 C.J.S., Evidence, § 113.

Obviously the seller was in a superior position to prove what his practices were before the advent of price regulation. Apparently in the instant case the defendant seller attempted to prove that factor and the plaintiff buyer agreed that he should but the court erroneously refused to permit it.

It is asserted that the plaintiff purchased the car for use in her business and thus the sale was excepted from the price regulation. I am satisfied with the discussion of that subject in the decision of the District Court of Appeal in this case which held the evidence was insufficient to establish that defense. Heesy v. Vaughn, Cal.App., 183 P.2d 942.

The majority opinion holds that the buyer's (plaintiff's) sole theory for recovery was that the sale was for cash and not on a conditional sale contract, and that she cannot now change her position. The obvious answer to that holding is that the seller-defendant squarely put the conditional sale contract in issue and relied thereon, and, as seen from the foregoing discussion, the case made thereon was a prima facie violation of the price control law. In other words, defendant proved plaintiff's case, thus he could not be injured by any alleged change of theory on the part of plaintiff. It is difficult to see how that argument justifies a holding that plaintiff is bound by her theory of the case, when such a holding will permit defendant to evade the provisions of the price control act and result in a miscarriage of justice.

For the foregoing reasons I would reverse the judgment and remand the cause for a new trial.

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31 Cal.2d 673

HALL et al. v. CHAMBERLAIN et al.

L. A. 20145.

Supreme Court of California, in Bank.
April 23, 1948.

Rehearing Denied May 20, 1948.

1. Taxation 🔑688

In action to quiet title to realty sold and conveyed to the state for delinquent taxes, curative acts that went into effect on August 4, 1943 and thereafter were of no avail to defendants as holders of a tax deed from the state, where realty was conveyed by owner to plaintiffs on July 9, 1943. St.1943, p. 1993; St.1945, p. 2176.

2. Taxation 🔑688

In action against holders of a tax deed from the state to quiet title to realty, defendants could not invoke curative act that went into effect after conveyance of realty by owner to plaintiffs, merely because plaintiffs did not record their deed until after effective date of the curative act, where there was no evidence that the state when it took deed or when curative act became effective was acting in good faith without notice of plaintiffs' interest. St.1943, p. 1993; Civ.Code, §§ 1214, 1215.

3. Taxation ⚷627

Where published delinquent tax list on which sale of realty by operation of law to the state was based, listed delinquency as $56.46 and addenda to delinquent tax list gave the sum of $58.46 under column designated "Least Amount Accepted at Sale", notice was defective and such defect was fatal to the tax sale. Pol. Code 1937, §§ 3764, 3817d.

4. Taxation ⚷788(4, 5)

Code section providing that a tax deed to the state is conclusive evidence of the regularity of all other proceedings from assessment of assessor, inclusive, up to execution of deed, refers to proceedings other than those mentioned in the preceding section providing only that such deed is primary evidence of certain enumerated matters. Pol.Code 1937, §§ 3786, 3787.

5. Taxation ⚷788(5)

A tax deed to the state is prima facie but not conclusive evidence of due publication of delinquent tax list and the giving of notice. Pol.Code 1937, §§ 3786, 3787.

6. Taxation ⚷734(7), 788(4, 5)

Defect in published delinquent tax list which gave notice of deeding of property to the state, was not cured by tax deed to the state, since the tax deed was only prima facie evidence of the regularity of the tax proceedings. Pol.Code 1937, § 3786.

7. Taxation ⚷745

Tax deed from state to purchasers was not conclusive evidence of regularity of proceedings from and including tax assessment, where statute making deed conclusive evidence did not become effective until after rights were acquired by grantees from the owner of the realty, who sought to have their title quieted on ground that tax sale was void because of defective notice of sale. Revenue and Taxation Code, § 3711.

8. Limitation of actions ⚷182(5)

Generally, if a statute of limitation is not pleaded, it is waived.

9. Limitation of actions ⚷182(5)

In action to quiet title, wherein plaintiffs to prevail, had burden to negative tax deed to defendants, defendants, by failing to plead one-year limitation statute providing that a proceeding based on an alleged invalidity or irregularity of any deed to the state for taxes can only be commenced within one year after recording of deed to state, waived right to rely on such statute. Revenue and Taxation Code, § 3521.

TRAYNOR and EDMONDS, JJ., dissenting.

◆

Appeal from Superior Court, Ventura County; Ernest D. Wagner, Judge.

Action by B. P. Hall and others, a copartnership doing business under the firm name and style of Hall, Marquardt & Company, against Henry Chamberlain and others to quiet title to realty. From a judgment for plaintiffs, defendants appeal.

Judgment affirmed.

Prior opinion, 183 P.2d 743.

Edward C. Maxwell, of Oxnard, William T. Selby, M. Arthur Waite, Dist. Atty. and Julien G. Hathaway, Deputy Dist. Atty., all of Ventura, for appellants.

Wm. MacKenzie Brown, of Los Angeles, and Chas. F. Gerard, of Ventura, for respondents.

CARTER, Justice.

This appeal involves an action to quiet title by plaintiffs based upon their claim of ownership of real property by virtue of a title derived from the predecessor of the record owner (that is, the owner whose title was claimed to have been divested by proceedings for sale of the property for delinquent taxes). Defendants, Henry and Katherine Chamberlain, based their claim of title on a tax deed from the state. Plaintiffs prevailed in the court below, the court finding fatal irregularities in the delinquent tax sales and tax deeds.

It appears that in 1932 Pan American Bank of California (the predecessor in title of plaintiffs) was the owner of the property. The taxes assessed on the property for that year not having been paid, the property was sold to the state by operation of law in 1933. The court found that the California Bank became the owner of the property on February 14, 1938 by "Commissioner's Deed on Foreclosure," evidently the result of a mortgage foreclosure in which the Pan American Bank of California was the owner-mortgagor and the California Bank the mortgagee. Five years having elapsed since the sale to the state, the tax collector conveyed the property to the state by tax deed on July 1, 1938. On July 9, 1943, the California Bank conveyed the property to plaintiffs. Following delinquent tax proceedings the state sold the property to the Chamberlains and executed a tax deed to them on March 20, 1944. The curative acts (statutes healing irregularities in tax sale proceedings) relied upon by the Chamberlains as remedying any irregularities in the tax sales and deeds, became effective on August 4, 1943, and thereafter. (Stats. 1943, ch. 458; Stats.1945, ch. 1134.)

[1] Before discussing the alleged irregularities in the tax sales and deeds it must first be observed that the curative acts (supra) are of no avail to the Chamberlains in view of the rule announced by this Court in Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531. In that case some of the property was sold to the state for delinquent taxes in 1912 and the rest in 1918. The first part was sold and conveyed by the state to a private purchaser in 1917, and the remainder in 1923. Like in the instant case, defendants rested their title on tax deeds. Plaintiffs' title was based upon an interest gained from a sheriff's sale and deed in a mortgage foreclosure proceeding in 1937, the mortgage having been executed in 1915. The essence of the holding in the Miller case, as later stated by this Court, was that: "The decision * * * withheld from the application of the [curative] act, in accordance with the limitation of section 2(b) thereof, the vested right of the plaintiff which had *intervened prior to the effective date of the curative statute.*" [Emphasis added.] City of Compton v. Boland, 26 Cal.2d 310, 313, 314, 158 P.2d 397, 399. An effort is made to distinguish the Miller case on the ground that there the mortgagee had an interest prior to the institution of tax proceedings, but even assuming that would make a difference, the mortgage in the Miller case was executed after the sale by operation of law to the state for delinquent taxes. In any event we fail to see what difference it makes. As seen from the facts in the Miller case and the interpretation of its holding in City of Compton v. Boland, supra, the essential test is whether the owner (that is, the person having title at the time delinquent tax proceedings were initiated) has thereafter transferred to a third person or such person has acquired his title to the property prior to the effective date of the curative acts.

[2] It is argued by the Chamberlains that because the deed from the California Bank to the plaintiffs was not recorded until August 16, 1943, after the effective date of the curative act, the Miller case is not controlling in view of the provisions of the recording acts voiding unrecorded interests in real property as against a subsequently recorded interest acquired in good faith and for a valuable consideration (see, Civ.Code, secs. 1214, 1215). Their claim appears to be that when the 1943 curative act became effective, the tax deed to the state, although theretofore executed and recorded, became valid, and as it was recorded before the deed from the California Bank to plaintiffs, the latter is ineffective. This argument cannot prevail for the obvious reason, that the burden was on the Chamberlains of proving that the state, when it took the deed or when the curative act became effective, was acting in good faith—without notice of plaintiffs' interest, (Bell v. Pleasant, 145 Cal. 410, 78 P. 957, 104 Am.St.Rep. 61; Thomas v. Vanlieu, 28 Cal. 616; Chapman v. Ostergard, 73 Cal.App. 539, 238 P. 1081; Lindley v. Blumberg, 7 Cal.App. 140, 93 P. 894) and there is no evidence on that subject.

Among the irregularities urged in the tax sale process, is the claim that the notice of the sale to the state, culminating in the deed to the state on July 1, 1938, failed to specify the correct amount of taxes for which the property was assessed and sold. The published delinquent tax list in 1933 upon which the sale by operation of law was based, lists the delinquency as $56.46, which presumably embraced all taxes, penalties and costs due on the property as prescribed by section 3764 of the Political Code in 1933. The addenda to the delinquent tax list which was published in 1938 and lead to the deed to the state of July 1, 1938, stated that notice was given that on July 1, 1938, the following described property would be deeded to the state on July 1, 1938, unless redeemed. Under a column designated "Least Amount Accepted at Sale," and opposite a description of the property here involved, appears the sum of $58.46 ($2 more than the amount in the first mentioned delinquent list). At the time of the publication and the execution of the deed to the state, provision was made for deeding the property to the state rather than a sale to a private purchaser (Pol.Code, sec. 3817d, as of 1938), and the notice of such deeding was required to be published in the addenda and to state the amount for which the property was sold to the state (that is, previously sold by operation of law). (Pol. Code, sec. 3817d, as of 1938.) As seen, the addenda in the instant case did not purport to give the amount for which the property was sold to the state but listed the amount under the heading "Least Amount Accepted at Sale" and the amount was $2 greater than the amount for which the property was sold to the state.

[3] The delinquent list with the addenda constituted the only notice to the owner that his property would be deeded to the state. The notice was defective in that it failed to state correctly the amount for which the property was sold to the state and the designation of the nature of the figure stated. It therefore failed to comply with the statute. Such failure to comply with the statute in regard to notice is fatal. Knoke v. Swan, 2 Cal.2d 630, 42 P.2d 1019, 97 A.L.R. 841; Gottstein v. Kelly, 206 Cal. 742, 276 P. 347; Hall v. Park Bank of Los Angeles, 165 Cal. 356, 132 P. 452; Miller v. Williams, 135 Cal. 183, 67 P. 788; Warden v. Gries, 120 Cal. App. 187, 7 P.2d 342; Warden v. Broome, 9 Cal.App. 172, 98 P. 252.

[4-6] The Chamberlains argue, however, that the deed to the state was conclusive evidence of compliance with the law. At the time of the deed to the state the statutes provided that the deed was "primary evidence that: 1. The property was assessed as required by law; 2. The property was equalized as required by law; 3. The taxes were levied in accordance with law; 4. The taxes were not paid; 5. At a proper time and place the property was *sold as prescribed by law,* and by the proper officer; 6. The property was not redeemed; 7. The person who executed the deed was the proper officer; 8. Where the real estate was sold to pay a poll-tax or taxes on personal property, that the real estate belonged to the person liable to pay the tax." [Emphasis added.] (Pol.Code, sec. 3786.) The following section reads: "Such deed, duly acknowledged or proved, is (except as against actual fraud) conclusive evidence of the regularity of all *other* proceedings, from the assessment of the assessor, inclusive, up to the execution of the deed." [Emphasis added.] (Pol.Code, sec. 3787.) These sections must be read together, and it is apparent that section 3787, which gives the effect of conclusive evidence as to all *other* proceedings, must refer to proceedings *other* than those mentioned in section 3786. As to the latter, the deed is only prima facie evidence. Bernhard v. Wall, 184 Cal. 612, 194 P. 1040; McDonough v. Cooper, 179 Cal. 384, 177 P. 153; Hayes v. Ducasse, 119 Cal. 682, 52 P. 121. It is apparent, therefore, that under those sections (Pol.Code, secs. 3786, 3787) the deed is prima facie but not conclusive evidence of due publication of the delinquent tax list and the giving of notice (see, Gramson v. Geniella, 209 Cal. 610, 289 P. 817; Scott v. Beck, 204 Cal. 78, 266 P. 951; Bell v. Brigance, 74 Cal.App. 322, 240 P. 50) and where a notice is mailed, a direction to return it to the sender if not delivered within a certain time (which is different than that fixed in the statute) is fatal. Joslin v. Shaffer, 66 Cal.App. 69, 225 P. 307. It must, therefore, follow, that *the defect in the published delinquent tax list* which gave notice of the deeding of the property to the state, being embraced with-

in the italicized portion of subdivision 5 of section 3786 as above quoted, was not cured by the deed here involved which was only prima facie evidence of the regularity of the tax sale proceedings. For those reasons we hold that the notice here involved, which failed to comply with the statute (specify correct amount for redemption of property), constituted a defect in the sale, and hence the property was not sold at a proper time and place as required by law under subdivision 5 of section 3786. The presumption to the contrary is rebuttable and falls under section 3786 rather than section 3787. It was rebutted in this case.

[7] It is urged that the deed from the state to the Chamberlains executed in 1944 was conclusive evidence of the regularity of all the proceedings from and including the assessment. But in 1938 when the property was deeded in the foreclosure proceeding to the California Bank, such tax deed were merely prima facie evidence of the regularity of such proceedings. (Pol.Code, sec. 3897, as it read in 1938.) Although such a deed was later made conclusive evidence (see, sec. 3711, Rev. & Tax.Code, formerly Pol.Code, sec. 3836.1 as added in 1939, Stats.1939, ch. 529), that change in the law, if applied to the facts of this case, would have the same effect as a curative act. Before it was made conclusive evidence the interest of California Bank had intervened, and under Miller v. McKenna, supra, its interest was vested and could not be divested by the change in the law. The plaintiffs, although they acquired their title after the change in the evidentiary effect of the deed, acquired the right of the California Bank. If that were not true the vested interest of an intervening owner would be of small value, inasmuch as any change in the law validating the tax proceedings after he acquired his interest would deprive him of the right to transfer such interest. Such cases as Mercury Herald Co. v. Moore, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111; Bray v. Jones, 20 Cal.2d 858, 129 P.2d 357; South San Joaquin Irr. Dist. v. Neumiller, 2 Cal.2d 485, 42 P.2d 64, and Buck v. Canty, 162 Cal. 226, 121 P. 924, to the effect that the state may, at any time after property is deeded to the state, change the method of its disposition and cut off the right to redeem, do not alter the result. Here we have statutes purporting to cure defects, which, to be applicable here, and cut off an intervening vested right, must cure a fatal defect in the proceeding for sale of the property to the state.

Finally, it is urged that plaintiffs' action is barred by the limitation provision found in the Revenue and Taxation Code, reading: "A proceeding based on an alleged invalidity or irregularity of any deed to the State for taxes or of any proceedings leading up to the deed can only be commenced within one year after the date of recording of the deed to the State in the county recorder's office or within one year after June 1, 1941, whichever is later.

"Sections 351 and 358, inclusive, of the Code of Civil Procedure do not apply to the time within which a proceeding may be brought under the provisions of this section." (Rev. & Tax.Code, sec. 3521.)

It is conceded that the time limitation specified in said section had elapsed when the instant action was commenced. However, prior to the decision of this case by the District Court of Appeal, Second Appellate District, Division Two, (Hall et al. v. Chamberlain et al., Cal.App., 183 P.2d 743) no mention of the above quoted section was made by any of the parties nor was any claim made by them that the proceeding was not timely brought. The Chamberlains first relied upon that section in this Court after the District Court of Appeal had made it a ground for its decision.

[8] The general rule is firmly established that if a statute of limitation is not pleaded it is waived. (16 Cal.Jur. 603–604.) In the instant case plaintiffs' action was phrased in the conventional terms of one to quiet title. Inasmuch as tax deeds were outstanding, for plaintiffs to prevail it was incumbent upon them to negative such deeds, and the Chamberlains should have pleaded the statute of limitation to that issue. Even if we put the matter in a different way, that is, assuming that plaintiffs would rely upon their conveyance

from the record owner, defendants would counter with the tax deeds, plaintiffs would assert the invalidity of those deeds, and defendants would reply that the statute had run, the need for pleading the statute still exists.

[9] To escape the effect of the general rule the Chamberlains advance the argument that statutes of limitation may be pleaded by pleading the facts rather than making a specific reference to the statute involved. They rely upon such cases as Osborn v. Hopkins, 160 Cal. 501, 117 P. 519, Ann.Cas.1913A, 413; Tofte v. Tofte, 12 Cal.App.2d 111, 54 P.2d 1137; Franklin v. Southern Pacific Co., 40 Cal.App. 31, 180 P. 76, and refer to the allegations in the answer of defendant Ventura County: "That on or about the 1st day of July, 1938, the defendant Robert S. Cooney, duly elected, qualified and acting Tax Collector of the County of Ventura, did execute and deliver to the State of California a deed conveying to the State of California the property described in said paragraph III, for delinquent taxes as provided by law, said deed being recorded in Volume 498, at page 380, Official Records of Ventura County; that thereafter, on or about March 20, 1944, in the manner provided by law, the said property was sold by the said Robert S. Cooney to the defendant Henry Chamberlain; that thereafter the said Robert S. Cooney duly made and executed a deed conveying said property to the said Henry Chamberlain, said deed being recorded in Volume 691, at page 283, Official Records of Ventura County." Assuming defendants, the Chamberlains, may take advantage of the pleading of the codefendant, Ventura County, yet the "facts" are not pleaded. The essence of the rule requiring the statute to be pleaded is to apprise plaintiff that defendant intends to rely upon that defense. While it may be that inferentially, the times being stated, it follows that the action was not timely filed under the statute, yet more is required. There must be some expression that lateness of the commencement of the action is a ground of defense. It is the contention of the Chamberlains that the effect of section 3521 is to vest title in the state, but it is manifestly nothing more than an ordinary statute of limitation, that is, a personal defense which may be waived.

The judgment is affirmed.

GIBSON, C.J., and SHENK, SCHAUER and SPENCE, JJ., concur.

TRAYNOR, Justice.

I dissent.

Had the property remained in the hands of the owner-mortgagor until the effective date of the Curative Act of 1943, the deed to the state would unquestionably have been validated by that act. (Miller v. McKenna, 23 Cal.2d 774, 781, 782, 147 P.2d 531, and cases there cited.) Under the majority opinion, however, the rights of plaintiffs and their immediate predecessor in interest, whether or not they had actual or constructive notice of the claims of the state, are greater than those of the owner-mortgagor, even though they took title to the land subject to the prior claims of the state for the delinquent taxes.

The question whether plaintiffs or their predecessor are bona fide purchasers is not considered in the majority opinion or in Miller v. McKenna, supra, upon which it relies, although the rule relied upon is designed solely for the protection of innocent third persons. McFaddin v. Evans-Snider-Buel Co., 185 U.S. 505, 510, 511, 22 S.Ct. 758, 46 L.Ed. 1012; United States Mortgage Co. v. Gross, 93 Ill. 483, 494, affirmed 108 U.S. 477, 2 S.Ct. 940, 27 L.Ed. 795; see 16 Am.Jur. 449. The foreclosure deed to the California Bank was executed after the taxes had been delinquent for nearly five years. Plaintiff did not even show that the California Bank acquired the foreclosure deed without actual notice of the claim of the state for taxes, which was a matter of public record. The plaintiffs themselves acquired whatever rights the California Bank had in the property after the deed to the state had been recorded, and there is no showing that they acquired that interest without actual notice of the claims of the state.

Under established principles of law plaintiffs could have no rights against the state superior to that of their predecessors in interest. The court in this case and in the Miller case creates for plaintiffs a vested right in the minor defects in the tax deed to the state. I can find no basis in reason or authority for the creation of this right and must therefore dissent for the reasons set forth in my dissenting opinion in Miller v. McKenna, supra, 23 Cal.2d 774, 792, 147 P.2d 531.

EDMONDS, J., concurs.

Rehearing denied; TRAYNOR, J., dissenting.

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85 Cal.App.2d 171

SUN INDEMNITY CO. OF NEW YORK v. INDUSTRIAL ACC. COMMISSION et al.

No. 13720.

District Court of Appeal, First District, Division 1, California.

April 27, 1948.

Rehearing Denied May 27, 1948.

Hearing Denied June 24, 1948.

1. Workmen's compensation 🔑1939

The sole function of the District Court of Appeal in workmen's compensation case is to determine whether there is substantial evidence, including permissible inferences, to support findings of Industrial Accident Commission since court is not permitted to interfere with finding which is based upon conflicting evidence or conflicting inferences which might fairly be deduced therefrom, even though court might consider that weight of evidence is to the contrary.

2. Workmen's compensation 🔑1529

Finding of the Industrial Accident Commission that employee's insanity resulted from injury occurring in the course of and arising out of employment was sustained by substantial evidence.

3. Workmen's compensation 🔑1158

Finding of the Industrial Accident Commission that employee was incompetent at time of execution of compromise and release was sustained by substantial evidence.

4. Workmen's compensation 🔑1939

The weight of the opinions of expert witnesses is to be determined by the Industrial Accident Commission.

5. Workmen's compensation 🔑1935

The District Court of Appeal must take the testimony most strongly supporting the ruling of the Industrial Accident Commission.

6. Workmen's compensation 🔑976

As respects right to recover for employer's failure to furnish medical treatment, an injured employee who was being treated by doctor provided by employer or insurance carrier was not justified in going to a doctor of her own choosing either because doctor theretofore treating her was away or because she was dissatisfied with his treatment without communicating with the office of the doctor who had been treating her or the insurance carrier and requesting that another doctor be provided particularly in view of fact that she had made appointment to see former doctor on his return, which she failed to keep. Labor Code, §§ 4600, 4601.

7. Workmen's compensation 🔑978

Even an emergency does not justify an employee in remaining over a long period of time under the care of emergency doctor at least without notifying employer's insurance carrier so as to be entitled to recover for employer's failure to furnish medical treatment and particularly where the employee in order to continue on with her new doctor broke an appointment with the one provided by the carrier. Labor Code, §§ 4600, 4601.

◆

Certiorari by Sun Indemnity Company of New York to review a decision of the Industrial Accident Commission of the State of California setting aside on the application of Jessie D. McKinney and Jessie D. McKinney, an incompetent, by her guardian ad litem and trustee George B. McKinney, an order approving compromise and release between such incompetent and insurance carrier on ground of incompetency at time the document was executed.

Annulled in part and otherwise affirmed.

W. N. Mullen, of San Francisco, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondents.

BRAY, Justice.

The questions presented for determination by this court are whether the evidence supports the findings of the commission (1) that applicant's present mental condition resulted from her industrial injury; (2) that she was incompetent or insane when she signed a compromise and release agreement; and (3) that the employer, on or about July 1, 1944, failed to provide her with necessary medical treatment?

The commission found that on October 19, 1943, applicant sustained injury occurring in the course of and arising out of her employment, by slipping on some grease on linoleum and falling, "striking her back with resultant back pathology and insanity." The fact of injury is not disputed. The main attack is on the finding that such injury caused her insanity. Applicant, from the date of her fall until February 29, 1944, remained away from work. She worked part time from March 21, 1944, to September 15, 1944, when she was again forced to leave her employment. On April 24, 1945, applicant and the carrier entered into a compromise and release agreement, approved by the commission, by which she received $1,200 in addition to the cost of medical treatment to that date and compensation theretofore paid in the sum of $561.45. On June 29, 1945, applicant was declared incompetent. On application by her guardian the commission set aside the order approving the compromise and release upon the ground that she was incompetent at the time she executed the document.

[1, 2] The sole function of this court is to determine whether there is substantial evidence, including permissible inferences, to support the findings of the commission, as we are not permitted to interfere with a finding which is based upon conflicting evidence or conflicting inferences which might fairly be deduced therefrom. Cal. Shipbuilding Corp. v. Ind. Acc. Comm., 27 Cal.2d 536, 165 P.2d 669; Riskin v. Ind. Acc. Comm., 23 Cal.2d 248, 144 P.2d 16; Pacific Lbr. Co. v. Ind. Acc. Comm., 22 Cal.2d 410, 139 P.2d 892; Associated Ind. Corp. v. Ind. Acc. Comm., 18 Cal.2d 40, 112 P.2d 615; Schaller v. Ind. Acc. Comm., 11 Cal.2d 46, 77 P.2d 836. Even though we might consider that the weight of evidence is to the contrary, there is substantial evidence from which the commission could find, or at least reasonably infer, that applicant's insanity resulted from her fall.

The case contains a long, involved history, several transcripts, and voluminous medical reports. Under the above rule, only the facts favorable to applicant will be set out. Contradictory evidence will be omitted. In her fall applicant received a compression fracture of the 12th dorsal vertebra. She remained in the St. Francis Hospital from the time of her injury until some time in January, 1944, when she was dismissed, wearing a brace. On January 27 she was readmitted because of pain in the back and groin due to the brace. She left the hospital on February 9. On March 21, she returned to work, but was able to work only a couple of hours a day, having to spend "a lot of time lying down and resting." April 5, when seen by Dr. Atkinson, applicant complained of pain in the lumbar region, with fatigue on walking and chronic constipation, the latter aggravated since her injury. A somewhat similar situation was found by Dr. Dresel on April 21. June 26, applicant was still complaining of soreness and weakness in her back. August 10, x-rays showed "an irritable duodenum consistent with small ulceration or gall-bladder disease." September 30, she was hospitalized with "acute enteritis" and in an apparent "state of nervous exhaustion." She was dismissed October 11, but readmitted because of "spastic colon." She was discharged November 25. September 30, Dr. Taylor found applicant to be still suffering considerable pain in her back. On August 3, she had seen Dr. Taylor, complaining of considerable distress and pain in her back. He found that she was "decidedly in need of medical attention and orthopedic care." He referred her to Dr. Abbott, who provided her with another brace. Dr. Abbott stated that on December 4 "Her symptoms are due at present to the compression of the twelfth thoracic body, plus a very faulty posture." Dr. Taylor found trouble in her gastro-intestinal tract. She was in a "rather rundown nervous condition." "* * * I cannot help but feel that this fracture which caused her considerable pain and with which she tried to work over a long period of time has upset her nervous system to such an extent that it is very much responsible for her present condition, illness, etc." In December she was hospitalized at Ross General Hospital by Dr. Tyler "for observation as to her vague abdominal symtoms of nausea and pain and because of the possibility of a fecal impaction." Dr. Pate saw her three or four times in December. He stated: "* * * I thought she was a psychoneurotic and that the condition dated back to the time of her injury." Moreover, he felt that it was entirely possible that her mental state was the early manifestation of a true phychosis. February 1, 1945, she still had considerable pain in her back, requiring a sleeping pill at night for relief. She was again hospitalized from February 17 to February 22, as apparently she had been unable to keep anything on her stomach and "she complained bitterly of various abdominal pains." She was incoherent at times and exceedingly nervous. She was readmitted February 26, because of incessant vomiting, and a "tentative diagnosis was made of extreme psychoneurosis." About March 9 she attempted suicide and was admitted to a hospital, remaining until April 19. Dr. Schmidt diagnosed her on March 23 as "sufficiently depressed, neurotic and melancholic to be mentally unstable." Dr. Schmidt testified on November 24: "* * * I feel definitely her injury was part of the cause of her nervous breakdown or her mental instability, in spite of the fact that she didn't say a word to me about it." May 24, she was admitted to Stanford Hospital, where she refused to eat, stating she wanted to die. She did not leave her bed to perform bodily functions. Dr. Lubin, who saw her there, "felt that the injury to her back, her subsequent hospitalizations and unemployment could have been a cause of her mental disorder." On June 29, under a petition for commitment to the State Hospital, the medical examiners made the diagnosis of depressive mania and she was committed. At the Napa State Hospital on July 2, 1945, a diagnosis of manic-depressive psychosis, depressed type, was made.

Dr. Alfred S. Oliver of the staff of that hospital testified that it was his opinion that there was a direct relation between the injury to her back and her present mental status. It was his opinion that her mental condition had existed for a period of "months" prior to her commitment to the Napa State Hospital. While about a year and a half before her accident, applicant had been in the St. Helena Sanitarium for what was diagnosed as "chronic constipation, arterial hypotension and nerve exhaustion," and while there was medical evidence to the effect that applicant's condition did not result from the accident (Dr. Schaller stated that "her fractured vertebra was but an incident and not a determining factor in her present condition"), the evidence before summarized is substantial and sufficient, if believed (and it was believed by the commission), to support its findings.

The Compromise Agreement.

[3] The same is true of the finding that at the time of the execution of the compromise agreement, April 24, 1945, applicant was incompetent. To show that there was substantial evidence to support this finding it is only necessary, in addition to the foregoing evidence, to refer to the following: Dr. Schmidt, who examined applicant on March 22, 1945, about a month before the date of the agreement, testified that when he saw her she was mentally unstable to the extent that she was incompetent to "handle her own problems" and that if she received no psychiatric treatment in that month "there is not one chance in a hundred she recovered sufficiently to have mental stability" at the time of executing the agreement. Mrs. Welch, who cared for applicant from April 19, 1945, until May 24, 1945, testified that applicant was unable to prepare her own food, was depressed and anxious, and "sometimes she would stare at the ceiling and refuse to answer questions." Although prior to her injury she was a smart looking, neatly dressed businesswoman, at the time she habitually wore an old coat and safety pins, with a rag over her head. Dr. Lubin saw applicant at Stan-

ford Hospital approximately one month after she signed the document. While he refused to give an opinion on her competency prior to his seeing her, he felt that she was incompetent at the time he saw her and advised that a guardian be appointed and that she be committed to a state hospital. He stated that she had shown a progressive decline during the preceding year or so. Dr. Oliver, who saw her at the Napa State Hospital from July 2 on, testified that in his opinion her mental condition had existed for a period of "months" prior to her commitment. Dr. Oliva testified that he saw applicant March 9, the day after she took poison, and she was under his care until April 19 (five days before she signed the release). He definitely felt her to be of unsound mind, and tried to have her committed.

The testimony of other doctors and lay witnesses to the effect that applicant was of sound mind at the time of the execution of the release created a conflict in the evidence, but the commission resolved that conflict in favor of applicant. The medical picture as disclosed by the evidence introduced by applicant shows a situation in which after the accident her nervous condition grew progressively worse until insanity resulted.

[4] Petitioner contends that Dr. Schmidt's opinion that applicant's present condition was induced by her injury was without foundation, and cites various cases which hold that opinions of medical experts must be based upon facts in the case. While certain facts concerning applicant's prior condition and treatment were unknown to him at the time he saw applicant, after these facts were called to his attention he continued in his opinion that she was mentally unsound when he saw her. "The opinions of qualified medical witnesses with reference to the origin and cause of the injury are valid evidence which will support an award. [Citing cases.]" Pacific Emp. Ins. Co. v. Ind. Acc. Com., 19 Cal.2d 622, 629, 122 P.2d 570, 573, 141 A.L.R. 798. The weight of the evidence of experts is to be determined by the commission. State Comp. Ins. Fund v. Ind. Acc. Comm., 195 Cal. 174, 231 P. 996.

Medical Treatment.

[5-7] The commission found that "The employee was required to and did secure medical treatment commencing July 1, 1944, upon failure of the defendants to provide the same," and allowed applicant the value of such medical treatment. The evidence upon which this finding is based is the testimony of applicant herself. In March, 1944, she told the carrier that she wanted another doctor, so on April 21, 1944, she was examined by Dr. Dresel, another of the carrier's physicians. Dr. Dresel did not testify, but a letter from him to the carrier dated May 3 is in evidence, in which he opines that she is able to return to work. "However, she feels that she needs a little further treatment, such as some supplementary physiotherapy following work. This could be given to her with some benefit, as it would strengthen her muscles." The letter ends up: "I would like to review this patient again in one month's time." The last time he treated her was the end of June, and he then told her he was going away for two months. She had an appointment to see Dr. Dresel on his return, but did not wait for him. On August 3 she went to Dr. Taylor "Because I had this pain all the time * * * The insurance company's doctors were not helping me any and I had to go to some doctor; that's all." She was then asked if Dr. Dresel was treating her and she said that he was but "went on a two months vacation and left me." "I spoke to Dr. Taylor about Dr. Dresel being away and when he came back I had an appointment with him." Dr. Taylor told her it would not be necessary for her to keep the appointment as Dr. Abbott and he were now taking care of her case. When specifically asked if she had an appointment with Dr. Dresel she testified: "The insurance man 'phoned and asked me to come in and I said I would wait until I saw Dr. Dresel before I came in; it was nearly that time." When asked if she was satisfied with the treatment given her by Dr. Dresel up to the time he went on his vacation she said that he did not do anything and she was still in pain. In spite of this she demurred in no way to his making an appointment with her more than

two months off, and when most of that time had elapsed informed the carrier that she would wait for Dr. Dresel's return. She again testified that she was not satisfied with Dr. Dresel's treatment so she went to Dr. Taylor. When asked if she asked the carrier for a change of doctors after seeing Dr. Dresel "in May," she said, "No, I didn't; Dr. Dresel was away." Later in her testimony she stated that she last saw Dr. Dresel in late June. Again when asked why she went to Dr. Taylor she stated that she was in pain and "wanted relief." She stated that she saw Dr. Taylor in June. Upon being shown a letter from Dr. Taylor in which he stated that he first saw her on August 3, she then admitted that was the date when she first saw him. When asked if Dr. Dresel had returned at that time she stated, "No, sir. I don't know that he had, I will say, as far as I know." As Dr. Dresel last saw applicant about June 26, it must be assumed that the two months he took for vacation were July and August. As we have to take the testimony most strongly supporting the ruling of the commission, we must assume that Dr. Dresel had not returned from his vacation at the time when, in August, applicant first saw Dr. Taylor. The situation as disclosed by the evidence, then, is that applicant at the end of June saw Dr. Dresel. He told her he was to be away for two months, and made an appointment to see her on his return. Apparently the time of such arrangement was satisfactory to her, for she made no complaint of it, and when the insurance man 'phoned her to come in she said she would wait until she saw Dr. Dresel as "it was nearly that time." It is apparent also that her main reason, expressed more than once, for seeing another doctor, was that she did not feel that the insurance company's doctors were helping her. The situation here did not justify her going to a doctor of her own choosing without first either contacting Dr. Dresel's office or the carrier and requesting that another doctor be provided. If she was dissatisfied, as the evidence discloses she was, she was not entitled to employ a doctor until she had first given the employer or his carrier the opportunity of providing further care. This they had done, when three or four months before she had complained of the service she was getting and was sent by them to Dr. Dresel. A reading of her testimony shows that her main reason for going to Dr. Taylor was her dissatisfaction. She was not too sure that Dr. Dresel was away. It is unfortunate that Dr. Dresel was not called to state during what period he was away. However, assuming that she felt in need of treatment before the date of his return, or her appointment with him, that would not justify her going to another doctor and continuing with him and other doctors and incurring great hospital expense, breaking her appointment with Dr. Dresel, and not informing the employer, or the carrier, of this fact.

Section 4600 of the Labor Code provides that medical, surgical and hospital treatment, etc., reasonably required, shall be provided by the employer. "In the case of his neglect or refusal *seasonably* to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment." (Emphasis added.) There is no contention here that the employer *refused* such treatment. It cannot be said that there was any neglect seasonably to do so. Taking the case in the strongest aspects the evidence will bear, it really resolves into a question of whether, where the employer has provided the employee with a doctor, who, after notifying the employee of his impending two months absence and after making an appointment agreed to by the employee, leaves without designating a substitute doctor, it is such neglect which under the Labor Code, justifies the employee in going to a doctor of her own choosing, without first giving either the office of the designated doctor or the carrier an opportunity to provide medical assistance. Of course, we are not discussing here a sudden emergency. While applicant claims to have been in pain, there is no evidence that it was any different or greater pain than she claimed to be suffering at all times. Moreover, even an emergency does not justify an employee in remaining over a long period of time under the care of the emergency doctor, at least without notifying the carrier, and particularly, where, as here, the employee, in order to continue on with her new doctor, broke an appointment with the one provided by the carrier.

The case which we have found which tends to give the strongest support to respondents' position is Massachusetts, etc., Ins. Co. v. Pillsbury, 170 Cal. 767, 151 P. 419, however, the facts in that case are quite different from those here. There the employee was dissatisfied with the advice given him by the surgeon selected by the carrier, who had amputated his crushed finger. After he had communicated that dissatisfaction to the carrier, he was directed to go to another surgeon. However, that surgeon was out of town, apparently indefinitely. He then went to his family physician. The court upheld an award for the latter's fees, holding that the carrier had neglected seasonably to provide the treatment reasonably required, as the employee "was not bound to wait indefinitely until [the surgeon] should return." Page 771 of 170 Cal., page 421 of 151 P. There the employee needed urgent and continuous treatment. Here the employee did not require such treatment at the time in question and agreed to the date of the deferred appointment without demur. Moreover, the evidence shows that while applicant was under the care of Dr. Dresel she was also under the care of Dr. Atkinson, whom she had seen on or about April 5. No reason is given why she did not go to Dr. Atkinson instead of to a new doctor. In Gildersleeve v. Ind. Acc. Comm., 212 Cal. 763, 1 P.2d 1, the only case cited by respondents, the tender of medical aid was not made to the employee personally and also was contingent upon the employee first getting a certain finding from the commission. The court upheld a ruling of the commission to the effect that this did not constitute a true tender of medical treatment.

Schneider on Workmen's Compensation Law, vol. II, 2d Ed., sec. 491, p. 1626, states: "When the employee abandons the medical and hospital service supplied by the employer, and secures other treatment of his own choice, he does so at his own risk, and cannot have the expense of the service of his own choice allowed against the employer or insurer unless he can satisfy the commission that the service supplied by the employer was inadequate or inefficient to an extent that justified the employee in abandoning it."

That the employee who desires to change physicians must notify the employer (or the carrier) is shown by section 4601 of the Labor Code, which provides that "If the employee so requests, the employer shall tender him one change of physicians" and provides the method to be followed. The section also provides that the employee in any serious case is entitled *on request* to the additional services of a consulting physician.

There can be situations which would constitute neglect under the Labor Code, for a physician furnished by the employer to leave an employee for two months without designating a substitute, but under the circumstances here such is not the case. The employee did not need immediate treatment. This is shown by the acquiescence of the patient in the appointment date and the fact that when called by the carrier's agent near the date of the appointment, applicant stated that she would wait for Dr. Dresel's return. Far from neglecting applicant, the carrier was solicitous enough to contact her voluntarily.

The following portion of the findings and award of the commission is annulled, to wit: "3. The employee was required to and did secure medical treatment commencing July 1, 1944, upon failure of the defendants to provide the same, and is entitled to recover the reasonable value thereof, the same to be fixed by this commission subsequently upon request and the filing of itemized bills in the event that the parties are unable to adjust the bills out of Court." In all other respects, the award is affirmed.

PETERS, P. J., and WARD, J., concur.

HURT v. SUSNOW.

Civ. 13603.

District Court of Appeal, First District, Division 1, California.[1]

April 27, 1948.

Hearing Granted June 24, 1948.

1. Physicians and surgeons 🔑18(6)

In malpractice action, normally plaintiff must prove that defendant physician failed to have and use degree of learning and skill ordinarily possessed by physicians of good standing practicing in community.

2. Negligence 🔑121(2)

The "res ipsa loquitur" doctrine normally applies where accident that occurred was such that in ordinary course of events, defendant using ordinary care, it would not have happened, and where instrumentality causing accident was under control of defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

3. Physicians and surgeons 🔑18(6)

Where hospital furnished silver nitrate pencil used by surgeon in treatment of patient preparatory for surgery to remove varicose veins, but nurse asked surgeon if equipment furnished was that desired and was informed that it was and patient was burned by the solutions, the "res ipsa loquitur" doctrine was applicable, even though hospital was not a party defendant.

4. Negligence 🔑134(1)

The res ipsa loquitur doctrine raises an inference of negligence, and such inference is itself evidence which alone may support a verdict for plaintiff.

5. Negligence 🔑121(2)

Where res ipsa loquitur doctrine is applicable, defendant must show that he exercised due care under circumstances or show cause of accident, and such showing is a matter of defense.

6. Trial 🔑156(2)

A party is not bound by any portion of testimony of adverse party called under statute permitting examination of adverse party, and in determining whether a favorable inference or presumption has been rebutted so as to warrant a nonsuit such adverse testimony must be disregarded. Code Civ.Proc. § 2055.

7. Appeal and error 🔑989

On appeal from order granting defendant's motion for nonsuit, only that portion of testimony of defendant, who was called under statute permitting examination of adverse party, favorable to plaintiff could be accepted, and balance was required to be disregarded. Code Civ.Proc. § 2055.

8. Appeal and error 🔑927(3), 989

On appeal from judgment of nonsuit, court may consider only evidence most favorable to appellant and must indulge in every reasonable inference raised by such evidence.

WARD, J., dissenting.

* * *

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Malpractice action by Sara P. Hurt against David A. Susnow. Judgment for defendant, and plaintiff appeals.

Reversed.

Fabian D. Brown, of San Francisco, for appellant.

Robert L. Lamb and Theodore Tamba, both of San Francisco, for respondent.

PETERS, Presiding Justice.

The plaintiff, Sara P. Hurt, brought this malpractice action for damages alleged to have been suffered as the result of the negligence of the defendant, Dr. David A. Susnow, in rendering medical services to plaintiff. At the close of plaintiff's case defendant moved for a nonsuit, which motion was granted on the ground that plaintiff had failed to prove that defendant was negligent. Plaintiff appeals.

[1] The record shows that plaintiff failed to prove by evidence, that the defendant doctor failed to have and use the degree of learning and skill ordinarily possessed by physicians of good standing prac-

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[1] Dismissed Aug. 24, 1948.

ticing in San Francisco. That is normally required. Lashley v. Koerber, 26 Cal.2d 83, 156 P.2d 441; Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695; McCurdy v. Hatfield, Cal.Sup., 183 P.2d 269; Lawless v. Calaway, 24 Cal.2d 81, 147 P.2d 604; Rasmussen v. Shickle, 4 Cal.App.2d 426, 41 P.2d 184. The only question on this appeal is whether this defect in proof was excused under the doctrine of res ipsa loquitur.

The record discloses the following facts: Plaintiff testified that she is 32 years of age; that for some time prior to April of 1946 she was suffering from a varicose vein condition in both legs from her thighs to her ankles; that a doctor other than defendant directed her to the defendant for surgery to correct the condition; that defendant made a visual examination at his office and directed that she enter a hospital; that she entered the designated hospital at about 3 p. m. on April 23, 1946; that defendant visited her at about 6 p. m., and had her stand beside the bed while he again examined her legs; that defendant then directed a hospital nurse to bring him a small basin of water and a silver nitrate pencil; that the nurse returned with such articles and asked the doctor if this was the pencil he wanted and he replied that it was; that he then dipped the pencil into the water and outlined on her legs the veins that were to be removed; that there were four such markings made on each leg, two above the knees and two below; that shortly thereafter her legs began to burn and became very inflamed around the areas marked by defendant; that in a short time blisters formed at such areas; that the pain was severe; that the head nurse and the house doctor tried to alleviate the pain with a lotion, but it did not help much; that the defendant arrived the next morning to operate, but, upon examining her legs, told her that the operation could not be performed because the burns were too severe, and she was sent home; that she was forced to remain away from work for two weeks, and wore bandages for over a month; that defendant treated her several times during that month; that one leg at the time of trial (May, 1947), some thirteen months after the date she was burned, was still scarred from such burns; that prior to the trial she had had the varicose veins removed by surgery performed by a doctor other than defendant.

The only other witness was defendant who was called by plaintiff under § 2055 of the Code of Civil Procedure. He testified that he had examined plaintiff in his office, had recommended surgery and had plaintiff sent to the hospital; that he examined her at the hospital on the evening before the operation was to be performed; that he marked off on plaintiff's legs with a silver nitrate solution the areas where the surgery was to be performed; that he marked four such areas on each leg; that silver nitrate produces a stain that lasts ten to fourteen days; that the purpose of such markings is to outline the veins to be removed; that when the patient is lying down (on the operating table) the veins tend to relax and disappear, but when the patient is standing the veins stand out and are easily seen; that ordinarily there is no unfavorable reaction from the application of silver nitrate; that plaintiff, however, had such a reaction and was burned; that plaintiff had a very fair skin; that he knew when he applied the solution to plaintiff's legs that some people are susceptible to silver nitrate burns, but he did not then know whether or not plaintiff was susceptible to such burns; that he procured the silver nitrate from the stock supply of the hospital; that he did not know who manufactured it, and made no attempt to ascertain that fact; that the "stock" was 100% silver, but that the solution made therefrom "is a relatively weak solution"; that when he used the solution he was not aware of its "potency," and made no attempt to investigate after the plaintiff was burned to ascertain the strength of the solution; that he knew "from experience what it will do." The doctor also testified that it was the common practice of doctors in San Francisco to mark off the area to be operated upon with a silver nitrate solution, and that it was also standard practice in this area to mark off the operating area without first making any tests. He stated that prior to his treatment of plaintiff he had performed three or four hundred such operations and that everything he did in this case was performed according to the ordinary standard of practice of surgeons in San Francisco; that in the past several years no other doctor had performed such an operation in his presence.

On this evidence the court granted defendant's motion for a nonsuit "on the general grounds of insufficiency of the evidence to establish a case against the defendant." Inasmuch, as already pointed out, it is the burden of the plaintiff in such a case to show that the doctor did not possess and use the degree of skill possessed by similar practitioners in the same locality, and since no such evidence was offered, it is obvious that unless the doctrine of res ipsa loquitur is applicable the trial court correctly granted the nonsuit.

[2, 3] It is our opinion that the doctrine in question is applicable to the facts here involved. That doctrine normally applies where the accident that occurred was such that in the ordinary course of events, the defendant using ordinary care, it would not have happened, and where the instrumentality causing the accident was under the control of the defendant. Gerhart v. Southern Cal. Gas Co., 56 Cal.App.2d 425, 132 P.2d 874.

The first requirement is clearly met in the instant case. Certainly it cannot be contended that the severe burning of patients is the normal result of the preparatory treatment for surgery to remove varicose veins. If the solution was too strong defendant or someone was negligent. If plaintiff was peculiarly susceptible to silver nitrate it was a question of fact whether defendant should have taken steps to ascertain that fact. At any rate, such susceptibility would be a matter of defense. Where the patient, under various circumstances, has been burned during medical treatment it has been established that such a factual situation raises the doctrine. Thus the doctrine has been applied where the patient was burned by the application of hot compresses or heating apparatus (Timbrell v. Suburban Hospital, Inc., 4 Cal. 2d 68, 47 P.2d 737; Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436); where the patient was burned by an infra-red lamp (McCullough v. Langer, 23 Cal.App. 2d 510, 73 P.2d 649); and where the patient was burned by the operation of an X ray machine. Moore v. Steen, 102 Cal.App. 723, 283 P. 833; Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107. All of these cases were cited with approval in Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695. Defendant does not challenge the contention that the accident here involved is not the normal result of the treatment administered, but contends that the doctrine is not applicable because it was not shown that the doctor had "exclusive" control of the silver nitrate solution. In this connection defendant points out that the evidence shows that the hospital furnished the silver nitrate pencil to the defendant. The evidence also shows that the nurse asked the doctor if the equipment so furnished was what he desired, and the doctor replied that it was.

There can be no doubt that in the early cases on this subject in this state it was held that, before the doctrine could arise, it was necessary for the plaintiff to show that the instrumentality causing the accident was within the exclusive control of the defendant. This rule, in the early cases, was rigidly applied. See cases collected and commented upon in a note in 33 Cal. L. Rev. 331, p. 332, notes 2 to 7. In recent years, however, the courts have greatly relaxed the rigidity of this requirement. Thus, in cases where a common carrier and a vehicle collide and the plaintiff was riding in the common carrier, the plaintiff has been allowed to apply the doctrine against the defendant operating the common carrier (St. Clair v. McAlister, 216 Cal. 95, 13 P.2d 924), or against both the carrier and the driver of the other vehicle. Dieterle v. Yellow Cab Co., 34 Cal.App.2d 97, 93 P.2d 171. The doctrine has even been applied where two private vehicles collide in favor of a plaintiff passenger in one of the vehicles. Godfrey v. Brown, 220 Cal. 57, 29 P.2d 165, 93 A.L.R. 1092. Obviously, in such cases two independent agencies over which no one person had "exclusive" control may have caused the injury, but, nevertheless, the doctrine was held applicable.

There are cases even more clearly in point. It has been held that the doctrine applies against both the doctor and the hospital in a malpractice action (Armstrong v.

Wallace, 8 Cal.App.2d 429, 47 P.2d 740), and likewise applies in such cases against the surgeon, three attending physicians and two nurses. Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258. In the last cited case, 25 Cal.2d at page 491, 154 P.2d at page 690, it is stated:

"We have no doubt that in a modern hospital a patient is quite likely to come under the care of a number of persons in different types of contractual and other relationships with each other. For example, in the present case it appears that Doctors Smith, Spangard and Tilley were physicians or surgeons commonly placed in the legal category of independent contractors; and Dr. Reser, the anesthetist, and defendant Thompson, the special nurse, were employees of Dr. Swift and not of the other doctors. But we do not believe that either the number or relationship of the defendants alone determines whether the doctrine or res ipsa loquitur applies. Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for failure in this regard. Any defendant who negligently injured him, and any defendant charged with his care who so neglected him as to allow injury to occur, would be liable. The defendant employers would be liable for the neglect of their employees; and the doctor in charge of the operation would be liable for the negligence of those who became his temporary servants for the purpose of assisting in the operation.

"In this connection, it should be noted that while the assisting physicians and nurses may be employed by the hospital, or engaged by the patient, they normally become the temporary servants or agents of the surgeon in charge while the operation is in progress, and liability may be imposed upon him for their negligent acts under the doctrine of respondeat superior. Thus a surgeon has been held liable for the negligence of an assisting nurse who leaves a sponge or other object inside a patient, and the fact that the duty of seeing that such mistakes do not occur is delegated to others does not absolve the doctor from responsibility for their negligence. [Citing cases]."

Defendant, in his brief, seemingly agrees that such cases would be applicable here had the hospital been made a party defendant, but contends that, since the hospital was not made a party defendant, the doctrine is not applicable. The point is without merit. If the hospital had been made a party defendant and the doctrine had thus been applicable, it would throw the burden of explanation on both defendants. Such explanation would show that either the doctor, or the hospital, or both, or neither was negligent. Of course, in the event that the jury believed the last possibility, and such belief was based on substantial evidence, there would be no liability, but that is a matter of defense. If the explanation showed that the doctor and the hospital were both negligent, both would be jointly and severally liable. In such event, one tort feasor who is severally liable has no legal right to complain that another tort feasor is not joined. If the explanation shows that the hospital alone was negligent, the doctor would not be liable. On the retrial, of course, the doctor may show, by way of defense, if he can, that he had no right to control the nurse, and that the negligence, if any, was the fault of such nurse or of the hospital. Thus under no conceivable circumstances could the failure to join the hospital have adversely affected the rights of the doctor.

[4–7] The doctrine of res ipsa loquitur being applicable, it was error to have granted the nonsuit. The doctrine raises an inference of negligence, and such inference is itself evidence which alone may support a verdict for plaintiff. Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; see cases collected 19 Cal.Jur. p. 717, § 132. It is the duty of the defendant to rebut such evidence by showing that he exercised due care under the circumstances, or, in some cases at least, by showing the cause of the accident. Dierman v. Providence Hospital, Cal.Sup., 188 P.2d 12. Such a showing is, of course, a matter of defense. While it is true that in this case defendant, while testifying under § 2055 of the Code of Civil Procedure, described what he did and declared that he had used the standard of care usually employed by doctors in this locality, such testimony, even if it be conceded that it would support a finding of due care had such finding been made by the trier of the facts, would do no more than raise a conflict with the inference of negligence raised by the doctrine of res ipsa loquitur. At least since the case of Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, it has been the settled law of this state that a party is not bound by any portion of the testimony of an adverse witness called under § 2055, and that, in determining whether a favorable inference or presumption has been rebutted so as to warrant a nonsuit, such adverse testimony must be disregarded. The rule is thus succinctly stated, at page 559 of 212 Cal., at page 537 of 299 P. of that opinion: "Our conclusion, therefore, is that the testimony of a witness called under section 2055 of the Code of Civil Procedure is not, when weighing it against a presumption, to be considered, nor is it really, evidence of the party calling such witness, and that the evidence thus produced does not dispel a presumption contrary thereto, but in favor of the party calling such adverse witness. This testimony is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or, if the case is before a jury, by the jury. When the action is before a jury, however, the duty of weighing this evidence is with the jury and not with the court upon a motion for a nonsuit or directed verdict." On this motion for a nonsuit we must accept only that portion of defendant's testimony favorable to plaintiff and disregard the balance. Farmer v. Fairbanks, 71 Cal.App.2d 70, 162 P.2d 26; Estate of Lances, 216 Cal. 397, 14 P.2d 768; People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029; Lawless v. Calaway, 24 Cal.2d 81, 147 P.2d 604.

The dissenting opinion states that the doctrine of res ipsa loquitur is not applicable to the facts here involved, and bases this conclusion on testimony produced by the defendant while testifying under § 2055. Thus, it is therein stated: "This statement is in accord with the *defendant's testimony* that it is common practice to apply silver nitrate prior to such an operation and that ordinarily no irritation or burns result therefrom." (Italics added.) And again it is stated: "* * * medical evidence showed that the injury occurred although defendant used the degree of learning and skill ordinarily possessed by physicians of good standing" in the area. The "medical evidence" thus referred to was that of defendant. Thus, the dissent is predicated upon the theory that the doctrine is not applicable because the testimony of defendant given under § 2055 demonstrates that the doctrine does not apply. This violates the rule set forth above that on an appeal from a nonsuit, testimony of a defendant given under § 2055 must be completely disregarded. It also should be mentioned that no attempt is made in the dissent to distinguish the cases cited supra holding that burns caused by hot compresses, heating apparatus, X rays and infra-red lamps raise the doctrine.

The dissenting opinion quotes at length from Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, in support of its position that, in the instant case, the inference of negligence raised by the doctrine of res ipsa loquitur was rebutted as a matter of law by the opinion evidence of the defendant to the effect that he used due care. While the broad language quoted from the Engstrom case has frequently been explained and distinguished by the courts, even the Engstrom case does not stand for the rule that the opinion or statement of the one charged with negligence that he was not negligent rebuts, as a matter of law, the inference of negligence created by the doctrine of res ipsa loquitur. The true rule is that normally whether an inference has or has not been rebutted is a question of fact. The trier of the fact is the exclusive judge of the credibility of the witnesses and may consider the interest of the witness in the result of the case. Normally, the trier of the fact may reject in toto the testimony of a witness, even though the witness is uncontradicted. "To these well settled rules there is a common sense limited exception which is aimed at preventing the trier of the facts from running away with the case. This limited exception is that the trier of the facts may not indulge in the inference when that inference is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. The trier of the facts may not believe impossibilities. When the rebutting testimony is of such a nature that the minds of reasonable men cannot differ on the subject then the trier of the facts cannot, and should not be permitted to, indulge in the inference. If there is any reasonable doubt as to whether the inference, as a matter of law, has been rebutted, that doubt should be resolved in favor of submitting the question to the trier of the facts." Hicks v. Reis, 21 Cal.2d 654, 660, 134 P.2d 788, 791. That is the way the rule of the Engstrom case has been explained and limited by the later Supreme Court cases. In addition to the Hicks case, see Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868.

In the instant case it would violate every principle of equity, fairness, logic and the law to hold that the testimony of defendant, a biased prejudiced witness with a direct interest in the outcome of the case, rebutted, as a matter of law, the inference of negligence raised by the doctrine of res ipsa loquitur.

[8] This being an appeal from a judgment of nonsuit we are required to consider only the evidence most favorable to appellant and must indulge in every reasonable inference raised by such evidence. There being an inference of negligence raised by the doctrine of res ipsa loquitur it was error to have granted the nonsuit.

The judgment appealed from is reversed.

BRAY, J., concurs.

WARD, Justice (dissenting).

I dissent.

Negligence upon the part of a physician or surgeon is not presumed from the mere happening of an injury to a patient under his care. Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695. The manner and circumstances of the injury, however, may justify the application of the doctrine of res ipsa loquitur. As stated in the majority opinion, "That doctrine normally applies where the accident that occurred was such that in the ordinary course of events, the defendant using ordinary care, it would not have happened, and where the instrumentality causing the accident was under the control of the defendant. Gerhart v. Southern Cal. Gas Co., 56 Cal.App.2d 425, 132 P.2d 874."

In support of the conclusion that the first requirement is met in the instant case, it is stated that, "Certainly it cannot be contended that the severe burning of patients is the normal result of the preparatory treatment for surgery to remove varicose veins." This statement is in accord with the defendant's testimony that it is common practice to apply silver nitrate prior to such an operation and that ordinarily no irritation or burns result therefrom. It does not follow that because an injury does not ordinarily occur, in the rare instance in which an injury does occur the doctrine of res ipsa loquitur will permit the recovery of damages. "To say that the doctrine of res ipsa loquitur allows the recovery of damages in every case where an injury does not ordinarily occur, would place a burden upon the medical profession which the law has not heretofore laid upon it. Moreover, such a rule is not justified by either reason or authority." Engelking v. Carlson, supra, 13 Cal.2d at page 220, 88 P.2d at page 697.

The majority opinion recognizes that several cases upon which it relies were cited in Engelking v. Carlson, supra, 13 Cal.2d at page 221, 88 P.2d at page 698. The Supreme Court there discusses those cases as follows: "It is true that in a restricted class of cases the courts have applied the doctrine of res ipsa loquitur in malpractice cases. But it has only been invoked where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised. For example, it has been applied where a sponge was left in the body of the patient after closing an operative incision. (Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740); where the patient was burned by the application of hot compresses or heating apparatus. (Timbrell v. Suburban Hospital, 4 Cal.2d 68, 47 P.2d 737; Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436; McCullough v. Langer, 23 Cal.App.2d 510, 73 P.2d 649); where the patient was burned through the operation of an X-ray machine (Moore v. Steen, 102 Cal.App. 723, 283 P. 833; Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107); and where the patient sustained an infection through the use of an unsterilized hypodermic needle. Barham v. Widing, 210 Cal. 206, 291 P. 173. In each one of these situations the rule was applied because common knowledge and experience teaches that the result was one which would not have occurred if due care had been exercised. But the present case shows an entirely different situation. Here what was done lies outside the realm of the layman's experience."

In the present case, as in Engelking v. Carlson, supra, medical evidence showed that the injury occurred although defendant used the degree of learning and skill ordinarily possessed by physicians of good standing of the locality in which he was practicing. "The law has never held a physician or surgeon liable for every untoward result which may occur in medical practice. It requires only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient. Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654. Whether he was done so in a particular case is *a question for experts and can be established only by their testimony.* Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Patterson v. Marcus, 203 Cal. 550, 256 P. 222. And when *the matter in issue is one within the knowledge of experts only and is not within the common knowledge of laymen,* the expert evidence is conclusive. William Simpson Const. Co. v. Industrial Accident Comm., 74 Cal. App. 239, 240 P. 58; Johnson v. Clarke, 98 Cal.App. 358, 276 P. 1052. Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. On the contrary, in the absence of expert evidence, it will be presumed that a physician or surgeon exercised the ordinary care and skill required of him in treating his patient. Donohoo v. Lovas, 105 Cal.App. 705, 288 P. 698." (Emphasis added) Engelking v. Carlson, supra, 13 Cal.2d at pages 220, 221, 88 P.2d at page 697.

As was recently stated by the Supreme Court in McCurdy v. Hatfield, Cal.Sup., 183 P.2d 269, at page 271: "A physician is required to have the degree of learning and skill possessed by physicians of good standing practicing in the same locality, and it is his duty to use ordinary care and diligence in applying that learning and skill in the treatment of patients. Lashley v. Koerber, supra, 26 Cal.2d 83, 89, 156 P.2d 441; Lawless v. Calaway, 24 Cal.2d 81, 86, 147 P.2d 604."

The majority opinion contains a paragraph attacking the dissent. With respect to an alleged failure of the dissent to distinguish certain cases, it may be observed that Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740; Timbrell v. Suburban Hospital, Inc., 4 Cal.2d 68, 47 P.2d 737; Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436; McCullough v. Langer, 23 Cal.App.2d 510, 73 P.2d 649; Moore v. Steen, 102 Cal.App. 723, 283 P. 833, and Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107, are distinguished as involving situations in which a layman could say "as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised." Engelking v. Carlson, supra, 13 Cal.2d at page 221, 88 P.2d at page 698. Upon a mere showing that burns resulted from defendant's application of silver nitrate, can a layman say that the result was one which would not have occurred if due care had been exercised? On the contrary, "the present case shows an entirely different situation. Here what was done lies outside the realm of the layman's experience." Engelking v. Carlson, supra, 13 Cal.2d at page 221, 88 P.2d at page 698.

Reference to the Engelking case also serves to answer the contention that the dissent disregards the rule "that on an appeal from a nonsuit, testimony of a defendant given under sec. 2055 must be completely disregarded." Plaintiff in that case brought suit for physical injuries alleged to have been sustained as the result of the negligence of two physicians who were joined as defendants. A nonsuit was granted as to one defendant, and as to the other a verdict was directed in his favor. The defendant for whom a verdict was directed was called by the plaintiff under section 2055. His testimony concerning what was done by him and his codefendant and concerning the procedure ordinarily employed by surgeons performing an operation of the kind submitted to by the plaintiff is set forth in the opinion of the Supreme Court. In affirming the judgments entered on the nonsuit and directed verdict, the Supreme Court makes the statements above quoted. A precedent has therefore been set by which the appellate court may examine the medical evidence in order to determine whether "the accident was such that in the ordinary course of events, the defendant using ordinary care, the accident would not have happened." Gerhart v. Southern Cal. Gas Co., supra, 56 Cal.App.2d at page 431, 132 P.2d at page 877.

The rule of Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, has not been extended to the extent stated in the majority opinion, "that a party is not bound by any portion of the testimony of an adverse witness called under § 2055, and that, in determining whether a favorable inference or presumption has been rebutted so as to warrant a nonsuit, such adverse testimony must be disregarded." The *inference of negligence* raised by the doctrine of res ipsa loquitur does not have the concomitants of the presumptions listed in Code of Civil Procedure section 1963. "Generally speaking, * * * it may be said that a *presumption* is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of such party's own witness, when such testimony was not the product of mistake or inadvertence. Smellie v. Southern Pac. Co., supra; Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 8, 210 P. 269; Pitt v. Southern Pac. Co., 121 Cal.App. 228, 232–235, 9 P.2d 273; Peters v. California Bldg.-Loan Ass'n, 116 Cal.App. 143, 154, 2 P.2d 439; Fortier v. Hogan, 115 Cal.App. 50, 56, 57, 1 P.2d 23. However, a presumption is not dispelled by evidence produced by the opposite party but remains as evidence in the case sufficient to support a judgment, except in rare cases in which the rebutting evidence is absolutely conclusive. Smellie v. Southern Pac. Co., supra. * * * In passing, it should also be mentioned that the testimony of a witness called under section 2055 of the Code of Civil Procedure is not binding on the party calling him, and for the purpose now under consideration he is not considered to be a witness of the party so calling him, and therefore his testimony does not serve to dispel a presumption upon which such party relies. Smellie v. Southern Pac. Co., supra, 212 Cal. at page 555, 299 P. 529. On the other hand, an *inference* is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side. Maupin v. Solomon, 41 Cal.App. 323, 324–326, 183 P. 198; Martinelli v. Bond, 42 Cal.App. 209, 183 P. 461." Engstrom v. Auburn Auto Sales Corp., 11 Cal.2d 64, 70, 77 P.2d 1059, 1063.

However, even if the testimony of the defendant must be disregarded, the plaintiff has failed to make a sufficient showing for the application of the doctrine of res ipsa loquitur. Gerhart v. Southern Cal. Gas Co., supra, 56 Cal.App.2d at page 431, 132 P.2d at page 877 cited by the majority holds "that *for a plaintiff to make out a case entitling him to the benefit of the doctrine, he must prove* (1) that there was an accident; (2) that the thing or instrumentality which caused the accident was at the time and prior thereto under the exclusive control and management of the defendant; (3) *that the accident was such that in the ordinary course of events, the defendant using ordinary care, the accident would not have happened.*" (Emphasis added) Here, as in the Gerhart case, "The failure to prove all of the necessary elements set forth above would, in the instant case, entitle the defendant to judgment, and, of course, would not cast any burden upon the defendant to meet any inference of negligence created under the rule." Gerhart v. Southern Cal. Gas Co., supra, 56 Cal.App.2d at page 431, 132 P.2d at page 877.

The trial court correctly granted the motion for a nonsuit upon the ground that plaintiff had failed to prove that defendant was negligent.

85 Cal.App.2d 246

BROWN v. TROPHY-CRAFT CO.

Civ. 16393.

District Court of Appeal, Second District, Division 2, California.

April 29, 1948.

Hearing Denied June 24, 1948.

1. Appeal and error 🔑80(3)

If a decree in equity is designated "interlocutory", but directs a further hearing, it may be an adjudication so final as to constitute a "final judgment" for purpose of appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

2. Appeal and error 🔑80(3)

An equitable decree, so complete that it leaves no issue for future consideration except compliance with its terms, is a "final decree" without regard to designation given by court, but, if further judicial action is necessary for a final determination, the decree is "interlocutory".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Decree" and "Interlocutory Decree".

3. Appeal and error 🔑80(4)

A judgment directing the taking of an account with direction that referee should report result of accounting to court was not an appealable "final judgment". Code Civ.Proc. § 645.

4. Appeal and error 🔑458(2)

Where judgment appealed from was not final and appealable because it directed an accounting, appellant was not entitled to a writ of supersedeas pending final determination of appeal.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Suit by Carl W. Brown against the Trophy-Craft Company. From the judgment, the defendant appealed, the plaintiff filed a motion to dismiss the appeal, and the defendant filed a petition for a writ of supersedeas.

Application for writ of supersedeas denied and the appeal dismissed.

George Boshae, of Los Angeles, for appellant.

Borah & Borah, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Respondent has moved the court to dismiss the appeal herein on the ground that the orders appealed from are not appealable. Simultaneously, appellant presents its petition for a writ of supersedeas "staying all proceedings including the taking of an account of defendant's books pending the final determination of the appeal."

[1, 2] The bases of the motion for dismissal are that the judgment is interlocutory and that it can be reviewed on appeal only after the final judgment; that a judgment which fixes the liability and the rights of the parties but refers the cause for some judicial purpose such as the statement of an account is not a final judgment and is not appealable. Appellant contends that the correct rule for determining whether an interlocutory judgment is appealable is to ascertain first the nature of such decree. If a decree in equity is designated "interlocutory" yet directs a further hearing for certain purposes, it may be an adjudication so final and complete as to constitute it a final judgment with reference to its appealability. If it is so complete

that it leaves no issue for future consideration except compliance with its terms then it is final without regard to the designation given it by the court, but if further judicial action is necessary "to a final determination of the rights of the parties, the decree is interlocutory." Bakewell v. Bakewell, 21 Cal.2d 224, 225, 130 P.2d 975; Lyon v. Goss, 19 Cal.2d 659, 670, 123 P.2d 11; Gunder v. Gunder, 208 Cal. 559, 561, 282 P. 794; Hollar v. Saline Products, Inc., 3 Cal.2d 80, 81, 43 P.2d 273. In Bessinger v. Grotz, 52 Cal.App.2d 379, 380, 126 P.2d 355, 356, 127 P.2d 66, the above rule was approved, but the appeal was dismissed because the judgment decreed that plaintiff have leave to redeem, appointed a referee, and directed him "to take * * * an accounting of all sums received by her * * * from the use and occupation * * * that when such accounting is and has been rendered and received and settled that a final judgment be entered, fixing, in accordance with the findings and conclusions of law herein, the sum for which said property may be redeemed." In that case the findings did not state the amount received by the defendant under the contract or that the defendant had received no other sums for use and occupation of the land, leaving matters yet to be determined by the referee whose accounting required the court's approval. Such further judicial action destroyed the finality of the decree.

The leading authority holding that a judgment for an accounting is not final is Gunder v. Gunder, 208 Cal. 559, 282 P. 794. After cancelling certain conveyances as void the judgment required *defendant* to render a full, complete and true account to a referee of all moneys and bonds received by the defendant from plaintiff during their marriage, and of all proceeds from the sale of bonds, of money, profits or proceeds derived from the operation of the Elsinore Gas Works; that he render a full, complete and true account of the true condition of the accounts and business of the Elsinore Gas Works; that upon rendition of said account of said referee and the court's approval thereof plaintiff shall be given a final judgment. Much judicial action was to be taken after the interlocutory decree in that case. In Pomper v. Superior Court, 191 Cal. 494, 496, 216 P. 577, the general rule was declared to be that where a decree is made fixing the liability and rights of the parties and referring the case to a master or subordinate tribunal for a judicial purpose, such as the statement of an account upon which a further decree is to be entered, the decree is not final; it is not appealable merely because it has settled the basic issue involved in the case. It is not final if it has expressly left for future determination the rights of the parties with relation to the rents, issues, and profits which was one of the issues raised by the complaint. Under such circumstance the whole case is still before the court for final adjudication.

[3] The instant judgment is similar to those in the Bessinger, Gunder and Pomper cases in that the account to be taken by the referee is "1. * * * of all the dealings and transactions with respect to the agreement between plaintiff and defendant. * * * 2. * * * that he shall report the result of such accounting to this court." Moreover, section 645, Code of Civil Procedure, provides that the findings of the referee may be excepted to and reviewed in like manner as if made by the court, and when the reference is to report the facts, "the finding reported has the effect of a special verdict." Thus before the findings of the referee bind the parties they are subject to exceptions by the parties and to approval by the court. The report of the result of such accounting is obviously to permit the court to approve or reject it. Therefore, the instant decree is not final. Pomper v. Superior Court, supra; Gunder v. Gunder, supra; Lyon v. Goss, 19 Cal.2d 659, 123 P.2d 11; Middleton v. Finney, 214 Cal. 523, 526, 6 P.2d 938, 78 A.L.R. 1104; Bessinger v. Grotz, 52 Cal.App.2d 379, 381, 126 P.2d 355, 127 P.2d 66.

Appellant contends that the judgment is final in accordance with the rule stated in Zappettini v. Buckles, 167 Cal. 27, 138 P. 696. But neither in that case nor in Clark v. Dunnam, 46 Cal. 204, upon which it relies, did the decree involve a reference for an accounting, and there was therefore no further judicial action required on the part of the court to adjudicate finally the rights of the parties. These cases are carefully analyzed in Security-First National Bank v. Superior Court, 132 Cal.App. 683, 691, 23 P.2d 1055.

[4] Since an appeal lies only from a final judgment and since the petition for supersedeas fails to present a case where no further questions can come before the trial court except such as are necessary to carry the judgment into effect, the petitioner is not at this time entitled to a writ of supersedeas. Bakewell v. Bakewell, 21 Cal.2d 224, 228, 130 P.2d 975.

The application for a writ of supersedeas is denied and the appeal is dismissed without prejudice.

WILSON, J., concurs.

McCOMB, Justice (concurring).

I concur in the opinion. Since the purported appeal is from a nonappealable order, a dismissal of the appeal does not constitute an affirmance of the interlocutory order of the trial court and in my opinion the application for a writ of supersedeas should be denied and the appeal dismissed.

85 Cal.App.2d 219

In re HALAMUDA.

FLAKOLL v. HALAMUDA et al.

Civ. 3654.

District Court of Appeal, Fourth District, California.

April 27, 1948.

1. Infants 🔑16

Petition to free child from the control of his parents was not prematurely filed on ground that one full year had not expired since child had been declared a ward of the juvenile court as required by the Welfare and Institutions Code, where child was made a ward of the juvenile court on February 26, 1946, and petition was filed on February 26, 1947. Civ.Code, § 10; Code Civ.Proc. § 12; Pol.Code, §§ 12, 3257, 3258; Welfare and Institutions Code, § 701.

2. Infants 🔑16

Unverified report of probation officer filed in proceeding to have child declared free from the custody of his parents, on ground of parents' cruelty and neglect, became a judicial record that juvenile court judge could and should consider in deciding the case, and contents of report were required to be regarded as legal evidence. Welfare and Institutions Code, §§ 639, 640, 784; Code Civ.Proc. §§ 1887, 1894, 1904, 1905, 1918, subd. 6.

3. Infants 🔑16

In proceeding in juvenile court to have child declared free from the custody of his parents on ground of parents' cruelty and neglect, evidence sustained finding of "cruelty" on part of mother, though there was no showing of physical abuse by her, where she did not protect child from the cruel and inhuman treatment by the father. Welfare and Institutions Code, § 701(b).

Appeal from Superior Court, San Diego County; Dean Sherry, Judge.

Proceeding in the matter of Fred Halamuda, a person who should be declared free from the custody of his parents, Fred Halamuda and Erma Halamuda, wherein Arthur A. Flakoll, Chief Probation Officer of San Diego County, petitioner, filed a petition against the parents to free the child from the control of the parents. From a judgment of the juvenile court freeing the child from the custody and control of the parents, they appeal.

Judgment affirmed.

Charles E. Burch, Jr., of San Diego, for appellants.

James Don Keller, Dist. Atty. and County Counsel, and Bertram McLess, Jr., Deputy Dist. Atty. and County Counsel, both of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment of the Juvenile Court of San Diego County freeing Fred Halamuda, a child of about three years of age, from the custody and control of his parents, Fred Halamuda II, his father, and Erma Halamuda, his mother. We will hereafter refer to the father as Halamuda and to the minor as Fred.

Three grounds are urged for a reversal of the judgment, namely, (1) That the petition to free Fred from the control of his parents was prematurely filed in that "the period of one full year continuously immediately prior to the filing of a petition" had not expired since Fred had been declared a ward of the Juvenile Court as required by subdivision (b) of Section 701 of the Welfare and Institutions Code; (2) that the evidence was insufficient to support the judgment as the hearing was informal and no sworn testimony or verified documents were presented; (3) that there was no evidence of any cruelty towards or neglect of Fred by his mother.

Fred was made a ward of the Juvenile Court on February 26, 1946, and the petition to free him from parental control was filed on February 26, 1947, it being conceded by both parties that the statement in the judgment to the effect that the petition to free Fred from parental control was filed on February 27, 1947, was a typographical error. Section 701 of the Welfare and Institutions Code provides in part as follows:

"The jurisdiction of the juvenile court extends also to any person who should be declared free from the custody and control of either or both of his parents. The words 'person who should be declared free from the custody and control of either or both of his parents' shall include any person under the age of 21 years who comes within any of the following descriptions: * * *

"(b) Who has been cruelly treated or neglected by either or both of his parents, if such person has been a ward of the juvenile court, and such parent or parents deprived of his custody because of such cruel treatment or neglect, for the period of one year continuously immediately prior to the filing of a petition praying that he be declared free from the custody and control of such cruel or neglectful parent or parents."

In support of his argument that the petition was filed one day too soon, appellants rely on Section 3257 of the Political Code providing that a year is a period of 365 days; Section 3258 of the Political Code providing that a day is the period of time between one midnight and the following midnight, and Section 12 of the Political Code, 10 of the Civil Code, and 12 of the Code of Civil Procedure all of which provide that the time in which an act is to be done is computed by excluding the first day and including the last unless the last day is a holiday when it is to be excluded.

The case of Coagriff v. Election Commissioners, 151 Cal. 407, 91 P. 98, 99, seems to be decisive of this question. The statute under consideration there provided that a certain petition might be filed "not more than 50 days nor less than 20 days before the day of election" which was on November 6, 1906. It was held that a petition which was offered for filing on October 17, 1906, was in time and should have been filed, the court saying:

"The fractions of the days are no more taken into consideration than are the fractions of the seconds. The consequence is that every day, and every part of that day is, by this rule, one day before every part of the succeeding day. The last moment of any day is, in contemplation of law in such cases, one day before the first moment of the next day, although the elapsed time is infinitesimal. * * * So, by counting the consecutive days backward from November 6th, it will be found that October 17th was 20 days, and if 20 days, then not less than 20 days, before November 6th. This is what is contemplated by section 12 of the Political Code, declaring that in computing time by days, the first day is to be excluded and the last day included. Excluding November 6th, the first day, we find October 17th, to be the twentieth day, or the last day of the period, and as it is to be included in the count, it must be counted as part of the period."

Other statutes are similarly construed in the following cases: Estate of Espinosa, 179 Cal. 189, 175 P. 896; Antelope Valley Union High School Dist. v. McClellan, 55 Cal.App. 244, 203 P. 147; Galusha v.

Meserve, 58 Cal.App. 174, 208 P. 348; Kelly v. State Personnel Board, 31 Cal.App. 2d 443, 88 P.2d 264.

[1] On authority of these cases we conclude the petition was not prematurely filed.

The procedure in the hearing in the Juvenile Court was most informal as is usual in such proceedings. Halamuda had filed a written appearance and waiver of service of citation but was not personally present at the hearing. Mrs. Halamuda had been served with citation and was present with her mother. A deputy district attorney and two assistant probation officers were present. None of these persons were sworn as witnesses but all were interrogated by the Juvenile Court Judge and made unsworn statements to him. There was before the court a long and detailed report from the probation officer of San Diego County, and several other reports from him. There was also a report from the probation officer of Los Angeles County where this proceeding was instituted and from which County it was transferred to San Diego County.

It is now argued that there is no evidence supporting the judgment as it rests solely upon unsworn statements and unverified documents and does not comply with the provisions of section 784 of the Welfare and Institutions Code which permits the Juvenile Court Judge to hear the case and to dispose of it "after full and careful consideration of all the evidence presented." It is urged that the word "evidence" is used in its legal sense of including only sworn testimony and authenticated documents that are admissible in a court of law. In support of this argument the appellants rely chiefly on In re Hill, 78 Cal.App. 23, 247 P. 591.

Sections 639 and 640 of the Welfare and Institutions Code require the probation officer to be present at the hearing and that he "shall furnish to the court such information and assistance as the court may require" (Sec. 640) and to "inquire into the antecedents, character, family history, and environment of every person brought before the court * * * and shall make his report in writing to the judge thereof." (Sec. 639.) The report must be filed and there is no requirement that it be verified. It is apparent that the inquiry required must be from persons purporting to have knowledge of facts so that the report based on such inquiry must, to a certain extent, be based on hearsay. This seems to be contemplated by the section.

Section 1887 of the Code of Civil Procedure provides that there are two kinds of writings, public and private. Section 1894 of the same code divides public writings into four classes one of which is judicial records. Section 1904 of the Code of Civil Procedure provides "A judicial record is the record of the official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding." The next section provides that a judicial record of this State may be proved by producing the original, and subdivision 6 of section 1918 of the Code of Civil Procedure is to the same effect as to other official documents.

[2] With these provisions in mind we have no hesitancy in holding that when the unverified report of the probation officer was filed it became a judicial record that the Juvenile Court Judge should consider in deciding the case. As the judgment recites that it was so considered, its contents must be regarded as legal evidence.

The foregoing conclusion is fortified by In re Jones, 34 Cal.App.2d 77, 93 P.2d 185, 188, where it is said:

"It is true the hearing was not conducted with all the strict formality of a criminal proceeding; but it was not necessary to do so because as frequently pointed out by the courts, proceedings of the juvenile court in dealing with cases of dependent children are not of a criminal nature. In re Edwards, 99 Cal.App. 541, 278 P. 910, 290 P. 591, citing earlier cases. Such court operates under special powers, in conformity with procedure prescribed therefor by the juvenile court law, which authorize the consideration by the juvenile court, in cases of this kind, of the written reports and recommendatons of the probation officer, which under said law are open to inspection of the interested parties. Secs. 638, 639 and 640, Welfare & Institutions Code. In other words, from its very nature and because of necessary qualifications for doing the work for which it is intended, the juvenile court was not designed as a trial court in the ordinary sense; and its method of operation is very different from the one governing in the trial of criminal cases, mainly because technicalities and formalities are largely eliminated. People v. Superior Court, 104 Cal.App. 276, 285 P. 871."

The report of the probation officer shows acquaintance with this case since April, 1945, when he states:

"At this time, both Mrs. Halamuda and the neighbors testified that the father frequently beat the little boy, that he slapped him for trifles, sometimes with a stick or a blunt end of a knife, because the child's manner or attitude annoyed him. The mother admitted that the boy was so afraid of his father that he would sit quietly for hours when the father was in the home, apparently afraid to move or to attract the older man's attention for fear of punishment."

Halamuda was twice arrested for cruelly beating Fred and on one occasion was found guilty and fined either $100 or $125. It is apparent that Halamuda's dislike of Fred arose at least partially from his questioning the boy's paternity. The report further states that Mrs. Halamuda "admits that Fred is aware of this (hatred), when she says, as she did on occasion, 'Fred will be playing happily until the minute his father walks into the room. Then it's just as if a curtain dropped over his eyes, and his face is perfectly blank.' Mrs. Halamuda's mother, Mrs. Blanche Gargulo, states that in her opinion, the mother is as eager to be relieved of the problems and responsibilities which Fred's presence in the home present, as is the father. Mrs. Gargulo said that Mrs. Halamuda wished to relinquish Fred for adoption at the time of his birth, but that on her insistence, she did not do so. So unstable is the attitude of the Halamudas toward their son, that they have relinquished him for adoption on two occasions and have later voided the relinquishment. * * * The parents seem to be incapable of reaching any final decision concerning themselves or their child, they alternately reject and accept Fred in such a fashion that the child feels absolutely no security in his own home. His personality and behavior have been seriously affected by the instability which he has experienced."

It is further stated in the report:

"Recently, Fred has been given to outbursts of hysterical crying and temper tantrums, a manifestation of emotional disturbance, which was not present before. It is increasingly evident that great emotional damage has been done to the child, and that it is imperative that he be so situated that he is able to receive the stability and security due him. The father through his attitude and actions has made a positive contribution to the unfitness of the home. Equally, the mother has contributed to the situation in a negative manner through her refusal to remove the child voluntarily from a harmful environment, and her refusal or inability to protect Fred from the effects of his father's rejection. The mother is too unstable and too ineffectual to create and execute any constructive plan for the successful reestablishment of the family unit."

The report contains many other instances of the mistreatment of Fred, including scars on his back from beatings, and conclusively shows that his parents cannot provide a fit and proper home for him.

Our conclusion that the report of the probation officer was legal evidence before the court to be considered on the hearing makes it unnecessary to consider the other question argued, namely, the competence as evidence of the unsworn statements of the other persons present at the hearing.

[3] It is argued on behalf of Mrs. Halamuda that the evidence is insufficient to support the portion of the judgment depriving her of the custody of Fred as there is no evidence of any cruelty towards or abuse of the boy by her. This is true insofar as physical acts of cruelty are concerned but cruelty may be inflicted mentally by failure to act as well as by physical abuse. She could not aid Fred and did not protect him from the cruel and inhuman treatment of her husband. She could not and did not provide a home for him where he could live peacefully and grow into normal youth. While her faults were negative in this respect in failing to act, the

results on the child were equally bad. Further, it should be remembered that a minor may be freed from parental custody and control because of neglect as well as because of cruelty. The evidence points to serious neglect of the welfare of Fred by his mother. Her weakness and instability of character were repeatedly pointed out in the report and it is very evident that neither parent could furnish a fit home for the boy and that the Juvenile Court Judge was confronted with a situation where he could do nothing else than free Fred from the parental control of both parents for the protection and welfare of the child which is the ultimate result to be aimed at in all juvenile court proceedings.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

WALL v. M. & R. SHEEP CO. et al.*

Civ. 3714.

District Court of Appeal, Fourth District, California.

April 26, 1948.

Rehearing Denied May 18, 1948.

Hearing Granted June 24, 1948.

1. Constitutional law 🔑285
Taxation 🔑658(3, 4), 688

Defects in notice of sale by state of several parcels of land separately assessed to same owner and sold to state for delinquent taxes, in that notice described all parcels together as one body of land and named as minimum bid the total amount of taxes and penalties on all properties, were not jurisdictional and did not involve due process of law and were cured by curative acts of 1943 and 1945. Revenue and Taxation Code, § 3704; Gen.Laws Acts 8443, 8443a; U.S.C.A.Const. Amend. 14.

2. Taxation 🔑734(9)

Defects in notice of sale by state of land sold to state for delinquent taxes were not prejudicial to purchaser of interest in land subject to delinquent taxes, since, regardless of such defects, title still remained in state.

3. Taxation 🔑511, 743

One who became owner of land after taxes were levied for which land was sold to state and subsequent purchaser of his rights and interests in the land took subject to existing tax delinquency and their rights or interests as against private individuals who purchased the land from state were not superior to those of original owner.

4. Constitutional law 🔑139, 229(3), 285
Taxation 🔑37, 688

Curative acts of 1943 and 1945 cured defects in tax proceedings relied on by plaintiff to invalidate tax sales and deeds to state and from state to defendants, as against contention that such defects were jurisdictional and application of curative acts would result in legalizing taxes which were entirely void and, in effect, levying new taxes for local purposes, and would violate federal Constitution by taking property without due process of law, denying to plaintiff equal protection of the law and impairing his contractual rights. Gen.Laws Acts 8443, 8443a; U.S.C.A.Const. Amend. 14.

5. Constitutional law 🔑195

The Legislature can cure all matters within its sphere of action except defects which are jurisdictional or which violate due process of law rule, and it can validate anything which it could have dispensed with in the beginning or any manner of procedure for which it could originally have provided, and such curative acts may apply to and be effective as to pending litigation.

6. Taxation 🔑688

Where former owner of land sold to state for delinquent taxes and subsequent purchasers of his interests in the land made no effort for more than 13 years to pay the taxes or redeem the land, both the equities and law favored application of curative acts of 1943 and 1945 to cure any nonjurisdictional defects in proceedings by which state acquired title to the land and sold it to others. Gen.Laws Acts 8443, 8443a.

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* Subsequent opinion 205 P.2d 14.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Clifford S. Wall against W. & R. Sheep Company and others to quiet title to land and invalidate taxes levied on the land and tax sales and deeds. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

Roy A. Linn, of Los Angeles, for appellant.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title and, in a second count, to invalidate and have declared void taxes levied on the property for the year 1931–32, together with the tax sales and deeds through which title was later conveyed to the state and from the state to these defendants.

The property involved consists of six parcels, being sections or fractional sections none of which are contiguous. These properties were first marked sold to the state on June 30, 1932, having been assessed the preceding year to The Title Insurance and Trust Company. The parcels were deeded to the state on July 26, 1937, and sold by the state to these defendants on October 14, 1943. On March 16, 1944, the plaintiff acquired the rights and interests, if any, of one George W. Clemson who had become the owner of the properties, subject to the delinquent taxes, in 1932.

These properties are in the same school districts and this action involves the same tax proceedings as those involved in the case of Wall v. State of California, 73 Cal. App.2d 838, 167 P.2d 740, and the same grounds of invalidity are here asserted. This case was held in abeyance on demurrer until the decision in that case. The only difference between the cases originally was the fact that in Wall v. State the tax collector had not yet sold the property at public sale when the action was brought, while in the instant case the land was sold by the state to the defendants before this action was filed and before this plaintiff acquired any purported title to the land. After the decision in Wall v. State, the plaintiff herein amended his complaint by alleging that his predecessor in interest, George W. Clemson, became the owner of the property after the taxes of 1931–32 were levied and before the curative acts were passed, and by alleging that the curative acts of 1943 and 1945, Gen.Laws, Acts 8443, 8443a, are inapplicable and ineffective since they purport to levy a tax for local purposes where no valid tax existed and since they take the plaintiff's property without due process of law and divest him of his vested rights in violation of the Fourteenth Amendment to the Federal Constitution. The court sustained a demurrer to the complaint as amended, without leave to amend, and entered a judgment that the plaintiff take nothing. This appeal followed.

The appellant here makes the same attack upon the validity of these tax proceedings from their inception up to and through the deed to the state in 1937 as was made in the case of Wall v. State, supra, including the contentions that the appropriations for veterans' organizations were levied for a private purpose and were gifts, that the tax rates fixed resulted in collecting excessive taxes which were not needed, that school district taxes were improperly assessed, that there were various irregularities in the tax rolls and notices given, and that a single tax deed was made for all of the parcels although they were separately assessed. These contentions were all considered and held to be without merit in Wall v. State, and it would serve no useful purpose to repeat what was there said or to further analyze the authorities in that connection.

[1, 2] The appellant further contends that the deed of October 14, 1943, from the state to the respondents passed no title because the notice of sale upon which it was based was deficient in that it described these several parcels, which had been separately assessed to the same owner, all together as though they constituted one body of land, and named but one minimum bid, being the amount of the total taxes and penalties on all of the properties. It is argued that this notice of sale failed to comply with the requirements of section 3704 of the Revenue and Taxation Code, with the result that

the sale and the deed from the state to the respondents are void. Essentially, this is the same attack that was made in Wall v. State with reference to the sale to the state, it being there contended that a single tax deed was made for all of the parcels even though separately assessed. It was there held that this was a matter which was within the purview of the curative acts and which was cured by them. The matter is not jurisdictional and does not violate the due process rule, and we can see no reason why the circumstance here complained of is not one which is covered and controlled by the curative acts. A further consideration is that the appellant is in no way prejudiced in this matter since, even under his contentions, title still remains in the state and any rights he attempted to purchase were cut off by the previous proceedings, as pointed out in Wall v. State.

[3] The appellant contends that a different situation exists here since this is a suit against private individuals while in the case of Wall v. State, the state itself was a party. No valid distinction appears in this respect. Nor does any distinction appear in the fact, newly alleged, that the appellant's predecessor George W. Clemson became the owner of the property after the taxes were levied and before the passage of the curative acts. Clemson and the appellant each took subject to the existing tax delinquency and their rights or interests are in no way superior to those of an original owner. No rights have intervened in the constitutional sense and the appellant took with full notice of the existing situation.

[4-6] Finally, the appellant contends that the defects in the tax proceedings upon which he relies are jurisdictional; that the curative acts are not applicable because they attempt to legalize taxes which are entirely void and, in effect, levy new taxes for local purposes; and that the construction given to the validating acts in the case of Wall v. State violates the Federal Constitution by taking property without due process of law, by denying to the appellant the equal protection of the law, and by impairing his contractual rights. This attack upon the curative acts of 1943 and 1945 and which, if upheld, would nullify all curative acts, cannot be sustained. It is well settled that the legislature can cure all matters within its sphere of action except defects which are jurisdictional or which violate the due process rule; that it may validate anything which it could have dispensed with in the beginning or any manner of procedure for which it could originally have provided; and that such curative acts may apply to and be effective as to pending litigation. Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531; Chambers v. Duvall, 26 Cal.2d 139, 156 P.2d 921; City of Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397; Southern Service Company, Limited v. Los Angeles County, 15 Cal.2d 1, 97 P.2d 963; Wall v. State of California, 73 Cal.App.2d 838, 167 P.2d 740. Under these authorities none of the contentions here made by the appellant can be sustained. For more than thirteen years the owners of the properties here in question made no effort to pay these taxes or to redeem the property. The purpose and beneficial effects of the curative acts are peculiarly appropriate here, no good reason appears why they are not here applicable, and both the equities and the law are in favor of such an application.

The judgment is affirmed.

MARKS and GRIFFIN, JJ. concur.

85 Cal.App.2d 182

PEOPLE v. DANIELS et al.

Cr. 2487.

District Court of Appeal, First District,
Division 1, California.
April 27, 1948.

Hearing Denied May 24, 1948.

1. Criminal law 🔑1023(12)

Orders denying motions in arrest of judgments of conviction were not appealable. Pen. Code, § 1237.

2. Criminal law 🔑1141(2)

Appellants had affirmative duty to show that evidence was insufficient to support convictions, and Attorney General had no duty to assume burden of demonstrating that convictions were sustained by evidence, where appellants, without a statement or analysis of the evidence, contended evidence was insufficient to support convictions.

3. False pretenses 🔑1

Money taken from another upon false representations or false pretenses constitutes "theft".

See Words and Phrases, Permanent Edition, for all other definitions of "Theft".

4. Conspiracy 🔑47
False pretenses 🔑49(1)

Evidence sustained convictions for grand theft and conspiracy to commit grand theft by inducing prosecutrix to deliver $5,500 to defendants for deeds to realty assessed at $50, by falsely representing that realty was property owned by defunct insurance corporation in which prosecutrix' husband had been a shareholder, and that prosecutrix was entitled to share in realty by court order, and that the realty was very valuable and could be sold to an oil company for a large sum.

5. Conspiracy 🔑47

A conspiracy need not be established by proof of an express conspiracy agreement, and it is sufficient if the existence of conspiracy can be reasonably deduced from the facts and circumstances proved.

6. Forgery 🔑44

Evidence sustained conviction for forging deeds to realty. Pen. Code, § 470.

7. Criminal law 🔑478(2)

A witness need not follow the profession of a handwriting expert to qualify as an expert on handwriting, and it is only necessary that witnesses' calling requires the making of frequent comparisons of handwriting.

8. Criminal law 🔑478(2)

Police officer, who had worked in the "check detail" of police department and had general police experience in examining documents and had compared hand writing in connection with his duties, was qualified as an expert on handwriting to give opinion testimony in forgery prosecution that signatures on deeds were in defendant's handwriting. Pen.Code, § 470.

9. Criminal law 🔑369(1)

Generally, a defendant can be tried only for the offenses charged, and evidence of other independent crimes that has no tendency to prove a material fact involved in the crime charged is inadmissible.

10. Criminal law 🔑372(1)

Evidence of crimes other than crime charged is admissible in evidence to show a pattern, scheme, design, project, or plan of which the two crimes are a part.

11. Criminal law 🔑372(9)

In prosecution for grand theft and conspiracy to commit grand theft by inducing prosecutrix through false representations to deliver to defendants over $5,500, for deeds to realty assessed at $50, testimony as to another transaction by same defendants virtually identical was admissible as showing a scheme or design of which the two crimes were a part, although the transaction testified to was not the crime charged.

12. Criminal law 🔑372(9)

In prosecution for grand theft and conspiracy to commit grand theft by inducing prosecutrix through false representations to deliver to defendants over $5,500, for deeds to realty assessed at $50, testimony relating to fraudulent manner in which deeds to realty had been obtained by defendants was admissible as showing a scheme or design of which both crimes were a part, although manner in which defendants obtained deeds was not crime charged.

13. Criminal law ⚿**1186(4)**

Errors denying a constitutional right do not necessitate a reversal of conviction unless prejudice is shown or is presumed. Const. art. 6, § 4½.

14. Criminal law ⚿**1186(4)**

Where grand theft, conspiracy to commit grand theft, and forgery prosecutions were transferred from one department to another in absence of defendant, and evidence demonstrated beyond a reasonable doubt that defendants were guilty, and contention on appeal that defendants would have objected to transfer on ground of prejudice of trial judge was an afterthought arrived at only after conviction, no prejudice was shown and conviction would not be reversed although transfer was error under constitutional and statutory provisions requiring presence of defendants at trial. Pen. Code, §§ 1043, 1181; Const. art. 1, § 13; art. 6, § 4½.

Appeal from Superior Court, City and County of San Francisco; Daniel R. Shoemaker, Judge.

Thomas W. Daniels was convicted of grand theft, conspiracy to commit grand theft, and forgery, and Marvin M. O'Malley was convicted of grand theft and conspiracy to commit grand theft, and they appeal from judgment of conviction from orders denying motions for a new trial, and from orders denying motions in arrest of judgment.

Appeals from orders denying motions in arrest of judgment dismissed, and orders denying motions for new trials and judgments of conviction affirmed.

Busick & Busick, of Sacramento, for appellants.

Fred N. Howser, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Norman Elkington, Asst. Dist. Atty., both of San Francisco, for respondent.

PETERS, Presiding Justice.

[1] The defendants appeal from judgments of conviction based upon jury verdicts finding them both guilty of two counts of grand theft and one count of conspiracy to commit grand theft, and finding defendant Daniels guilty of two counts of forgery, that charge having been dismissed as to defendant O'Malley. Each defendant was also found to have suffered one prior conviction of a felony. In addition to appealing from the judgments of conviction, defendants appeal from the orders denying their motions for a new trial, and also attempt to appeal from the orders denying their motions in arrest of judgment. The orders denying the motion in arrest of judgment are not appealable. Penal Code, § 1237; People v. Martin, 188 Cal. 281, 205 P. 121, 21 A.L.R. 1399; People v. Battilana, 52 Cal.App.2d 685, 126 P.2d 923; People v. Dallas, 42 Cal.App.2d 596, 109 P.2d 409. The appeals therefrom should be dismissed.

[2] The appellants, without a statement or analysis of the evidence, contend that the evidence is insufficient to support the judgments of conviction, stating that they "will leave it in the lap of the Attorney General to point out where any such evidence lies." App.Op. Brief, p. 25. That is not a proper method of presenting the point. It is the duty of the appellant to show error, and that means he is under an affirmative duty in that respect. It is not proper to attempt to shift the burden upon the respondent, and the latter is under no duty to assume the burden of demonstrating that the judgments are supported in the absence of a proper attack upon them. In the present case the Attorney General has seen fit to analyze the evidence, and appellants make no attempt in their reply brief to attack this analysis. Under such circumstances this court would be warranted in disregarding the point entirely. However, inasmuch as appellants raise and argue other points, and because an understanding of the evidence is necessary to understand those points, we will briefly review the evidence that demonstrates to a certainty that the judgments on all counts are supported by substantial and convincing evidence.

The Facts.

The prosecutrix, Louise Tresmontan, is an elderly widow who resides and has an interest in the lease of a small hotel in San Francisco. On June 24, 1946, Daniels called upon her and told her that he had some good news for her; that a certain defunct insurance company in which her husband had been a shareholder had been found to own some valuable oil lands in Kettleman Hills; that a court had ruled that a portion of these lands were to be awarded to the shareholders; that the properties were worth $80,000,000; that she was entitled to the share of her deceased husband; that she would have to pay him $75.30 for the expenses of a deed for her share; that she was not to consult a lawyer. She paid Daniels $75.30 by check. Some time later Daniels called upon her and gave her a deed to a certain Lot No. 24 in Kettleman Hills. That deed had been secured by O'Malley, under the assumed name of A. G. Stone, from one Mabel Carson, upon his promise, never performed, to convey to Mabel Carson some Texas oil royalties. When Daniels delivered the deed to Mrs. Tresmontan he told her that the Standard Oil Company would pay her $4,000 for the property. Several days later Daniels told her that he wanted something over $1,800 for the "expenses of the lot," but she refused to give it to him. Deniels told her that he would send someone else around to see her. The next day defendant O'Malley visited her and told her that his name was Stone; that he represented the Standard Oil Company; that he had known her husband; that she would get at least $45,000 from the Standard Oil Company for the property. O'Malley must have been pretty convincing because that afternoon the prosecutrix and the two defendants went to her bank and she gave them a cashier's check for $1,807.20 payable to Daniels. During this visit O'Malley exhibited to the prosecutrix a check for $45,000 that he represented was that of the Standard Oil Company, telling the witness that it was for a person in Utah who had acquired oil lands in the Kettleman Hills area as a shareholder in the same insurance company in which her husband was a shareholder, and that he, as the agent of the Standard Oil Company, had purchased the land from her.

The next visit of appellants to the prosecutrix occurred about a week later. At that time they told her that the Standard Oil Company would pay her $30,000 for the land, but that the deal could not be closed until they were paid $3,765 for "expenses from the land and taxes." On August 14, 1946, the prosecutrix delivered to Daniels a cashier's check made out to his order in that amount. No check from the Standard Oil Company, or any other check, was ever delivered to her, but appellants delivered to her another deed to a fractional portion of Lot No. 24.

Some time later appellants exhibited to her a supposed check of the Standard Oil Company made out to her for $45,000 and she was told that for another $5,000 they would deliver this check to her. She then realized that she had been "fooled" and demanded her money back. Daniels told ner that, if she would return the two deeds, the money would be returned. She offered to do so but, of course, never received back the money. The two grand theft charges embraced the receipts of $1,807.20 and the $3,765. The forgery counts against Daniels embraced the two deeds given to the prosecutrix, to both of which was signed the name of "Raymond Greer" as grantor, and both deeds bore the notarization of one Laura Hughes.

Inspector King of the Oakland Police Department testified that Mrs. Daniels first told him that "Greer" was a friend of her husband's and that she had taken Greer to the notary who was a friend of hers to have the deeds notarized. Later she told King that she had met Greer in a bar and that he was unknown to her husband. Daniels told King that he had never heard of Greer or of A. G. Stone, the name under which O'Malley secured Lot No. 24 from Mrs. Carson. Later King again questioned Daniels about his activities in approaching shareholders of defunct insurance companies and telling them that by making payments of taxes and expenses to him they would be entitled to share in the oil lands of such companies. King told Daniels that he knew that Daniels possessed a so-called "sucker list" of such shareholders. He also told Daniels that he knew that Mrs. Daniels had taken either Daniels or O'Malley to Laura Hughes and got her to notarize the deeds under the name of "Raymond Greer." Daniels then told King that his wife had nothing to do with the deal and was innocent; that his wife at his request took the deeds to the notary after they had been signed "Raymond Greer" and that the notary accommodated his wife because she was an old friend. Daniels also admitted to King that he received mail in San Francisco in two places under the name of "Raymond Greer." Some time lated Daniels told King that he had first met O'Malley in April or May, 1946; that he, Daniels, had told O'Malley that he had the "sucker list" of stockholders in the insurance company; that if they could get hold of some oil land they could "use" the "sucker list" together; that the two of them had gone to the recorder's office in Fresno to look into the titles of land in the Kettleman Hills district; that they then found that Mabel Carson owned Lot No. 24 in that area; that O'Malley had got in touch with Mrs. Carson in Oakland; that when O'Malley returned from his visit to Mrs. Carson he not only had the deed to Lot No. 24, but also a deed from her to ten acres of land in Kern County; that O'Malley had exhibited to the prosecutrix what purported to be a Standard Oil Company check for $45,000.

Inspector King also testified that in his opinion the signatures of "Raymond Greer" on both deeds given to the prosecutrix were in the handwriting of Daniels. He based this conclusion on a comparison of the signatures on the two deeds with exemplars of Daniels' handwriting. The officer testified that he had worked "in the check detail" and had "general police experience in examining documents," and that "on the Bunco Detail we have occasion to compare handwriting." A handwriting expert called by Daniels gave it as his opinion that the handwriting on the deeds was not that of Daniels.

An officer of the Standard Oil Company of California testified that he had examined the company records back as far as 1933 and that from that date to the date of trial no Marvin M. O'Malley and no A. G. Stone had been employed by the company; that his company at no period here relevant owned land in the section in which Lot No. 24 is located; that his company had never attempted to buy Lot No. 24; that the photostat of the check exhibited by appellants to the prosecutrix was not a photostat of a check issued by his company.

Mabel Carson was called as a witness for the prosecution. On this appeal appellants urge that her testimony and that of the next witness to be discussed, Marianne Hook, related to prior and unrelated offenses and that the admission of such evidence was prejudicially erroneous. Mrs. Carson testified that since 1938 she and her daughter owned Lot No. 24 as joint tenants; that her daughter also owned ten acres of land in Kern County; that in May, 1946, O'Malley called upon her in Oakland stating that his name was A. G. Stone and represented that he was associated with the legal firm of Greer & Greer in Los Angeles; that he wanted to secure Lot No. 24 and the ten acres owned by her daughter; that he induced her and her daughter to convey Lot No. 24 and the ten acres to Raymond Greer on O'Malley's promise, under the alias A. G. Stone; that he would transfer to them certain oil royalties in Texas land. The transfer of royalties was never made, the Standard Oil Company was never interested in these lands, and no insurance company ever owned these lands. Lot No. 24 had an assessed valuation of $50. It should be here mentioned that counsel for neither appellant, who were separately represented at the trial, ever objected to her testimony on the ground that it covered inadmissible prior offenses.

This is not true of the testimony of Marianne Hook. As to her testimony objection was made on the inadmissibility of prior offenses ground. She testified that in the spring of 1946 O'Malley came to the ranch occupied by her and her husband, told them he was A. G. Stone and that he was an attorney representing Raymond Greer. He then made certain other representations and induced the Hooks to purchase from "Raymond Greer" as grantor the ten acres of land which he had induced the daughter of Mrs. Carson to convey to "Greer." The Hooks gave O'Malley a total of $610, purportedly to pay off taxes, assessments, etc., which O'Malley represented were against the land. O'Malley also told the Hooks, as an inducement to the purchase, that the Union Oil Company wanted to lease the land, and he exhibited what purported to be a check of that company to the Hooks for $3,000, representing that the company would pay that for the lease. The Union Oil Company had no desire to lease the ten acres, and A. G. Stone was not connected with that company. Daniels was not present during any of the O'Malley-Hook transactions.

Both defendants testified on their own behalf and contradicted most of the prosecution's evidence. Such evidence merely created a conflict with that of the prosecution.

Contentions of Appellants.

Appellants, as already pointed out, contend that the evidence is insufficient to support the judgments, and that the evidence of Carson and Marianne Hook was erroneously admitted because, so it is urged, it disclosed unrelated and separate offenses. It is also urged that both appellants were denied their constitutional and statutory right to be present at all stages of their trials.

Sufficiency of the Evidence.

[3, 4] The brief resume of the evidence already given demonstrates beyond doubt that the guilty verdicts on all counts are amply supported. Money taken from another upon false representations or false pretenses, of course, constitutes theft. People v. Selk, 46 Cal.App.2d 140, 115 P.2d 607; People v. Cook, 10 Cal.App.2d 54, 51 P.2d 169. Here the defendants, acting together, induced the prosecutrix to deliver to them over $5,500 for two deeds to Lot No. 24, which lot was assessed at $50. They falsely represented that this lot was part of a large area owned by a defunct insurance company; that she was entitled to share in those lands under a court order; that she could secure her interest by paying off certain charges against the land; and that the total area was worth $80,000,000. Daniels further told her, falsely, that the Standard Oil Company would pay her $45,000 for her interest, and exhibited to her a forged check in that amount. The grantor of the two deeds to prosecutrix was a fictitious person. Daniels confessed most of the details of the plot to Inspector King. It is obvious that the two theft counts are amply supported.

[5] The conspiracy count is also clearly supported. A conspiracy, of course, need not be established by proof of an express conspiracy agreement—it is sufficient if the existence of such conspiracy can be reasonably deduced from the facts and circumstances proved. People v. Bucchierre, 57 Cal.App.2d 153, 134 P.2d 505; People v. Yant, 26 Cal.App.2d 725, 80 P.2d 506; People v. Dal Porto, 17 Cal.App.2d 755, 62 P.2d 1061, 63 P.2d 1199. The evidence clearly establishes the participation of both defendants in procuring the checks from the prosecutrix. Daniels' participation is obvious. O'Malley, as part of the fraud, procured Lot No. 24 from Mabel Carson and her daughter, and had it transferred to "Raymond Greer," an alias of Daniels. When the prosecutrix was doubtful about making the last payment to Daniels he produced O'Malley, masquerading as an employee of the Standard Oil Company, and O'Malley exhibited the $45,000 forged Standard Oil Company check. The two defendants went to Fresno and investigated the titles in the Kettleman Hills area, in order to get "bait" to feed their "sucker list." The two defendants accompanied the prosecutrix to the bank when she secured the last cashier's check. Later the two defendants demanded of her an additional $5,000. That such evidence supports the inference that these various overt acts were performed pursuant to an illegal agreement constituting a conspiracy is not only reasonable but inevitable under the facts.

[6-8] The verdicts finding Daniels guilty of forging the two deeds are also supported. Under § 470 of the Penal Code, "Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to * * * any * * * deed * * * or * * * passes, or attempts to pass, as true and genuine, any of the above-named false * * * forged * * * matters, * * * with intent to defraud, * * * is guilty of forgery." The

evidence shows that Daniels adopted, with intent to defraud, the alias of "Raymond Greer," and Inspector King testified that, in his opinion, Daniels had signed the name of Raymond Greer to both deeds. Moreover, the deeds, and exemplars of Daniels' handwriting, were introduced into evidence and exhibited to the jury. The testimony of Daniels' expert that Daniels did not sign the deeds merely created a conflict. The members of the jury were entitled to exercise their own judgment on this issue. See cases collected 10 Cal.Jur. p. 1009, § 267. Moreover, if expert testimony were necessary on this issue, which it was not, Inspector King qualified as such an expert. It is the law of this state that in order to qualify as an expert on handwriting it is not necessary that the witness follow the profession of handwriting expert—it is only necessary that in the particular calling he does follow he is called upon to make frequent comparisons of handwriting. Estate of Newell, 75 Cal.App. 554, 243 P. 33. Inspector King clearly qualified as an expert under such rule.

Evidence of Other Offenses.

[9, 10] Appellants urge that it was error of a most prejudicial nature to have admitted the testimony of Mabel Carson and Marianne Hook concerning their transactions with O'Malley then masquerading under the alias of A. G. Stone, it being contended that such evidence disclosed the commission of offenses completely independent of the offenses charged. It is the general rule that a defendant can be tried only for the offenses charged, and that evidence of other independent crimes that has no tendency to prove a material fact involved in the crime charged is inadmissible. See cases collected 8 Cal.Jur. p. 58, § 167. To that rule there are several exceptions as well settled as the rule itself. One such exception "is that evidence of other crimes is admissible to show a pattern, scheme, design, project or plan of which the two crimes are a part." People v. Cassandras, Cal.App., 188 P.2d 546, at page 550; see, also, People v. Peete, 28 Cal.2d 306, 169 P.2d 924, certiorari denied, 329 U.S. 790, 67 S.Ct. 356, 490; note 35 Cal.L.Rev. 131. The rule, supported by many authorities, is thus stated in 8 Cal.Jur. p. 69, § 173: "Where several crimes are connected as part of one scheme or plan, all of the same general character, and tending to the same common end, they may be given in evidence to show the process or motive and design leading up to the particular crime for which the prisoner is being tried, and thus directly tending to show logically that the crime in question was a part of such common scheme. If the general crimes are part of a chain of cause and in consequence so linked as to be necessarily connected with the system or general plan, they are admissible."

[11] That the challenged evidence falls directly within this exception to the rule is too clear to require extended comment. The evidence already summarized shows that the dealings with Carson and Hook were part of a scheme to acquire lands near to proven oil lands in order to use such lands to defraud persons such as prosecutrix by reselling to them these lands on the representations falsely made that they were entitled to share in these lands, that they were very valuable, and that the oil company was willing to pay a huge sum for them. The "Hook" transaction was identical with the "Tresmontan" transaction, except that O'Malley represented an affiliation with the Union Oil Company instead of the Standard Oil Company, and exhibited a forged check for $4,000 to tempt the Hooks instead of $45,000, as was used on the prosecutrix. The case of People v. Cassendras, supra, at page 550 of 188 P. 2d, lays down the following test for the admission of such testimony: "So far as this praticular exception is concerned the evidence must be restricted to other acts with a sufficiently high degree of common features with the act charged to warrant the inference that if the defendant committed the other acts he probably committed the act charged." The "Hook" transaction meets this test.

[12] That evidence of the "Carson" transaction likewise falls within this exception is equally clear. The testimony of Mrs. Carson relating to the circumstances of the acquisition of Lot No. 24 by appellants demonstrated that that transaction was part and parcel of the scheme to defraud the prosecutrix. That testimony showed, among other things, that the land was not part of the assets of a defunct insurance corporation, as represented, and that the prosecutrix was not entitled to a part of such lands pursuant to a court order, as represented. Such evidence directly proved material facts in connection with the crime charged—i e., the falsity of the representations. The "Carson" transaction was not an independent, unrelated offense, but, in reality, a part of the offenses charged.

Were Appellants Denied Their Constitutional and Statutory Rights to be Present at All Stages of Their Trials?

The Constitution of California, Art. 1, § 13, provides in part, that: "In criminal prosecutions, in any court whatever, the party accused shall have the right * * * to appear and defend, in person and with counsel." Section 1043 of the Penal Code provides in part: "If the prosecution be for a felony, the defendant must be personally present at the trial." Section 1181 of the Penal Code in enumerating the reasons for which a new trial may be granted upon application of the defendant, provides in subd. 1: "When the trial has been had in his absence, if the indictment is for a felony." Appellants contend that the record shows that they were not present on one occasion when the causes were transferred from one department of the Superior Court to another, and contend that such action, in their absence, violated their constitutional and statutory rights.

The clerk's transcript discloses the following: On March 5, 1947, the defendants being present with counsel, Judge Cronin of the trial bench denied a motion to dismiss certain counts of the indictment made by defendant Daniels, and granted the motion to dismiss the forgery counts against O'Malley, accepted defendants' pleas of not guilty, and by consent of all concerned ordered the cause set for trial on Tuesday, April 15, 1947. The minutes then disclose that on March 24, 1947, the matter again came before Judge Cronin, ex parte, "having been advanced by order of court, from the calendar of April 15, 1947.

"The District Attorney, with counsel for defendants, and without the defendants, answered present.

"Thereupon the court made an order transferring the above entitled cause to Department Extra Sessions No. Three (3), of the Superior Court to be set and for further proceedings." That department was then presided over by Judge Shoemaker before whom the causes proceeded to trial on April 15, 1947.

The appellants urge that the hearing of the motion to transfer their trials to another department and the order made thereon was an integral part of their "trials" as that term is used in the constitutional and statutory provisions above quoted, that their absence on that day denied to them their constitutional and statutory rights as therein defined, and ipso facto requires a reversal. In addition, they further contend that they were prejudiced by the order in question (although they conceive prejudice to be a totally unnecessary foundation for their contention) because, so they state in their briefs they would have objected being tried before Judge Shoemaker because he was prejudiced against them. They make this assertion of prejudice in spite of the fact that neither prior to nor during the trial did they object to Judge Shoemaker trying the cases, nor did they contend before the trial court that he was prejudiced.

In support of their contention that the hearing of such a motion is part of their "trial" as that term is used in the above constitutional and statutory provisions, appellants cite a number of cases, mainly from other jurisdictions, which contain general language to the effect that the word "trial" embraces every step taken by the trial court from the time the indictment is presented to the court up to and including the final judgment. State v. Barrington, 198 Mo. 23, 95 S.W. 235; State v. Hudson, 55 R.I. 141, 179 A. 130, 100 A.L.R. 313; Molen v. Denning & Clark Livestock Co., 56 Idaho 57, 50 P.2d 9; State v. Spotted Hawk, 22 Mont. 33, 55 P. 1026; see, also, People v. McKamy, 168 Cal. 531, 143 P. 752.

We have no quarrel with the rule announced in these cases. We have grave doubts, however, that the drafters of the

Constitution and of the Penal Code ever intended in using the word "trial," to mean that it is error not to have a charged felon physically present during the making of every preliminary motion and order considered and passed upon by the trial court in his case, where no prejudice is shown. In People v. O'Brien, 88 Cal. 483, at page 490, 26 P. 362, at page 364, the Supreme Court affirmed a judgment of conviction and order denying a motion for a new trial in a case in which, as stated in the opinion, O'Brien's "trial was continued when he was not present in court." Nevertheless, the court held that the affidavit filed on the motion for a new trial "fails to show that the trial * * * was had in his absence, and therefore fails to show any ground for a new trial." 88 Cal. at page 490, 26 P. at page 364. If "continuing" the trial when the defendant is not present is not error, it would seem obvious that transferring the case from one department to another under like circumstances is not error.

However, even if it be conceded that it was error in the present case to have transferred the case from one department to another in the absence of defendant, such error would not, under Article VI, § 4½, of the Constitution, require a reversal unless prejudice is shown. This was the law even before Article VI, § 4½, was adopted. In the early case of People v. Miller, 33 Cal. 99, at page 100, decided under the Criminal Practice Act, the court affirmed a conviction and an order denying a motion for a new trial, and in doing so stated: "The statute provides that * * * a verdict rendered against a defendant in such case when the trial has been had in his absence will be set aside upon motion for new trial. * * * The trial was not had in the defendant's absence. She does not claim that she was absent except at the time when the jury came into Court and announced their verdict and while the same was being recorded by the Clerk. * * * It is not pretended she was in any manner prejudiced in respect to a substantial right by reason of her momentary absence; and, assuming that she was absent as claimed on her behalf, and that the proceeding which transpired during that interval was irregular, it must be held to be an error or mistake of no injurious consequence to the defendant, and in no wise rendering the verdict invalid."

The same rule was stated in People v. Erwin, 4 Cal.App. 394, 396, 88 P. 371, where it was stated: "We perceive no prejudicial error in the action of the court, on the 3d day of March, 1906, setting the case for trial on the 12th of April following, although such action was taken in the absence of the defendant, yet in the presence of his counsel. There was ample time for defendant to prepare for trial, and, when the case was called for trial, if he had any objections to the time or manner of the setting of the cause, the same should have been offered. No objections were interposed."

In People v. Rader, 136 Cal. 253, at page 256, 68 P. 707, at page 708, the court indicated that it might have been error to have set a case for trial in the absence of the defendant and his counsel, but stated: "But the defendant did not object when the case was called for trial, and it does not appear that he was prejudiced in the least by the resetting of the case."

[13] All of the above cases were decided before the adoption of Article VI, § 4½, to our Constitution as originally adopted in 1911. Since that date there can be no doubt that errors, even in denying a constitutional right, do not necessitate a reversal unless prejudice is shown or is presumed. It has been so held in reference to the very section of the Constitution here involved—Article 1, § 13. That section, in addition to guaranteeing the right of one accused of a felony to be present in person and by counsel, also guarantees the right of such a defendant to be free from being required to be a witness against himself. In People v. O'Bryan, 165 Cal. 55, 130 P. 1042, the trial court erroneously admitted evidence of defendant's admissions before the grand jury made before the defendant had been warned of his constitutional right to refuse to testify. The Supreme Court held that such evidence had been admitted in violation of the constitutional provision in question, but also held that such error, in the absence of prejudice, did not require a reversal. In this connection the court stated, at page 65 of 165 Cal., at page 1046 of 130 P.:

"Section 4½ of article 6 of our Constitution must be given at least the effect of abrogating the old rule that prejudice is presumed from any error of law. Where error is shown, it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work any injury. The mere fact of error does not make out a prima facie case for reversal which must be overcome by a clear showing that no injury could have resulted.

"* * * if a court should undertake to deny to a defendant charged with a felony the right of trial by jury, and after a hearing of the evidence render a judgment of conviction, it cannot be doubted that such judgment should be set aside even though there had been the clearest proof of guilt. Or, if a defendant, after having been once acquitted, should be again brought to trial and thereupon convicted, in disregard of his plea that he had been once in jeopardy, it would hardly be suggested that, because he was in fact guilty, no 'miscarriage of justice' had occurred.

"But it does not follow that every invasion of even a constitutional right necessarily requires a reversal. It may well be that the court, after examining the 'entire cause including the evidence,' is of the opinion that the error complained of, whatever its character, has not resulted in a miscarriage of justice. The mere fact that the assignment of error is based upon a provision of the Constitution is not conclusive. The final test is the opinion of the appellate court upon the result of the error. * * *

"The application of these views requires an affirmance of the judgment and order under review, notwithstanding our conclusion, as already stated, that the statements of the appellant to the grand jury should not have been allowed to go to the jury."

As late as the case of People v. Isby, 186 P.2d 405, at page 414, our Supreme Court, in discussing this question of a defendant's constitutional right to be present at all stages of the proceeding, stated: "Defendants rely on the well-settled rule that if the prosecution be for a felony, the accused must be personally present at the trial to validate a conviction. [Citing authorities.] Accordingly, it has been held in this state, as defendants properly note, that in the trial of a felony the accused must be personally present during the presentation of evidence before the jury [citing a case], or when the verdict is returned [citing cases]. And as further illustration of the rule, defendants cite cases holding that the accused was entitled to a new trial where it appeared that in his absence his objection to the introduction of evidence [citing a case], or his motion to exclude evidence [citing a case] was argued by the attorneys and decided against him by the judge. But in such instances the required presence of the accused bore a relation, reasonably substantial, to the fullness of his opportunity to protect himself on the criminal charge. In considering this point in relation to the constitutional guaranty of due process, Mr. Justice Cardozo in the case of Snyder v. Massachussetts, 291 U.S. 97, at pages 106-108, 54 S.Ct. 330, 332, 78 L.Ed. 674, 90 A.L.R. 575, aptly observed: 'Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. * * * [Rather] the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.' Thus, it is not necessary for a defendant to be present at proceedings which are merely preliminary or formal and at which matters affecting his guilt are not presented. [Citing authorities.] The determinative question is whether or not the accused suffered any damage by reason of absence at a particular stage of the proceedings."

[14] Tested by these standards it is quite clear that, even if it be assumed that error was committed in transferring the case in the absence of appellents, such assumed error could not have been prejudicial. The evidence demonstrates, beyond reasonable doubt, that appellants were guilty. So far as the contention, first made in their briefs, is concerned, that, if they had been present they would have objected to Judge Shoemaker because he was prejudiced against them, but little need be said.

Appellants, prior, at and during the trial, had ample time to challenge the qualifications of the trial judge. Appellants did not see fit to raise this point until after they had been convicted. At no time before, at or during the trial did they challenge the propriety of the transfer order made in their absence, nor did they, during such periods, make any charge of bias or prejudice against the trial judge. Under these circumstances it is obvious that the present contention is but an afterthought arrived at only after the jury properly had convicted them.

The appeals from the orders denying the motions in arrest of judgment are dismissed; the orders denying the motions for new trials and the judgments of conviction are affirmed.

WARD and BRAY, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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85 Cal.App.2d 352

BROADWELL et al. v. RYERSON et al.

Civ. 15910.

District Court of Appeal, Second District, Division 3, California.

May 4, 1948.

1. Dismissal and nonsuit 🔑15

Court was under no mandatory duty to grant plaintiffs' motion made in open court to dismiss the action in which no affirmative relief was sought by defendants, but it was a matter for the discretion of the court. Code Civ.Proc. § 581, subd. 1.

2. Continuance 🔑26(3)

Where a material witness for plaintiffs had been placed under subpoena, but witness left city on vacation without consent of plaintiffs' attorneys, and thereafter witness notified plaintiffs' attorneys that she would appear on 24 hours' notice, and witness was notified to appear, but failed to make plane connections and did not appear until after final arguments were made to jury, court abused discretion in denying plaintiffs' motion for a continuance because of absence of the witness. Code Civ.Proc. § 581, subd. 1.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Bradford Lyle Broadwell, by his guardian ad litem, Christian Broadwell, and by Christian Broadwell against Claude L. Ryerson and another to recover for injuries sustained by the minor when struck by an automobile driven by the named defendant. From a judgment for the defendants, the plaintiffs appeal.

Judgment reversed.

Russell H. Pray, Wm. C. Price and Delmar W. Doddridge, all of Long Beach, for appellants.

Joseph A. Ball and Clarence S. Hunt, both of Long Beach, for respondents.

SHINN, Acting Presiding Justice.

This is an action brought by the guardian ad litem of a minor, to be referred to herein as plaintiff, against Claude L. Ryerson, to recover damages for injuries suffered when he came into contact with the Ryerson car at 4th and Pine Streets in the city of Long Beach. Plaintiff had proceeded south on the west side of Pine and was struck in the intersection of Pine and 4th Streets. Defendant was driving west on 4th Street. Defendant's answer denied negligence and alleged contributory negligence of plaintiff as a defense. In a jury trial, verdict and judgment were for the defendant.

Plaintiff had subpoenaed as a witness one Jessie F. Westergard; she failed to appear when the trial commenced on Thursday, August 22, 1946; the case was on trial throughout that day, four witnesses testified for plaintiff and the trial was continued to the following morning. Upon the opening of the morning session on Friday, plaintiff's counsel made a motion for a continuance of the trial until the following week. As ground for the continuance it was stated that the witness had been subpoenaed on August 5, had requested that she be excused, that her request had been denied on at least three different occasions, that she had left the city on her vacation and thereafter caused to be conveyed to plaintiff's attorneys her promise to return on 24 hours notice, that she had been called by telephone immediately when counsel knew the trial was to proceed, that an attempt had been made to reach her that morning by telephone at her home, her place of employment, and at a vacation resort which was within 8 hours driving time from the court. It was stated positively by counsel that the witness had not been excused. Nevertheless, the court stated: "I think the effect of that was to excuse her and the motion for continuance will be denied inasmuch as it would cause the Court to be impotent for the period of one year—

"Mr. Price: In that event, your Honor, we will dismiss on behalf of the plaintiff.

"The Court: You make a motion to dismiss?

"Mr. Price: Make a motion to dismiss at this time.

"The Court: Is there any objection to that?" There was an objection on the ground that defendant had a witness present from outside the state and the court then stated: "I am sorry but your motion to dismiss will be denied. * * * I do not think you have a dismissal available to you after you have started the trial.

"Mr. Price: Your Honor, under Subdivision 4, I think the case should be dismissed, that's our situation. We have abandoned it.

"The Court: That has already been denied by the Court, and you haven't abandoned it, you have simply made a motion to dismiss.

"Mr. Price: All right, we will do that. On behalf of the plaintiff then we will abandon.

"The Court: Proceed with your trial, Mr. Hunt. Go ahead. Call the jury. Let the record show that the jurors are in their places. Proceed with your case. Mr. Price, do you desire to rest or proceed with your case?

"Mr. Price: No, your Honor, we do not rest. At this time we move to dismiss on behalf of the plaintiffs.

"The Court: You have already moved to dismiss and it has been denied. You may proceed.

"Mr. Price: And under Section 4, Subdivision 4—

"The Court: Please—please do not continue with that matter. You can proceed with your case, or you can rest, whatever you desire to do. I will hear additional evidence." Plaintiff's attorney thereafter made a further motion to dismiss on account of the absence of the witness, was admonished by the court not to mention the witness before the jury, and the jury were instructed to disregard the statement. Plaintiff called the name of the absent witness and there being no response, the court said: "Call another witness. Call another witness, let us not have any difficulty." Counsel then asked to abandon the case and the court refused to hear any argument and refused to allow counsel to approach the bench as requested by plaintiff's attorney. The defendant took the stand to testify in his own behalf but before he had given his testimony, plaintiff's attorney stated that he had been advised by telephone that the missing witness was on the way to court, and the court stated: "If she returns or if she arrives some time during the time that this case is on trial, you will be permitted to put the witness on the witness stand." On August 23, the witness not having appeared, plaintiff's attorney asked that a bench warrant be issued for the witness, which was refused, the court stating, in part: "Where a subpoena has been issued and the witness fails to appear under these circumstances—where a person calls a witness and then makes arrangements for the witness to answer on so many hours' notice—that settles it and I would not have jurisdiction. The motion will be denied." And counsel stated: "I do not wish to argue the motion, your Honor, after the ruling of the Court, but for the purpose of the record I would like to state that never at any time—and I will make an affidavit to this—never at any time did we tell the witness or her representative that she could go. That was the representative's statement to us, that she would go, and we at that time stated to him that she should come in and be here at the time of the trial.

At no time did I ever give her permission to go away or to return on 24 hours' notice or any other permission, other than to be here at the beginning of the trial on August 22.

"The Court: The same ruling." The evidence was thereupon closed, the attorney for plaintiff and the attorney for defendant addressed the jury in argument and the case was adjourned until the following morning when the following occurred:

"Mr. Price: Your Honor, at this time I would like permission to reopen briefly to put on one witness, Mrs. Westergard.

"The Court: You have rested, Mr. Price, and you have argued to the jury and it is too late at this time to reopen the case."

Plaintiff made a motion for new trial, supported by affidavits. Mr. Price made affidavit that after Mrs. Westergard had been subpoenaed he had a call from a Mr. Fraser, of the office of an oil company where Mr. Westergard worked, stating that Mr. Westergard would be on vacation on August 22, and that Mrs. Westergard desired to be excused from attendance, that the affiant refused to excuse her; that affiant, a few days later, called Mr. Fraser and advised him that it would be impossible to excuse Mrs. Westergard, and that on August 20 Mr. Fraser called the affiant and told him that the Westergards were at June Lake on their vacation and that upon one day's notice Mrs. Westergard would appear as a witness, that Mrs. Westergard was contacted by telephone and she was told to be in court at the very latest at 10:00 a. m. August 23rd. It was further stated in the affidavit that Mrs. Westergard was a witness to the accident and that her testimony was essential to a fair determination of the case. Mrs. Westergard made affidavit, that she was on the scene when plaintiff was injured, that she was among those who started to cross the intersection of Pine and 4th Streets, that the crowd started to cross 4th Street when the signal turned to "Go," and that the boy was struck at a point which would be in the crosswalk across 4th, at the west side of Pine. She stated that she had been served with a subpoena on August 5th, that when she went to June Lodge she believed that her husband had made an arrangement through his attorney, a Mr. Fraser, that she would not have to appear at 10:00 o'clock, August 22, but that shortly after that hour she was called by Russell H. Pray, on behalf of plaintiff, and requested to appear immediately; that she thereupon endeavored to return to Long Beach by plane; that planes in the local air service had been grounded by a storm and she and her husband then drove to Reno, Nevada, in order to get a plane to Long Beach, but found that she would be routed through San Francisco and would not reach Long Beach in time to attend the trial on August 23rd, although she was willing and anxious to do so. An affidavit was filed by Mr. Fraser in which he stated that in his conversations with plaintiff's attorneys, they had not excused Mrs. Westergard from attendance and that he, Fraser, made the arrangement with Mr. Westergard for the appearance of Mrs. Westergard at the trial, upon 24 hours' notice. Another affidavit was filed by Mr. Price, stating that immediately upon learning that the case would go to trial on August 22, a telephone call was put in for Mrs. Westergard who was reached at approximately 10:30 a. m., and that she advised Mr. Price that she would leave immediately for Long Beach and would be ready to attend court the following day. It was further stated that plaintiff went to trial in the belief that the witness would attend court not later than the morning of August 23rd.

[1] No affirmative relief was sought by defendant and therefore plaintiff insists that he had an absolute right to dismiss the action by motion in open court, as well as by written request to the clerk. It is settled that a dismissal by the clerk is mandatory and that the jurisdiction of the court is ended upon the filing of a request under the conditions specified in subdivision 1 of section 581, Code of Civil Procedure. It is plaintiff's contention that under similar conditions a motion made in open court deprives the court of jurisdiction to do otherwise than dismiss the action. This would be true if the court has no discretion in the matter. Defendant replies that although plaintiff had the right, prior to the 1947 amendment of section 581, St.1947, p. 2256, to dismiss the action by filing a written dis-

missal with the clerk, it was discretionary with the court to grant or deny the motion made in open court. We agree with defendant on this point. It is not true that the court must grant the motion; it may in its discretion either grant or deny it. Denial of the motion raises the question of the proper exercise of discretion and not the question of jurisdiction. (Boca etc. R. Co. v. Superior Court, 150 Cal. 153, 88 P. 718; Huntington Park Co. v. Superior Court, 17 Cal.App. 692, 121 P. 701; Chapman v. Superior Court, 1 Cal.App.2d 512, 36 P.2d 1093.)

[2] Plaintiff's alternative contention that it was an abuse of discretion to deny the motion is well-founded. From the record, as above quoted, we readily conclude that the motion to dismiss should have been granted. A material witness had been placed under subpoena and plaintiff's attorneys had denied several requests that she be excused from appearance on August 22. She left Long Beach without either the express or implied consent of the attorneys. After she had departed she caused plaintiff to be notified, by her husband's attorney, that she would appear as a witness upon 24 hours' notice. When it became certain that the case would go to trial August 22, she was promptly contacted and promised in good faith that she would appear the following morning. These matters were before the court during the trial. It was made to appear, later, by affidavit of Mrs. Westergard, that she made the mistake of endeavoring to return by plane, instead of by automobile, and was unable to make connections in time. The facts of the situation as they were presented during the trial afforded no basis for the conclusion persisted in by the court that plaintiff's attorneys had excused the witness. The facts were directly to the contrary. The court's statement that to grant the motion, which was for a continuance from Friday morning until Monday, "would cause the court to be impotent for the period of one year," is something we cannot fathom. If it was meant that any continuance granted would have to be for a period of not less than one year, we still would be unable to reconcile such a procedural oddity with our conception of the duty of a trial court to so adjust its procedure in emergencies that litigants will not be unnecessarily deprived of substantial rights. Where the enjoyment of substantial rights of a litigant conflicts with the mere convenience of the court, the rights should not be forfeited in order that the court be not discommoded. If the request had been granted the trial would thereby have been postponed but a single day. With the courts overflowing with work, a trial judge with an open day on his calendar, and who wished to employ it to advantage, should not find it necessary to remain idle. Plaintiff's attorneys were not to blame for the unfortunate situation. The blame rested entirely upon the witness. When it appeared that it was unlikely that she could be produced on Friday, either the motion for continuance or the motion to dismiss should have been granted. Plaintiff had an absolute right and the power to dismiss the action by filing a request with the clerk, but made the mistake of assuming that the court would grant his motion. He had a right to indulge in this assumption. We cannot understand why the court would deny such a motion, in circumstances which allowed plaintiff's counsel to dismiss the action by the simple expedient of handing to the clerk a written request for dismissal. In the difficulties of the situation, this available procedure evidently was overlooked, and we overlook the omission, since it is the mistakes of the court and not the mistakes of counsel that are under review.

It is unnecessary to discuss the court's refusal to issue a bench warrant for the witness or its refusal to reopen the case for the receipt of the testimony of the witness, Westergard, when she appeared. These situations would not have arisen if the motion to dismiss had been granted. They are of interest only as illustrating the persistent and good faith, although futile, efforts of plaintiff's attorneys to present their case properly.

The judgment is reversed.

WOOD, J., and VALLÉE, J. Pro tem., concur.

85 Cal.App.2d 358

PEOPLE v. COUNCE.

Cr. 4217.

District Court of Appeal, Second District,
Division 2, California.
May 4, 1948.

1. Assault and battery ⚷92

Evidence sustained conviction for assault with deadly weapon.

2. Criminal law ⚷260(11)

The trial court's determination that preponderance of conflicting evidence was in people's favor must be accepted as final on appeal from judgment of conviction.

3. Criminal law ⚷655(1)

In prosecution for assault with deadly weapon, trial court's remarks, referring to participants in fight between defendant and complaining witness as of "that particular race," indicated no bias against defendant, where both combatants were of same race.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

George C. Counce was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Joslyn & Hollopeter, of Pasadena, for appellant.

Fred N. Howser, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Defendant was charged by the information with the crime of assault with a deadly weapon, a felony. Trial by jury was waived. Defendant having been convicted and sentenced to serve a term of six months in the county jail appeals from the judgment.

Defendant concedes in his opening brief that the evidence in practically every particular is conflicting, that a judgment will not be disturbed if supported by substantial and credible evidence, and that in reviewing the sufficiency of the evidence to support a conviction the appellate court will view the evidence in the light most favorable to the prosecution. Defendant's only argument with reference to the evidence is that the testimony of the complaining witness and of those corroborating him is so inconsistent and inherently improbable as to be incredible.

Complaining witness Greene testified that he entered a cafe with a lady about 9:00 o'clock in the evening and while he was still standing defendant made a sudden and unprovoked attack on him and cut him with a knife; that he was not armed with a knife or other deadly weapon and that he did not try to fight defendant until he was attacked. In this he was corroborated by the lady who accompanied him and by another witness who was seated at a table at the time of the assault. A bartender in the cafe testified that he did not see the beginning of the fight; that when he first saw the men Greene was attacking defendant with a knife. Another witness testified that he saw both of the men wielding knives and cutting each other. Defendant testified that before knives were used Greene advanced toward him with his hand in his pocket and that he struck Greene with his fist, the blow being so hard that he, defendant, fell to his knees. This was the first blow struck by any one, says defendant. The latter did not assert that Greene menaced him in any way except that he considered Greene's hand in his pocket as a threat at the time defendant struck the blow with his fist.

[1, 2] There is nothing inherently improbable or incredible in the evidence given by Greene and those corroborating him. Notwithstanding defendant's concession as to the conflict in the evidence and the light in which it must be viewed by this court, he contends that the evidence preponderates in favor of defendant. The trial court determined wherein the preponderance lies, accepted the version of the fight given by Greene and the other witnesses for the people, and we must accept that determination as final. (See People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; People v. Johnston, 73 Cal.App.2d 488, 493, 166 P.2d 633; People v. Phillips, 76 Cal.App.2d 515, 520, 173 P.2d 392; People v. O'Moore, 83 Cal.App.2d 586, 189 P.2d 554.)

[3] The only other point made is the ridiculous charge that defendant was convicted by reason of passion and prejudice on the part of the trial court. This charge is based on the reference by the court to the parties engaged in the fight as being of "that particular race." Since both combatants were of the same race the remarks of the court cannot be construed as indicating any bias or prejudice against defendant. The record fails utterly to sustain this unfounded charge.

The appeal is without merit.

Judgment affirmed.

MORE, P. J., and McCOMB, J., concur.

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85 Cal.App.2d 261

PEOPLE v. THOMPSON.

Cr. 2065.

District Court of Appeal, Third District, California.

April 29, 1948.

1. Indictment and Information 🔑57

The sufficiency of an indictment is not to be tested by rigorous rules of common law nor by rules existent prior to 1927 and 1929 amendments to statutes governing pleadings in criminal cases. Pen.Code, § 950–952.

2. Criminal law 🔑1186(4)
Indictment and Information 🔑110(3)

Where defendant presumably received copy of transcript of proceedings before grand jury and was thereby informed of basis of charges against him, and charge against him of keeping false accounts relating to receipt, etc., of public moneys while justice of the peace was in words of statute, defendant had sufficient notice of offense of which he was accused, and any deficiency in language of indictment did not mislead him or result in miscarriage of justice, particularly where sentence following conviction on such charge was fixed to run concurrently with sentences on other counts in the indictment. Pen.Code, §§ 424, 925, 950–952, 960, 1404; Const. art. 6, § 4½.

3. Criminal law 🔑400(2)

In prosecution for keeping false accounts relating to receipt, etc., of public moneys by defendant while justice of the peace, where there was proof that original motor vehicle docket kept by defendant as justice had been lost, photostatic copies of pertinent portions of defendant's motor vehicle docket made by accountant who had been employed for several years to audit books of county were properly admitted. Pen.Code, § 424; Code Civ.Proc. § 1855, subd. 3, 1937.

4. Criminal law 🔑371(1), 372(8)

In prosecution for embezzling moneys which had come into defendant's possession as justice of the peace, where defendant testified that he did not intentionally fail to turn over to county auditor moneys which he had received, evidence of acts of embezzlement committed by defendant other than one charged in indictment was admissible to show course of action pursued by defendant and his fraudulent intent. Pen. Code, § 504.

5. Criminal law 🔑783(1)

Instruction that evidence of other embezzlements similar to those charged in indictment was to be considered only for such bearing as jury might find it to have on issues relating to defendant's state of mind was sufficient, as against defendant's contention that jury should have been cautioned that any such act committed subsequent to the date of embezzlement charged in any one count of indictment could not be considered.

◆

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

T. G. Thompson was convicted of keeping false accounts relating to receipt, etc., of public moneys while serving as justice of peace and of embezzling moneys which had come into his possession as such justice of the peace, and he appeals.

Affirmed.

Burt W. Busch, of Lakeport, for appellant.

Fred N. Howser, Atty. Gen. and Doris H. Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Appellant, who was a Justice of the Peace in Westwood Township in Lassen County, was charged in an indictment as follows: In count one with a violation of subdivision 3 of section 424 of the Penal Code, in that he had kept false accounts relating to the receipt, etc., of public moneys; and in counts two, three, four and five with violations of section 504 of the Penal Code, in that on four different dates he had embezzled moneys which had come into his possession as such Justice of the Peace. He demurred to the indictment, but the demurrer was overruled. He entered a plea of not guilty and was thereafter tried by a jury, which returned verdicts of guilty on all counts. He was sentenced to the state prison for the term prescribed by law, on each count, the sentences to run concurrently. No motion for a new trial was made. This appeal is taken from the judgment.

Grounds for appeal urged are (1) that the trial court erred in overruling his demurrer to the first count of the indictment; (2) and (3) that the court erred in admitting certain evidence; and (4) that said court erred in the giving of a certain instruction.

The charge contained in the first count of the indictment was in substance that defendant, on or about August 28, 1947, did wilfully, unlawfully, feloniously and knowingly keep false accounts relating to the receipt, safekeeping, transfer and disbursement of public moneys, he then being the duly elected and qualified Justice of the Peace of Westwood Township, and, as such, charged by law with the receipt, safekeeping, transfer and disbursement of public moneys of the said justice's court.

[1] This charge, it is asserted, does not comply substantially with the requirements of sections 950, 951 and 952 of the Penal Code, in that it does not use ordinary or concise language in such a manner as to enable a person of common understanding to know what was intended, or to enable defendant to plead the judgment as a bar to further prosecution; that it does not reveal the nature of the accounts, or in what manner they were kept falsely; and that, though it employs the language of section 424 of the Penal Code, it is nevertheless, insufficient. Appellant cites several cases, which, with one exception, were decided prior to the amendment of section 952 of the Penal Code in 1927 and 1929, which section as amended liberalized the rules of pleading in criminal cases, and provides that in charging an offense, each count shall be sufficient if it contains in substance a statement that the accused has committed some public offense therein specified; and that it may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. The sufficiency of an indictment is not now to be tested by the rigorous rules of the common law nor by the rules existent prior to the 1927 and 1929 amendments to our statutes governing pleadings in criminal cases. See People v. Codina, 30 Cal.2d 356, 359, 181 P.2d 881; People v. Curtis, 36 Cal.App.2d 306, 317, 98 P.2d 228.

Also, section 4½ of Article VI of the Constitution, adopted in 1911 and amended in 1914, provides that no judgment shall be set aside in any case on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Also see sections 960 and 1404 of the Penal Code, amended in 1927.

[2] Appellant was entitled to, and presumably received, a copy of the transcript of the proceedings before the grand jury (Penal Code, sec. 925), and was thereby informed of the basis of the charges against him. See People v. Gilbert, 26 Cal.App.2d 1, 7, 78 P.2d 770; People v. Gordon, 71 Cal.App.2d 606, 610, 611, 163 P.2d 110; People v. Jones, 61 Cal.App.2d 608, 615,

616, 143 P.2d 726; People v. Curtis, supra; and since it is conceded by him that the charge against him is in the words of section 424 of the Penal Code, we are satisfied that he had sufficient notice of the offense of which he was accused, and that any deficiency in the language of the indictment, if such there was, did not mislead him nor result in a miscarriage of justice, particularly since the sentences on the various counts in the indictment run concurrently.

[3] The second ground for reversal urged by appellant is that the trial court erred in permitting the witness Faulkner to testify regarding the Motor Vehicle Docket kept by appellant as Justice of the Peace, because of subdivision 3 of section 1855 of the Code of Civil Procedure. There was proof in the case that the original docket was lost, and section 1855 provides that under such circumstances the contents of a writing may be proven either by a copy or by oral evidence. Faulkner, who was an accountant who had been employed for several years to audit the books of Lassen County, and who had examined the books pertaining to defendant's justice's court, testified that he made photostatic copies of the pertinent portions of appellant's Motor Vehicle Docket, and they were introduced in evidence after testimony was adduced showing that the originals were lost. We find no error in this behalf. See Code of Civil Procedure, sec. 1937; People v. Mitchell, 74 Cal.App. 164, 168, 240 P. 36; 16 Cal.Jur. 697-698, 702.

[4] Appellant's third asserted ground for reversal is that the trial court permitted evidence of acts of embezzlement committed by him, other than those charged in the indictment, and particularly one act subsequent to the ones charged. It appears from the record that this evidence was adduced by the prosecution in rebuttal and after defendant had testified that he did not intentionally fail to turn over to the county auditor moneys which he had received. Evidence of these other embezzlements was thus given to show a course of action pursued by appellant, and his fraudulent intent. For such purpose evidence of similar acts, both before and after those charged, is admissible. See People v. Hatch, 163 Cal. 368, 378-380, 125 P. 907; People v. Talbot, 220 Cal. 3, 17, 18, 28 P.2d 1057; People v. Kendall, 65 Cal.App.2d 569, 570, 151 P.2d 39.

[5] The final alleged error asserted by appellant is that the court instructed the jury that they might consider evidence of other acts of embezzlement on the issue of intent, but failed to caution them that any such act committed subsequent to the date of the embezzlement charged in any one count could not be considered as evidence of intent as to that count. No authority for this contention is cited, and in view of the rule stated in the cases above cited, it has no merit. The court by its instruction advised the jury that evidence of other similar embezzlements was to be considered only for such bearing as they might find it to have on issues relating to defendant's state of mind. This was proper and it was enough. See People v. Kay, 34 Cal.App.2d 691, 696, 697, 94 P.2d 361.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

85 Cal.App.2d 230

TOOKE v. ALLEN.

Civ. 16014.

District Court of Appeal, Second District, Division 3, California.

April 28, 1948.

Rehearing Denied May 21, 1948.

Hearing Denied June 24, 1948.

1. Action 🔑45(3)

In action to recover damages for preventing plaintiff's peaceful occupation of apartment leased from defendant, complaint was not demurrable as improperly uniting several causes of action for separate torts in failing to furnish plaintiff adequate utility services, taking and detaining her clothing and other personal belongings, locking her out, invading her apartment, and assaulting her.

2. Landlord and tenant 🔑130(3)

In action for interference with plaintiff's peaceful occupation of apartment leased from defendant, plaintiff's testimony as to assaults on her by defendant in answer to question as to why she left apartment was admissible as tending to prove her state of mind occasioned by defendant's conduct and relevant to question of malice, though such assaults were not pleaded and occurred over year before filing of complaint.

3. Landlord and tenant 🔑130(3)

In action for interference with plaintiff's peaceful possession of apartment leased from defendant by allegedly malicious course of persecution, proof of interference with property rights, personal rights, or both was admissible, though cause of action was not for injuries to person or property in strict sense; any evidence tending to prove humiliating and terrorizing effect of defendant's conduct or motive therefor being relevant.

4. Landlord and tenant 🔑130(3)

A tenant may recover damages from landlord for deprivation of peaceful possession of leased premises by a succession of landlord's wrongful acts.

5. Torts 🔑11

One guilty of non-trespassory invasion of another's interest in private use and enjoyment of land is liable for damages, if such other has property rights and privileges respecting use or enjoyment interfered with, invasion is substantial, actor's conduct is legal cause of invasion, and invasion is either intentional or unreasonable or unintentional, but otherwise actionable under rules governing liability for negligent, reckless or ultrahazardous conduct.

6. Landlord and tenant 🔑130(3)

Loss of earnings, not being consequence of tenant's deprivation of peaceful possession of leased realty to be anticipated in usual course of things, should be pleaded by way of special damage to recover therefor from landlord.

7. Appeal and error 🔑1071(6)

While specific finding by court of amount of special damage sustained by plaintiff is better practice, failure to make such finding is not necessarily fatal to judgment awarding such damage.

8. Damages 🔑6

The fact that special damages are incapable of exact ascertainment does not bar award thereof as judicially determined from facts in evidence.

9. Landlord and tenant 🔑130(3)

Where plaintiff made issue of special damage sustained because of her loss of business as result of deprivation of peaceful possession of leased apartment by defendant landlord's wrongful acts, plaintiff was not required to specify in complaint amount of such damage.

10. Appeal and error 🔑1039(2)

Where issue of tenant's loss of business because of deprivation of peaceful possession of leased apartment by landlord's wrongful acts was presented and fully tried in action against landlord for damages, landlord was not harmed by failure of complaint to segregate claim for such special damage.

11. Trial 🔑393(1)

In action to recover damages for deprivation of peaceful possession of leased apartment by defendant landlord's wrongful acts, defendant had right to separate findings by court as to amounts of damages sustained by plaintiff as result of alleged business losses and on account of humiliation, inconvenience and mental distress.

12. Trial 🔑405(2)

A landlord's objections to his former tenant's proposed court findings on ground that failure to make separate findings as to amount of such tenant's damages because of business losses as result of deprivation of peaceful possession of leased apartment by landlord's wrongful acts and damages for humiliation, inconvenience and mental distress, was waived by failure to urge objection in trial court before findings were signed or on motion for new trial. Code Civ.Proc. § 634.

13. Appeal and error 🔑499(1)

Where record on appeal is silent as to whether appellant urged objection to trial court's findings on certain ground in such court before findings were signed or on motion for new trial, objection will be deemed waived. Code Civ.Proc. § 634; Rules on Appeal, rule 52.

14. Appeal and error ⚿938(3)

The Appellate Court must presume that record includes all matters material to determination of all points on appeal. Rules on Appeal, rule 52.

15. Appeal and error ⚿1071(1)

Where there was ample evidence to sustain verdict for appellee, issues were exhaustively tried, and trial court carefully considered matter of compensatory damages, point that court's findings as to damages were not sufficiently specific respecting losses and damages awarded appellee do not justify a reversal of judgment for appellee.

16. Appeal and error ⚿1071(1)

Any error in trial court's failure to make sufficiently specific findings as to appellee's damages was harmless to appellant, where evidence justified full amount of damages awarded.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Janet Tooke against George S. Allen to recover damages for persecution and abuse preventing plaintiff from enjoying peaceful occupation of her apartment in defendant's building. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joseph D. Taylor and Paul Taylor, both of Los Angeles, for appellant.

Frank C. Weller and Thomas S. Tobin, both of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

On March 1, 1942, plaintiff was and for some six years had been a tenant in an apartment house in Los Angeles known as the Huntley Apartments. For several years her rent had been $22.50 per month. Defendant George S. Allen acquired the property and accepted from plaintiff and gave his receipt for $22.50 as rent for the month of March. Thereafter, a dispute arose between the parties as to whether plaintiff should pay $22.50 or $30.00 per month for her apartment. No legal notice was given by defendant of an increase in the rent to $30.00. The dispute found its way to the OPA office of rent control, but the ramifications of the controversy need not be recounted here, since the trial court found that plaintiff's rent was $22.50 per month, and it is conceded on the appeal that there was sufficient evidence to support this finding. It was alleged in the third amended complaint that defendant engaged in a persistent and protracted scheme and effort to force plaintiff to vacate her apartment, which she finally did, but not until after she had instituted her present action in June, 1945. The action is for damages occasioned by a continuous course of persecution and abuse which prevented plaintiff from enjoying the peaceful occupation of her apartment, which was her home. In a court trial plaintiff was awarded $2,500 actual damages, and $2,500 punitive damages, and defendant appeals.

The findings as to defendant's conduct followed generally the allegations of the complaint. The court found that the defendant, George S. Allen, "together with certain of his employees, acting under his direction, entered upon and carried out a campaign of annoyance designed to force the plaintiff to vacate said apartment by interfering repeatedly with and violating her right to the peaceable possession thereof, and in pursuance of that design they did interfere with and destroy her peaceful possession of said premises"; that plaintiff is a woman of intelligence and refined sensibilities, that she has gained her livelihood by literary and artistic activities; that defendant made threats that he would violate plaintiff's right of peaceful possession, that she lived under fear of the execution of said threats; that in order to safeguard her belongings she had a special lock put on her door; that defendant broke the lock and key, entered plaintiff's apartment, removed a typewriter, clothing, wearing apparel and other personal belongings and keepsakes, scattered her papers and unfinished manuscripts on the floor; caused the hot water in her apartment to be reduced in quantity; caused the gas in her apartment to be shut off entirely several times, thus preventing her cooking; discontinued telephone service through the apartment house switchboard, which plaintiff had theretofore enjoyed in accordance with the usual practice in such cases, thereby preventing plaintiff from accepting incoming calls from prospective employers who desired her services as a retoucher and finisher of photographic portraits; that because of such interference and by reason of plaintiff's nervous and distraught condition, plaintiff's income was substantially reduced. It was also found that on at least two occasions with the design aforesaid, defendant forcibly entered plaintiff's apartment and assaulted her, by pushing her out of the apartment on one occasion and threatening her with death or serious bodily harm, thereby putting her in a condition of terror. It was further found that during the interval in question defendant avoided a judicial determination of his right to raise the rent of the apartment or evict plaintiff and that his conduct as stated was oppressive, willful and malicious. It was found that at the time defendant took possession of plaintiff's clothing and other personal belongings plaintiff was not indebted to defendant for rent but that at the time of the trial said articles were still in defendant's possession and withheld from plaintiff. It was further found that all of the acts constituting defendant's conduct as related in the findings were committed within three years immediately preceding the commencement of the action. It was found that as a result of defendant's acts plaintiff was humiliated, inconvenienced, distraught and terrorized, in addition to suffering direct pecuniary loss by reason of her inability to work under the conditions created by the defendant, "and that by defendant's interference with and destruction of her peaceful possession of the aforesaid premises, of which she was a lawful tenant, all as herein found, she was damaged in the sum of $2,500." Defendant demurred to the complaint generally; also upon the ground that several causes of action were improperly united and that those which could be united were not separately stated, to wit: a cause of action for the unlawful detention of personal property, a cause of action for personal injuries, a cause of action for injury to property, a cause of action for eviction, and a cause of action for nuisance.

[1] Defendant held to this position throughout the trial and insists here that plaintiff is seeking to recover upon many causes of action founded on separate torts. The trial judge rejected this theory and construed the complaint as stating a single cause of action arising out of a continuous course of conduct on the part of defendant, intended and calculated to disturb and destroy plaintiff's peaceful possession of her dwelling place. In a memorandum stating the grounds of his decision he said: "Defendant's counsel have argued that those (the above enumerated) incidents ought to be isolated and that each, if it occurred, ought to be dealt with as an independent act or omission or event. To do that would be to ignore the reality that an occasional annoyance, trespass or other wrong is quite a different matter from the threat and execution of a plan and series of interferences, under which the victim of the aggression is compelled to live in continual apprehension and by which the injurious effect of each incident in the plan increases in arithmetical or possibly geometric progression." Defendant builds an elaborate argument upon the assertion, "Successive separate torts can not be transmuted into a greater tort whether that tort be called a constructive eviction or the invasion of a possessory right." He separates the many acts of misconduct into classes, namely, (1) defendant's failure to furnish adequate telephone, gas, water, and electric service to plaintiff's apartment, (2) the taking and detention of plaintiff's clothing and other personal belongings, and (3) locking plaintiff out and invading her apartment and committing the assaults as above described. As to the first class of wrongs, he attacks the sufficiency of the evidence to prove that plaintiff was deprived of any of the services and maintains that the deprivation of these services, if proved, was nothing more than a breach of contract. Much of his argument on the facts is addressed to the weight of the evidence, rather than to its sufficiency, and requires no answer. A careful review of the evidence satisfies us that the findings with respect to the de-

privation of these utility services have support in the evidence. Defendant's legal point in this connection is that plaintiff should have pleaded in each instance a contract for the furnishing of these several utility services and should have sought damages for each breach which she was able to prove. In the development of this theory he points out that plaintiff proved no contract for telephone service and although he concedes that such service was customarily furnished in the apartment house, he appears to claim that this was a mere favor that could be discontinued at any time. In similar fashion he waives aside the failure to provide plaintiff with hot water, for after all, he says, what difference does it make if plaintiff was required to take cold baths and was unable to do her kitchen work. Also the shutting off of the gas was a trivial matter, since plaintiff's neighbors came to her rescue and allowed her to use their kitchens. The argument leads to the conclusion that these minor inconveniences which plaintiff was caused to suffer were too inconsequential to engage the time of the court, and that therefore plaintiff suffered no recoverable damage. As to the taking of plaintiff's clothing and other property under a claim of lien for unpaid rent, he does not attack the court's finding that at the time the property was taken no rent was due, but he says that the articles were produced by defendant at the trial and did not appear to have been damaged; that plaintiff suffered no injury through the taking of her clothing, and in addition, the statute had run against a cause of action for taking or injury to personal property, and there could be no recovery for that reason. Plaintiff placed a special lock on her door and the lock and key were broken by defendant or his employees. This, also, was a trivial matter according to the defendant, and did not constitute an eviction. Also, the entries into plaintiff's apartment and the commotion created by defendant upon such occasions, it is contended, had no tendency to interfere with plaintiff's peaceful possession of the premises. By this painstaking procedure he arrives at the conclusion that if plaintiff had split her action into a multitude of separate causes of action she would have been unable to sustain a recovery under any one of them, and defendant would have been held guiltless of any wrongdoing whatever. In this manner he would have the court obliterate the gravamen of his offense, namely, the pursuit of a purpose of unrelenting persecution by petty annoyances, the cumulative effect of which would be to render plaintiff emotionally disturbed to the point where further occupancy of the apartment would be intolerable. Carried to its logical conclusion defendant's theory would require several actions, and a separate cause of action for each annoying incident occurring on a separate day. It is an untenable theory, as we shall presently demonstrate.

[2] One of defendant's principal contentions is that plaintiff was awarded damages, included in the total sum, on account of the assaults mentioned in the findings. These acts, he says, were not pleaded, they took place more than a year prior to the filing of the complaint and any recovery thereon was barred by the statute of limitations. The record does not bear out the assertion that the court considered the described assaults as a basis for the award of damages. Evidence of the occurrences came in incidentally, as a part of plaintiff's answer to a question as to why she left the apartment. In denying a motion to strike the evidence, the court expressly limited the purpose for which it was admitted, namely, as evidence tending in some degree to prove plaintiff's state of mind occasioned by defendant's conduct. The evidence was admissible upon that ground and for the additional reason that it had relevancy to the question of malice.

[3] Plaintiff's cause of action was not for injuries to either person or property in a strict sense, but for interference with her right of peaceful possession. Interference with a property right is of the essence of such a cause of action and interference with personal rights would not be an unusual consequence, but proof of one or the other, or both would not change the basic nature of the cause of action. It is difficult to see how the cause of action could be established without such proof. Defendant's course of persecution was a

continuing offense, and allegedly malicious. Any evidence which tended to prove the humiliating and terrorizing effect of his conduct or the motive for it was relevant.

[4, 5] Plaintiff's right to recover damages for deprivation of peaceful possession occasioned by a succession of defendant's wrongful acts is supported by established principles. "The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if, (a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and (b) the invasion is substantial; and (c) the actor's conduct is a legal cause of the invasion; and (d) the invasion is either (i) intentional and unreasonable; or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct." Rest. Torts, sec. 822. The principle is most frequently applied in nuisance cases (Griffin v. Northridge, 67 Cal.App.2d 69, 153 P.2d 800; Vowinckel v. N. Clark & Sons, 216 Cal. 156, 13 P.2d 733; Strong v. Sullivan, 180 Cal. 331, 181 P. 59, 4 A.L.R. 343; Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 106 P. 581, 26 L.R.A., N.S., 183, 21 Ann.Cas. 1247), but has equal application to non-nuisance cases. Jones v. Kelly, 208 Cal. 251, 255, 280 P. 942; McIvor v. Mercer-Fraser Co., 76 Cal.App.2d 247, 172 P.2d 758; Smith v. Weber, S.D., 16 N.W.2d 537; Winchester v. O'Brien, 266 Mass. 33, 164 N.E. 807, 64 A.L.R. 895.

A further criticism of the judgment is that the damages allowed included an award to compensate plaintiff for the loss of business earnings. It is contended that the complaint and the findings should have specified the amount of damages sustained on that score. The complaint alleged that plaintiff had been rendered unable to successfully pursue her occupation of writer and illustrator for a period of approximately three years, had been unable to sleep at night, and had been, for the past three years, extremely nervous, upset and distraught, all to her damage in the sum of $4,000. The court found, "that as a result of said annoyance of the plaintiff by the defendant, his agents, servants and employees, and as a result of her incoming telephone calls being blocked and diverted, and as a result of the nervous and distraught condition of the plaintiff by reason of said annoyance, plaintiff's income was substantially reduced; that photographers who wished to employ her were unable to establish contact with her by telephone and discontinued availing themselves of her professional services by reason of their inability to contact her by telephone to give her work." And further, "that as a result of the acts of the defendant, the plaintiff was humiliated, inconvenienced, distraught, and terrorized in addition to suffering direct pecuniary loss by reason of her inability to work under the conditions created by the defendant, his agents, servants and employees, during her occupancy of the Huntley Apartments in the years of 1943, 1944 and 1945, and that by defendant's interference with and destruction of her peaceful possession of the aforesaid premises, of which she was a lawful tenant, all as herein found, she was damaged in the sum of $2,500."

[6-14] Loss of earnings would not be a consequence of deprivation of peaceful possession of real property to be anticipated in the usual course of things, and should therefore be pleaded by way of special damage. Undoubtedly it is a better practice for the court to find specifically the amount of special damage sustained by a plaintiff, but the failure to do so is not necessarily fatal to the judgment. It is not every case in which the amount of special damage can be ascertained with certainty and the present case is one in which the court was required to approximate the amount by the best method provided by the evidence. The fact that such damages are incapable of exact ascertainment does not bar the plaintiff from receiving an award judicially determined from the facts in evidence. Plaintiff made an issue of the damages sustained by reason of her loss of business. It was not necessary under the circumstances that she specify the amount claimed as a business loss. While defendant's demurrer specified uncertainty in that it did not appear from the complaint whether the damages were claimed on account of injury to property or to person, it did not urge un-

certainty for failure to specify the amount claimed as a business loss. Since the issue was presented and fully tried, no disadvantage or detriment resulted to defendant by reason of the failure of the complaint to segregate the claims for damages. However, we believe that defendant had a right to have separate findings as to the amount of damage sustained as a result of business losses and those awarded on account of the humiliation, inconvenience and mental distress suffered by plaintiff. But we do not find in the record, nor is it suggested, that defendant objected to plaintiff's proposed findings upon that ground before the findings were signed, nor on motion for new trial. The objection urged now is one that could have been obviated on motion for a new trial. When section 634, Code of Civil Procedure, was amended in 1913 to require the service of findings, and again in 1933 to require that they be not signed prior to five days after service, the purpose was to permit of a procedure for the pointing out of defects in the proposed findings, including objections that they were uncertain or not sufficiently specific. The situation presented to us here is one in which we think the objection should be deemed to have been waived by the failure to urge it in the trial court. Del Ruth v. Del Ruth, 75 Cal.App.2d 638, 644, 645, 171 P.2d 34. Since the record is silent on the subject, it will be deemed to have been waived. We must presume the record includes all matters material to a determination of all points on appeal. Rules on Appeal, 52.

[15, 16] But aside from the matter of waiver, the point that the findings as to damages are not sufficiently specific would not in the present case justify a reversal of the judgment. There was ample evidence that plaintiff had a profitable business as a retoucher of photographs and suffered substantial business losses through the inability of her employers to reach her by telephone when they had work for her to do. The record shows that the issues were exhaustively tried and that the trial court gave careful consideration to the matter of compensatory damages. Considering the indignities heaped upon plaintiff by the vicious and malignant conduct of the defendant, the award of damages was clearly not only a carefully weighed judicial determination of that issue but a conservative one as well. Any error in this regard would in any event be harmless, for the evidence was ample to justify the full amount of the award without reference to loss of earnings. See McIvor v. Mercer-Fraser Co., 76 Cal.App.2d 247, 254, 172 P.2d 758.

Little need be said as to the award of exemplary damages beyond the statement that the findings hereinabove quoted are amply supported by the evidence. Defendant, it is true, categorically denied plaintiff's accusations. He posed as a most considerate and indulgent landlord. Some of his tenants who had not suffered from his abuse gave him a good character. But it appears that there are times when his virtues are overcome by his wrath toward tenants of his cheaper apartments. See Sanders v. Allen, 83 Cal.App.2d 362, 188 P.2d 760. He has been assessed compensatory and exemplary damages before this for the ruthless oppression of another of his tenants, a refined elderly lady whom he falsely accused of being delinquent in the payment of a month's rent, and whom he drove from her apartment by malicious harassment. Butler v. Allen, 73 Cal.App.2d 866, 167 P.2d 488.

The judgment is a just one and we think there is no reason why defendant should not be required to pay it.

The judgment is affirmed.

WOOD, J., and VALLÉE, J. pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.

85 Cal.App.2d 373

ROYAL INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 16305.

District Court of Appeal, Second District, Division 1, California.

May 5, 1948.

1. Workmen's compensation ⇐1199

The provisions of Workmen's Compensation Law dealing with limitation of time within which proceedings for compensation may be commenced should be liberally construed. Labor Code, §§ 3202, 5405, 5408, 5410, 5804.

2. Workmen's compensation ⇐1285

Workmen's compensation application filed within 245 weeks after injured employee reached age 21, was not barred by limitation, notwithstanding that application was filed more than six months after accident and after last payment of compensation and after furnishing of last apparatus for injured foot, where no guardian ad litem had been appointed for injured employee. Labor Code, §§ 3202, 5405, 5408, 5410, 5804.

Proceeding under the Workmen's Compensation Act by Donald James Hitchcock, employee, opposed by the International Derrick & Equipment Company, employer, and the Royal Indemnity Company, insurance carrier. The insurance carrier filed a petition for writ of review to review an order of the Industrial Accident Commission awarding the employee a permanent disability rating and lifetime medical care.

Award affirmed.

Eugene S. Ives, of Los Angeles, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondent Industrial Accident Commission.

DORAN, Acting Presiding Justice.

The admitted facts of this case are as follows: "The respondent Donald James Hitchcock, while a minor, was injured on June 11, 1941. He received medical treatment until the spring of 1943 and compensation from June 11, 1941, until February 13, 1942. He received an additional sum of $995.53 paid on an informal permanent disability rating dated August 4, 1943. The last foot apparatus was furnished the claimant on May 11, 1946. The claimant became of age, that is, twenty-one years of age, on December 25. About three years and one month after he became of age, he filed the claim with the Industrial Accident Commission on January 21, 1947. No guardian or guardian ad litem was appointed for the claimant while he was a minor. As a result of his injury all of the toes of the left foot were amputated at the metatarsal phalangeal joint."

In addition to the above facts, the respondent Commission calls attention to a stipulation filed March 11, 1947, reading as follows:

"It is hereby stipulated by and between Donald James Hitchcock and International Derrick and Equipment Company and Royal Indemnity Company through Eugene S. Ives, their attorney of record, that the figures contained in the report of R. E. Haggard on August the 4th, 1943, are correct, and that if the applicant had been working at the age of 21 his wages would have been $34.00 per week, entitling him to disability payments of $22.10 per week."

At the hearing before the Industrial Accident Commission February 25, 1947, the employer, and the insurance carrier, petitioner herein, raised the issues of the Statute of Limitations, and "Lack of jurisdiction of this Commission". However, the Referee found that "Applicant is entitled to lifetime medical treatment, including prosthetic devices", and ruled that "The claim is not barred by the Statute of Limitation; the Industrial Accident Commission has jurisdiction". The employee's permanent disability was found to be 22¼%, as against an earlier rating of 17¼% on August 4, 1943. Thereafter a petition for rehearing was filed, the denial of which led to the present petition for a writ of review.

It is petitioner's present contention that "the claim of the applicant before the

Commission was barred by the Statute of Limitations; that the accident occurred on June 11, 1941; that the last payment of compensation was on August 4, 1943; that the last foot apparatus was furnished applicant on May 11, 1946; that applicant became of age on December 25, 1943; that the application herein was filed on January 21, 1947, more than six months following the accident, more than six months following the last payment of compensation; more than six months following the furnishing of the last foot apparatus; more than six months, as a matter of fact about three years and six months, after the injury."

The report of the referee on petition for rehearing, pertinent to the present controversy, is as follows: "Applicant became 21 on December 25, 1943. No guardian ad litem appointed, so under the last paragraph of Labor Code Section 5408, none of the time to that date is involved in the running of the Statute of Limitations. Medical treatment and compensation have been furnished and paid. Therefore the period for filing for permanent disability rating and lifelong medical is 245 weeks, which ordinarily runs from the date of injury, but here runs from December 25, 1943 (date of majority.) The application was filed January 31, 1947. I am sure the legislature did not intend to deprive the Commission of jurisdiction before the Statute of Limitations had run, and therefore find that the Commission does have jurisdiction."

In denying a rehearing, the referee refers to "the following unpleasant picture of the carrier's (petitioner's) relationship with the applicant", deduced from the evidence: "When applicant was 18½ years of age he was injured by the loss of a part of his left foot. Temporary disability compensation was paid and medical treatment furnished. Before he became of age an informal rating was made which did not include all of the facts of disability shown by the testimony at the hearing but resulted in 5% lesser permanent disability rating than ultimately was issued. Medical treatment; i. e., the furnishing of a prosthetic device continued to May 1946, not much beyond the 245 weeks from the date of injury; but from the verbatim testimony it became apparent that shortly thereafter the carrier (petitioner) refused to furnish the equipment desired or needed by the applicant, which would appear to be about November 9, 1946, by inference. The application was filed January 21, 1947. * * * The reasonable inference from these circumstances would be that the carrier figured that it would be safe in refusing to furnish medical treatment * * * because they thought the time had passed in which applicant could secure an order for the same. I am not inclined to support them in their avoidance of their obligation to furnish lifetime medical and also to pay a belated and appropriate permanent disability award".

At the outset it may be said that neither in the various provisions of the Labor Code, nor in the California case law to which attention has been invited, has the exact question involved herein been directly decided. Section 5405 of the Labor Code specifies "the periods within which may be commenced proceedings" for benefits, as follows: "(a) Six months from the date of injury, or from the date of the last payment of any compensation, or agreement therefor, or the expiration of any period covered by such payment. (b) Two years from the date of injury, in cases where agreement for a release or compromise, which has not been approved by the commission, is made for an amount less than the full compensation or benefit."

Section 5408 of the Labor Code provides that "No limitation of time provided by this division shall run against any person under twenty-one years of age or any incompetent unless and until a guardian or trustee is appointed". In Section 5410 is found the following provision: "Nothing in this chapter shall bar the right of any injured employee to institute proceedings for the collection of compensation within 245 weeks after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the commission in such cases shall be a continuing jurisdiction at all times within such period". One other provision may be noted, namely, Section 5804 of the Labor Code, stating that "No award of compensation shall be rescinded, altered, or amended after 245 weeks from the date of the injury."

The case of Abbott v. Industrial Accident Commission, 12 Cal.App.2d 478, 480, 55 P.2d 927, 928, has been cited as authority contrary to the referee's holding that the applicant herein had 245 weeks after becoming of age within which to file claim for a permanent disability rating and lifetime medical care. In that case it was held that where three years, two months and 20 days had elapsed from the qualification of the guardian of the claimant, an insane person, before a petition to reopen the proceedings before the commissioner was filed, "this lapse of time constituted a lack of diligence and that the petitioner is therefore barred from maintaining the proceeding to reopen the award of the commission."

In the instant case the referee took the position that the Abbott case "does not coincide with the facts of the present case, but certainly has some parallel circumstances", and stated, "I believe this case should be decided adverse to the defendants, even flying in the face of the Abbott case, even if it calls for taking the matter to the Supreme Court". The answer to the petition for writ of review, filed on behalf of the Commission, likewise maintains that the Abbott case cannot be considered as "authority for the proposition that a workman which has been injured while under twenty-one does not have 245 weeks within which to institute proceedings for new and further disability".

Also cited by petitioners is Jordan v. Industrial Accident Commission, 40 Cal.App.2d 276, 104 P.2d 695, wherein it was held that when an injured minor makes an agreement with the employer for release or compromise, and no guardian or trustee is appointed, the two-year period for the filing of a claim does not commence to run until the minor's majority. In the present case it will be remembered that no guardian or trustee was ever appointed; —obviously the Jordan case is not directly in point with the present controversy.

In the case of Gouanillou v. Industrial Accident Commission, 184 Cal. 418, 420, 193 P. 937, 938, it was held that "The right of a minor to disaffirm an adjudication of his rights by a judicial tribunal (Industrial Accident Commission) obtained in a proceeding in which he has not been duly represented as provided by law continues until barred by laches after the minor has attained the age of majority; the right is not dependent upon statute, but is a general rule of law enforced as a necessary incident to the status of minority."

That the rights of minors, at all times and in all proceedings, should receive special consideration and the utmost protection of the law goes without saying. The Workmen's Compensation Act is no exception to this general rule. On the contrary, as hereinbefore noted, Section 5408 of the Labor Code provides that "No limitation of time provided by this division shall run against any person under twenty-one years of age or any incompetent unless and until a guardian or trustee is appointed".

[1] The provisions of the Act, by its own terms, "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment". (Labor Code, Section 3202.) More specifically, as said in Colonial Ins. Co. v. Industrial Accident Commission, 27 Cal.2d 437, 439, 164 P.2d 490, 492: "it must be remembered that the provisions of the workmen's compensation law dealing with the limitation of time within which proceedings for compensation may be commenced, like other parts of that law, are to be liberally construed to the end that the beneficial features thereof shall not be lost to employees, and where provisions are susceptible of an interpretation either beneficial or detrimental to an injured employee, they must be construed favorably to the employee".

[2] With these fundamental concepts in mind, and considering the facts of the present controversy, it appears that the jurisdiction of the Industrial Accident Commission, and the award made, should be sustained. Any other disposition would,

in effect, permit the petitioning insurance carrier to deprive the Commission of continuing jurisdiction by urging petitioner's own failure to furnish the employee with the prosthetic device made necessary by the employee's accident. The several references in petitioner's briefs to the fact that the employee's formal claim was not "filed within six months after the last foot apparatus was furnished applicant", amount to just that. Such a situation is hardly consistent with the broad, beneficient features of the Workmen's Compensation Act, nor with the liberal construction of that law so often commented upon in the various cases.

The present case is not basically unlike Armstrong v. Industrial Accident Commission, 219 Cal. 673, 675, 28 P.2d 672, 673. In that case an employee had four distal phalanges of the left hand practically amputated by a circular power saw, but did not file a claim for compensation for more than a year after the injury and more than six months after medical attention was last furnished by the employer, but within 245 weeks after injury. The reviewing court held that the Industrial Accident Commission had properly found the claim for permanent injury not barred; liability being computed on the basis of 25% for the amputation and 5% for limitation of motion or stiffness which developed in the joints subsequent to the injury. In this connection the court there said: "It is manifest in this case that limitation of motion could not be determined as of the date of the injury and would not develop for some considerable period of time thereafter. The respondent commission has impliedly found that it did not develop for some time after the original injury. Such being the case and compensation for stiffness of the fingers being allowed, the respondent commission was authorized to grant compensation for all other disability".

The fundamental resemblance between the two cases is apparent when it is observed that on August 4, 1943 the present employee's injuries were described as follows: "Loss of all toes on left foot at proximate joints; slight tenderness on weight bearing; slight tendency of amputation scar to break down at times". At the later date of June 4, 1947, however, the employee's condition had become much more aggravated and was then described as follows: "Loss of all toes of left foot at proximal joints; *one-half inch atrophy about instep and one inch atrophy about calf muscles; moderate tenderness over proximal end of graft; with slight tenderness over plantar surface and end of fifth metatarsal*". (Italics added.) As hereinbefore stated, the recommended rating in the earlier report was only 17¼% as compared with 22¼% in the later rating. And, as pointed out in respondent's answer, previous to the filing of the employee's formal claim, compensation had been voluntarily paid and medical treatment furnished. It will also be remembered that on March 11, 1947, the Royal Indemnity Company entered into a stipulation with the employee to the effect that the "figures contained in the report of * * * August 4th, 1943, are correct", specifying the estimated majority earnings of the employee.

None of the cases cited by either party specifically decide or purport to decide the exact question here involved. No statutory provision, either in the Labor Code or elsewhere, standing alone, is directly determinative. Nevertheless, when read together, the various items of statutory and case law in any manner applicable, without exception, constantly and consistently reiterate the two propositions hereinbefore referred to, namely that the Workmen's Compensation Act in all its parts, and particularly in reference to limitation of actions, shall be liberally construed; secondly, that preservation of the rights of minors is the particular care of all courts and all tribunals. These two propositions are and of necessity must be, determinative of the present issue.

The award is affirmed.

WHITE, J., and BARTLETT, J. pro tem., concur.

HALE v. DEPAOLI et al.[*]

Civ. 13559.

District Court of Appeal, First District, Division 1, California.

April 28, 1948.

Rehearing Denied May 28, 1948.

Hearing Granted June 24, 1948.

1. Landlord and tenant 🔑164(6, 7)

Generally, lessor is liable for defects in premises which are not visible when lessor knows of such latent defects and they are unknown to lessee, but not when, as a reasonable and prudent person, he is unaware of such defects.

2. Partnership 🔑159

Partner in charge of construction of dwelling was charged with knowledge that porch railing was defectively constructed, though he did not personally install the railing, and other partner, who was not concerned with construction, had constructive knowledge of the defective railing. Civ.Code, §§ 2323, 2332, 2403, 2406.

3. Partnership 🔑125

Acts of each partner are generally attributable to the other.

4. Negligence 🔑44

Contractor-owner of building is liable if the work is negligently defective and contractor-owner knows or should know of dangerous situation created.

5. Negligence 🔑89(1)

Doctrine of imputed negligence should not be loosely applied.

6. Appeal and error 🔑927(3, 7)

In ruling whether nonsuit or directed verdict was proper, every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise in support of plaintiff's case must be accepted as true, and all evidence, direct and indirect, which has tendency to sustain plaintiff's case, must be accepted as true irrespective of its weight or value.

7. Landlord and tenant 🔑164(6)
Partnership 🔑153(1)

Constructive knowledge of defect in porch railing, with which member of construction partnership in charge of sales was charged as result of constructive knowledge of other partner who was in charge of construction, would not impute to first partner personal negligence but only knowledge of other partner's negligence, and would not make him liable for injuries sustained by tenant's daughter after partnership had sold house to third party and third party had resold to first partner, as an individual. Civ.Code, §§ 2323, 2332, 2403, 2406.

8. Landlord and tenant 🔑169(11)

In action for injuries to tenant's daughter resulting from defect in porch railing constructed by partnership, which sold the premises to a third party who resold the premises, after one partner's death, to surviving partner as an individual, whether surviving partner as landlord was negligent and should have inspected the premises before leasing them, in view of landlord's original constructive knowledge of defect as partner, and circumstances when premises were reconveyed to him, was for jury. Civ.Code, §§ 2323, 2332, 2403, 2406.

9. Landlord and tenant 🔑164(6, 7)

One who owns land and has actual knowledge of danger therein has duty of notifying incoming tenant, and, if such knowledge is constructive, surrounding circumstances control owner's duty.

◆

Appeal from Superior Court, City and County of San Francisco; Stanley Murray, Judge.

Action by Doris Hale, by her guardian ad litem, Idelle Wylie, against Louis Depaoli and another for injuries resulting from defect in railing. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Elmer P. Delany and William A. Sullivan, both of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondents.

WARD, Justice.

This is an appeal from a judgment of nonsuit rendered upon defendants' motion based upon the following grounds: "1. That no evidence had been introduced proving or tending to prove any breach of duty upon the part of said defendants. 2. That no evidence had been introduced proving or tending to prove any cause of action on behalf of plaintiff against said defendants."

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[*] Subsequent opinion 201 P.2d 1.

Plaintiff's complaint for personal injuries alleged that defendants were owners and also constructors of a dwelling rented by plaintiff's mother, her guardian ad litem, Idelle Wylie; that on April 22, 1943, the wooden railing enclosing the rear porch on said dwelling was latently defective "and constituted a dangerous nuisance in that wooden guard rail was attached to the posts hereinabove referred to with nails insufficient in number and length, to properly and securely hold it in place," and that on said date plaintiff stood with her back against the railing, which gave way, causing her to fall to a concrete walk approximately ten and one-half feet below. The complaint further sets forth that by reason of defendants' negligence plaintiff received certain physical injuries and shock to her nervous system. Contributory negligence was pleaded in the answer. By an amended complaint, plaintiff alleged upon information and belief that defendants "fraudulently concealed said defects and represented to the plaintiff that said premises were safe and habitable." Such allegation was denied in the answer to the amended complaint.

Certain facts were stipulated:

"Mr. Sullivan [attorney for plaintiff]: If the court please, the following stipulation was entered into at noon time: I had here certain records from downstairs indicating a transfer of title to the realty, the premises known as 180 Santa Rosa Avenue, San Francisco County—those are the premises alleged in the complaint, where the plaintiff was injured—and the following stipulation was entered into: That prior to the erection of this building, namely prior to 1925, Louis Depaoli and his wife, who is now deceased, were the owners of the realty premises, and in 1926 they conveyed the property, which had a building on it, to Mr. and Mrs. Antonio Male; that in 1934 Mrs. Male's husband passed away and her husband's interest in the property was terminated to show that she was the sole owner of the property; in 1937 the property was reconveyed by Mrs. Male to the defendant Mr. Depaoli and so that as of that time, and that the property is now and was as of the date of this accident, in the sole name and ownership of the defendant Louis Depaoli—it being alleged in the complaint that the defendant is the owner of that building and the real property where this accident took place. Is that correct?

Mr. Driscoll [attorney for defendants]: That is a correct stipulation, yes."

Thereupon without objection a fictitious name certificate showing that the New Era Building Company, a partnership, was composed of L. Ferreiros and L. Depaoli was introduced in evidence. A clerk in the Central Permit Bureau in the Department of Public Works testified that the plans and specifications were approved before the building was erected but that:

"Well, we had so many plans and specifications about 1927 a number of them were destroyed, a number of the least important. We kept the larger buildings, and the masonary buildings. Most frame buildings, the plans were destroyed.

"Q. This permit covers property constructed in 1925? A. That is correct.

"Q. To the best of your knowledge the building specifications pertaining to 180 Santa Rosa Avenue, San Francisco County, were destroyed at the direction of your office? A. That is correct."

In the determination of the question presented on this appeal, close attention must be given to the sharp distinction that must be made between Depaoli as a partner in the construction company, in which he was a constructing owner, and his position as a landlord, owner or lessor.

Evidence of defective construction came from Buran Spears, who was living at 180 Santa Rosa Avenue, April 22, 1943, while working as a chipper in the ship yards, and from Henry Ute, a carpenter, who lived next door. Mr. Spears testified that when he came back from work on April 22, 1943, he examined the portion of hand railing which was lying in the yard and found "On one end there were two small finish nails. * * * I don't remember seeing any nails at all in the other * * * [they were] around two to two and a half inches." He identified two nails as "finish" nails and stated they were similar to the ones at the end of the rail. He testified that he replaced the railing, using larger and heavier nails—more [than two] of them—nailing some blocks for support under the railing. Mr. Ute testified that on April 22, 1943, when he came home from work—about five-thirty—he examined the rail and found that there were two six penny finishing nails at each end. He explained that finishing nails are driven below the surface of the wood; that putty is used to conceal them and that after the nail has been painted over it is invisible. He testified that he did not think the rail had been "properly nailed in the first place." He testified that from another portion of the railing he took out one six penny and one eight penny finishing nail, which were introduced in evidence. He further testified that the railing had not been toenailed properly—four eight-penny finishing nails at each end would be proper. There is no evidence that from the date of erection of the rail to the date of the accident it had been rebuilt or changed in any manner.

Doris Hale and her sister—the only eye-witness—both testified that the accident occurred when Doris leaned against the rail which gave way causing her to fall backward. Neither she nor Mr. Yeneles, her companion, sat on the rail before the accident. Mrs. Wylie testified that she might have told a man in uniform (police officer) that Doris and a sailor had been sitting on the rail but that she did not see them. Both Doris and her mother testified to the practice of hanging kitchen mops on the back rail to dry and Mrs. Wylie spoke about throwing drop rugs over the railing. There is substantial evidence that the rail as originally constructed and on the day of the accident was defective.

[1] Subject to modification when based upon facts and circumstances to which special rules are applicable, the general rule is that a lessor is liable for defects in premises which are not visible when the lessor knows of such latent defects, and they are unknown to the lessee. The lessor is not liable when, as a reasonable and prudent person, he is unaware of such defects. Stanley v. Lander, 3 Cal.App.2d 284, 39 P.2d 225; 15 Cal.Jur. 705; 1 Tiffany, Landlord and Tenant, 563. It is said in Shotwell v. Bloom, 60 Cal.App.2d 303, 309, 310, 140 P.2d 728, 732: "The general rule is that the landlord is not liable for injuries to the person or property of the tenant or his invitees caused by defects in the leased premises. This general rule of non-liability is an application of the doctrine of caveat emptor. In general, the lessee takes the premises as they are. There is no duty on the landlord to inspect with the object of locating latent defects nor to repair patent defects. [Citing cases.]

"To this general rule there is a well-settled exception. This exception, supported by cases from many states, is stated in 1 Tiffany, Landlord and Tenant, p. 562, § 86, sub. d, as follows: 'The rule above stated, that the lessor is under no obligation to the lessee as regards the condition of the premises at the time of the demise, is subject to an exception to the effect that, if there is some hidden defect in the premises, or danger thereon, which is known to the lessor at the time of making the lease, but which is not apparent to the intending lessee, the lessor is bound to inform the latter thereof, and failing so to do, he is liable for injuries to the tenant arising therefrom.' This is the rule announced by the Restatement of Law of Torts, vol. 2, p. 969, § 388, and has been frequently declared in this state. [Citing cases.] The exception above mentioned applies not only in favor of the tenant but also in favor of those who enter in the right of the tenant, that is, in favor of members of the tenant's family * * *. As to such invitees of the tenant (except as to the lease of public or semi-public buildings), the landlord is liable to the same extent as he would have been had the tenant been injured. Stated another way, the landlord's liability, except in the case of public and semi-public buildings where his liability is greater (see King v. New Masonic Temple Ass'n, 51 Cal.App.2d 512, 125 P.2d 559), is no greater to the invitee of the tenant than it would be to the tenant himself. [Citing cases.]"

The evidence shows that Depaoli "did go on the premises when [he] sold it to Mr. and Mrs. Male" in 1926. There was nothing wrong with the back porch as far as he could see. When the property was reconveyed to Depaoli in 1937 by Mrs. Male "the house locked all right" to Depaoli. There was nothing wrong with the back porch. Depaoli may have gone on the premises, but made no inspection thereof at the time they were leased to Mrs. Wylie. There is no circumstance called to the attention of the court that should have caused Depaoli, as *landlord-lessor,* to make an inspection of the rail at the time of leasing the premises to Mrs. Idelle Wylie, the mother of Doris Hale, the injured minor.

If this case presented the question of DePaoli's liability as landlord in the year of the accident only, without reference to his previous capacity as constructing owner, the problems presented on this appeal would probably be at an end. However, the question is whether Depaoli as one of the constructing owners is liable because of a latent defect in the railing whose construction was supervised by Ferreiros, Depaoli having no actual knowledge of such latent defect.

In the year 1925 the New Era Building Company, a partnership composed of L. Ferreiros and Louis Depaoli, erected the building involved in this action. Among their other activities they were constructing owners. Ferreiros was the superintendent of construction while Depaoli gave most of his time to the sales department.

[2] The evidence does not show that Ferreiros, the partner of Depaoli, personally installed the railing, but as superintendent and one of the constructing owners he was charged with knowledge that the porch railing was defectively constructed. In a word, there is no evidence that Depaoli had actual knowledge but as the partner of Ferreiros he had constructive knowledge of the defective railing. "Every partner is an agent of the partnership for the purpose of its business." Civil Code, sec. 2403. The purpose of the business of the present partnership was the erection and selling of homes. If it had been proved by a preponderance of the evidence that there was actual knowledge on the part of Ferreiros of the defective porch rail it would have been the duty of Ferreiros to either correct the defect or notify his partner or perhaps both. "Hence, in order to determine whether the knowledge of the agent should be imputed to the principal, it becomes of primary importance to ascertain the exact scope and extent of the agency." 2 Pomeroy's Equity Jurisprudence, Fifth Ed., sec. 668. "Notice to agent, when notice to principal. As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Civil Code, sec. 2332.

If Depaoli is considered merely as a landlord-leasor, Couch v. Pacific Gas & Elec. Co., Cal.App., 183 P.2d 91, is not applicable. In the Couch case the defendant was the owner of an electric power house and of certain cottages connected with the plant. As a landlord it rented the cottages to its employees. A child of one of the employees was killed as a result of defective wiring. The primary question presented was—was the defect latent and was it known to the landlord-defendant? The court in its decision comments that defendant was not only the landlord, "but the vendor of electricity" and "controlled the electric system" of the "house * * * assigned to plaintiffs." "In its dual capacity it was charged with greater responsibility than it would have had as the mere landlord." Page 95 of 183 P.2d. "Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership." Civil Code, sec. 2406. "An authority to sell personal property includes authority to warrant the title of the principal, and the quality and quantity of the property." Civil Code, sec. 2323. "Whenever the agent's knowledge of certain facts exists only in contemplation of law,—that is, when he has received a constructive notice,—the imputation thereof to the principal is no less reasonable and clear. If, under any circumstances, a party, while dealing for himself, must be treated, in contemplation of law, as one who has acquired certain information, and must be charged with constructive notice thereby, the same result must follow when, under like circumstances, the party is dealing by means of an agent. * * * As the doctrine is thus based entirely on motives of policy; it should never in its application transcend the scope and limits of those motives. Whenever its operation in a given state of facts would produce manifest injustice, the courts should, if not absolutely compelled by express authority, withhold such operation. A tendency to restrict the doctrine—to confine it within the limits already established—is clearly exhibited by many of the recent decisions." 2 Pomeroy's Equity Jurisprudence, Fifth Ed., pp. 933, 934, sec. 676.

[3–6] Cases cited by defendant, which involve the rule that knowledge acquired by an agent before the commencement of the agency is not notice to the principal unless it appears that such knowledge was present in the mind at the time the agent acted for the principal, are not applicable here. The acts of each partner as a rule are attributable to the other. 20 Cal.Jur. 737. The rule is that the contractor-owner is liable if the work is negligently defective and the contractor-owner knows, or should know, of the dangerous situation created. The rule is sound, but is it applicable here? Its operation may result in a denial of monetary assistance to the minor for injuries or the imposition of a wrong on Depaoli, but at least sympathy for the injured plaintiff or prejudice against contractor-owners must not be the determining factor. Whether it should be put in force is questionable when a treatise such as Pomeroy's Equity Jurisprudence, which is characterized by intimate knowledge of the subject treated and the modern trend of opinion on the point under consideration, advises caution in the adoption of the rule. The doctrine of imputed negligence is not to be loosely applied. 19 Cal.Jur. 660. To promulgate, without limitation, a rule that a partner-agent (Depaoli) in the capacity of a constructing owner, who took no part in the actual construction of the building, but whose partner (Ferreiros) knew or should have known of the defective railing and whose knowledge or duty of knowledge is imputed to him (Depaoli), is responsible some eighteen years later for an accident attributable at least in part to the defect in construction under the assumed direction of Ferreiros, about which there is no evidence of actual knowledge of Depaoli, may be a rigorous rule. Its harshness as applied to the present case may be tested somewhat as follows: It is the law in California, which must be followed, that in ruling whether a nonsuit was proper, every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise in support of plaintiff's case must be accepted as true, and that all evidence, direct and indirect, which has a tendency to sustain plaintiff's case, irrespective of its weight or value, must be accepted as true. Burlingham v. Gray, 22 Cal.2d 87, 137 P.2d 9. The rule relative to a directed verdict is the same as the rule granting a nonsuit. Estate of Lances, 216 Cal. 397, 14 P.2d 768.

[7, 8] The constructive knowledge, under the circumstances of this case, would not impute to Depaoli personal negligence but rather knowledge of the negligence of his partner. Under the evidence and the law he would not, merely acting as a landlord, be liable. The question then is—did Depaoli in renting the premises to Mrs. Wylie do or omit to do something that contributed to the subsequent accident? The answer appears in his own testimony: "Q. Well, as far as you know, you did go on the premises when you sold it to Mr. and Mrs. Male, did you not? A. Yes." In 1937 after the death of Ferreiros, and after the death of Mr. Male, Mrs. Male, who had previously purchased the property with her husband, reconveyed the property to Depaoli. At that time Depaoli made an inspection of the house and a general inspection of the "back porch and stairs." In 1942 when the premises were leased to Mrs. Wylie the defendant failed to make an inspection of any part of the premises. Whether he was negligent and should have made such inspection in view of the original constructive knowledge he received and the circumstances of making an inspection when the premises were reconveyed to him but failed to inspect when he rented the same

premises to Mrs. Wylie is a question of fact.

[9] It is the duty of one who owns land and has actual knowledge of danger to notify an incoming tenant. If the knowledge is constructive, the surrounding facts and circumstances control the duty of the owner. Failure, in a proper case, to notify the tenant is negligence. Under the holding in the recently cited cases and many others this fact should have been presented to the jury. The order granting the motion for a nonsuit was improper. This determination of this question on appeal should not be interpreted as an indication that the members of this court believe Depaoli was negligent. That question, with perhaps some elaborations from each side, and the issue of contributory negligence, remain for presentation in a subsequent trial.

The judgment on nonsuit is hereby reversed.

PETERS, P. J., and BRAY, J., concur.

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85 Cal.App.2d 335

SITKEI v. FRIMEL et al.

Civ. 16217.

District Court of Appeal, Second District, Division 2, California.

May 4, 1948.

Hearing Denied July 1, 1948.

1. New trial 🔑109

Right to move for a new trial is statutory, and, unless procedure prescribed by law is followed, the right cannot be exercised when the opposing party offers objection. Code Civ.Proc. § 659.

2. New trial 🔑152

A defective notice of intention to move for a new trial cannot be amended after expiration of statutory time for filing the notice, since such amendment would in effect extend time allowed by law for giving such notice, and court has no power to grant an extension. Code Civ.Proc. § 659.

3. New trial 🔑152

When specifications of error on which party moving for a new trial relies are entirely omitted from notice of intention to move for a new trial, specifications cannot be supplied after expiration of statutory time for filing notice. Code Civ.Proc. § 659.

4. New trial 🔑152

Where ground of newly discovered evidence was not specified in original notice of intention to move for new trial, and that ground was added by amendment filed after expiration of time within which notice was permitted by statute to be filed, such ground was not before court, and granting of motion on that ground was beyond court's jurisdiction. Code Civ.Proc. § 659.

5. New trial 🔑150(2)

On motion for new trial on ground of newly discovered evidence, court erred in considering affidavits relating to allegedly newly discovered evidence, where affidavits were on information and belief, since statements made on information and belief are not competent evidence. Code Civ.Proc. § 659.

6. New trial 🔑101

Granting of new trial on ground of newly discovered evidence was error, where testimony of party moving for new trial showed that allegedly newly discovered evidence was known to her at the time of the trial. Code Civ.Proc. § 659.

7. New trial 🔑153

Where affidavits in support of motion for new trial on ground of newly discovered evidence were not filed within ten days after service of notice of intention to move for a new trial, and no extension of time for filing them was granted either by stipulation of parties or by order of court, they could not serve as a basis for the motion. Code Civ.Proc. § 659a.

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Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action for partition of realty by Bertha B. Sitkei against Helen M. Frimel and others. Findings and interlocutory judgment were entered decreeing that plaintiff and named defendant were owners in fee of an undivided one-half interest, and that realty should be sold and proceeds divided equally between them. From an order granting defendants' motion for new trial, plaintiff appeals.

Order reversed.

Sprague & Sparks and Richard W. Sprague, all of Los Angeles, for appellant.

Hahn, Ross & Goldstone and E. L. Saunders, all of Los Angeles, for respondents.

WILSON, Justice.

Appeal from an order granting motion for a new trial.

This is an action for partition of real property. Findings and interlocutory judgment were entered decreeing that plaintiff and defendant Frimel (hereinafter referred to as respondent) were the owners in fee of the property, each an undivided one-half interest, and ordering it to be sold and the proceeds divided equally between the parties after paying costs and expenses.

The interlocutory judgment was entered on March 26, 1947. On April 3, 1947, notice of entry of judgment was served and on the same day respondent served and filed a notice of intention to move for a new trial on six grounds, not however including the ground of newly discovered evidence. On April 25, 1947, respondent served and on April 28 filed "a notice of amendment to motion for new trial" stating that the motion would be made on the additional ground of newly discovered evidence material to the case and which respondent could not with reasonable diligence have discovered and produced at the trial. Accompanying the latter notice was an affidavit made on information and belief relating to the alleged newly discovered evidence. On May 2 and 5 additional affidavits were filed on behalf of respondent. On May 13 the court made an order granting the motion for new trial solely on the ground of newly discovered evidence. The order must be reversed for the several reasons hereinafter discussed.

(1) The court erred in considering the ground of newly discovered evidence. Section 659 of the Code of Civil Procedure provides that within ten days after receiving notice of entry of judgment the party intending to move for a new trial must file and serve on the adverse party his notice of intention "designating the grounds upon which the motion will be made" and whether it will be made on affidavits or the minutes of the court or both, and that "The time above specified shall not be extended by order or stipulation."

The notice did not specify newly discovered evidence as one of the grounds on which the motion would be made. No affidavits whatsoever were filed within ten days after the filing of the notice of intention. Nothing was done until 25 days after filing the notice, when, on April 28, the notice of amendment to motion for new trial was filed, adding the ground of newly discovered evidence.

[1] The right to move for a new trial is statutory and unless the procedure prescribed by law is followed the right cannot be exercised when the opposing party offers objection. Strict construction is necessary in order that litigants may not lose their rights. Smith v. Ibos, 22 Cal.App.2d 551, 553, 71 P.2d 847; Frye v. Pacific Freight Lines, 27 Cal.App.2d 748, 750, 81 P.2d 1027.

[2, 3] A defective notice of intention cannot be amended after the expiration of the statutory time for filing the notice since that would in effect extend the time allowed by law for giving such notice, and the court has no power to grant an extension. Little v. Jacks, 67 Cal. 165, 7 P. 449; Smith v. Ibos, supra; Packer v. Doray, 98 Cal. 315, 317, 33 P. 118; Union Collection Co. v. Oliver, 162 Cal. 755, 757, 124 P. 435; Cooney v. Furlong, 66 Cal. 520, 6 P. 388. When specifications of error on which the moving party relies are entirely omitted from the notice of intention they cannot be supplied after the expiration of the statutory time for filing the notice. Strange v. Strange, 23 Cal.App. 281, 282, 137 P. 1104.

[4] Since the ground of newly discovered evidence was not specified in the original notice of intention and that ground was

added by amendment filed after the expiration of the time within which the notice was permitted by section 659 of the Code of Civil Procedure to be filed, such ground was not before the court and the granting of the motion on the ground specified in the order was beyond the jurisdiction of the court.

Respondent relies on Stockett v. Henry, 28 Cal.App. 45, 151 P. 150, which intimates that the court has discretion to permit the moving party to correct his notice of intention to move for a new trial. The proposed correction does not appear from the opinion. In that case the party asked leave of court to make the correction and in the instant case the amendment was filed without stipulation of the opposing party and without leave of court. Moreover a mere correction is quite different from the addition of new grounds for the motion. Cases from other jurisdictions will not be considered since the rule is established without exception in this state.

[5] (2) The court erred in giving consideration to the affidavits relating to purported newly discovered evidence for the reason that they were insufficient to sustain the order even though the court had jurisdiction to consider the motion. Affidavits of one of counsel for respondent and by an attorney for respondent's son, who is not a party to the action, stated on information and belief that Hobart F. Frimel, the former husband of respondent, who had conveyed his interest in the property to appellant, was an enemy alien at the time of the transfer and that the conveyance was void because his interest in the property had been previously transferred to the Alien Property Custodian by a vesting order made under the laws of the United States. The affidavits are unavailing since the statements made on information and belief are not competent evidence. Kimic v. San Jose-Los Gatos, etc., Co., 156 Cal. 379, 396, 104 P. 986; Gay v. Torrance, 145 Cal. 144, 151, 78 P. 540; People v. Feld, 149 Cal. 464, 478, 86 P. 1100. There are no affidavits that neither respondent nor her other counsel were not, prior to the trial, possessed of the evidence as to the status of Mr. Frimel.

[6] (3) The court erred in acting on the so-called newly discovered evidence since the record shows that it was known to respondent and her counsel at the trial. Respondent testified that prior to the time that she and Mr. Frimel were divorced, which preceded the trial of this action, her husband told her he was leaving her. She was asked if she "notified the F.B.I." She replied, "Only when I went to Mr. Frimel with a paper showing that I would have to be repatriated, to sign a contract which would enable me to hold a position." Obviously respondent herself knew at the time she was testifying that Mr. Frimel was not a subject of the United States, otherwise there was no need for her repatriation. If her counsel were not previously advised of her husband's lack of citizenship, they received the information from her testimony. Since that evidence was a part of the record of the trial it was before the court when the motion for a new trial was heard and showed that the purported newly discovered evidence was already known to respondent and to the attorneys who made the affidavits.

[7] (4) The court erred in considering the affidavits because they were filed too late. Since they were not filed within ten days after service of the notice of intention to move for a new trial and since no extension of time for filing them was granted either by stipulation of the parties or by order of court, they could not serve as a basis for the motion. Code Civ.Proc. sec. 659a; Hicks v. Ocean Shore R. R. Inc., 18 Cal.2d 773, 789, 117 P.2d 850; Strange v. Strange, supra, 23 Cal.App. page 284, 137 P. 1104; Morris v. Purity Sausage Co., 1 Cal.App.2d 120, 36 P.2d 126.

The order granting the motion for a new trial is reversed.

MOORE, P. J., and McCOMB, J., concur.

85 Cal.App.2d 202

KHOURY v. BARHAM et al.

Civ. 15984.

District Court of Appeal, Second District, Division 3, California.

April 27, 1948.

1. Appeal and error 🔑**996**

Where two inferences are reasonably deducible from the facts, an appellate court cannot substitute its deductions for those of the trial court.

2. Appeal and error 🔑**931(1)**

All conflicts in the evidence must be resolved in favor of respondent and all reasonable inferences must be indulged in favor of the trial court's findings.

3. Appeal and error 🔑**989**

The power of an appellate court begins and ends with its determination that there is or is not substantial evidence to support the trial court's finding.

4. Specific performance 🔑**119, 121(2)**

In suit in quasi specific performance to enforce an alleged oral agreement by testatrix before her death to bequeath to plaintiff all of her property, plaintiff had burden to establish agreement by full, clear, and convincing evidence, that agreement was founded on an adequate consideration, and that plaintiff suffered an unjust and unconscionable injury and loss because of testatrix' failure to bequeath all of her property to him.

5. Appeal and error 🔑**1008(1)**

In suit in quasi specific performance to enforce an alleged oral agreement by testatrix before her death to bequeath to plaintiff all of her property, whether plaintiff's evidence was full, clear and convincing was primarily a question for the trial court.

6. Wills 🔑**58(2)**

Where a confidential relationship existed between elderly and wealthy widow and physician who resided in widow's home and acted as her physician, companion, and advisor, alleged oral agreement by widow to bequeath all of her property to her physician was presumably obtained by undue influence, and such presumption was evidence that would support a finding of undue influence against contradictory evidence offered by physician.

7. Specific performance 🔑**121(8)**

Where confidential relationship existed between wealthy and elderly widow and physician who resided with widow and acted as her physician, companion, and advisor, evidence sustained finding in physician's action against widow's executors for specific performance of alleged oral agreement by widow to leave all her property to physician by will, that the alleged agreement was obtained by physician by undue influence.

8. Specific performance 🔑**121(7)**

In suit in quasi specific performance to enforce alleged oral agreement to leave property by will to plaintiff, evidence sustained trial court's finding that no such agreement was made.

9. Appeal and error 🔑**1071(6)**

A failure to find on an issue not necessary to support a judgment is harmless.

10. Specific performance 🔑**128(4)**

Plaintiff was not entitled to judgment for reasonable value of services rendered by him to decedent where complaint did not pray anything except quasi specific performance and case was not tried on quantum meruit theory.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Suit in quasi specific performance by N. H. Khoury, also known as Norris N. Khoury, against Frank F. Barham and A. Laurence Mitchell, executors of the estate of Maggie George, deceased, and others to enforce an alleged oral agreement to devise and bequeath all of deceased's property to the plaintiff. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

See also 78 Cal.App.2d 204, 177 P.2d 579.

Harry C. Mabry, Raymond Tremaine and Jerry Giesler, all of Los Angeles, for appellant.

A. G. Ritter, of Los Angeles, for respondents.

VALLÉE, Justice pro tem.

Appeal by plaintiff from a judgment for defendants in a suit in quasi specific performance to enforce an alleged oral agreement to devise and bequeath all of the property of Maggie George, deceased, to plaintiff. The executors of the will of Maggie George and the legatees and devisees named therein are the defendants.

The complaint alleges that on November 14, 1942, decedent, Maggie George, made an oral agreement with plaintiff, by which she agreed to bequeath and devise to him by her will all of her property if he would assist her in her business and household affairs, act as her companion and as her physician so long as she lived; that plaintiff so agreed and performed the services until her death on July 1, 1945; that decedent did not bequeath or devise all of her property, appraised at about $155,000, to him, but only $3,000.

In June, 1940, plaintiff, an itinerant physician (Festus, Mo., Oshkosh, St. Louis, Los Angeles, San Bernardino), with little, if any, practice, met the decedent, Maggie George, a wealthy widow, in San Bernardino. Plaintiff was 39, Mrs. George about 59 years of age. Mrs. George lived in Beverly Hills in a large, luxurious home, with a butler, a cook, two maids, a gardener, and a chauffeur. She had had a male companion, named Raya, for more than ten years prior to this time. For some reason not disclosed, Raya had severed relations and departed. Mrs. George had paid Raya $100 or $150 a month for his services. She learned that plaintiff was not married. After a few preliminary conversations, plaintiff, at the request of Mrs. George, agreed to close his office in San Bernardino and go to her home, reside with her, and act as her chauffeur, companion and physician. Plaintiff testified that in these conversations Mrs. George told him that if he did so and remained with her as long as she lived she would will him all of her property and that he agreed to do so. Mrs. George at that time gave plaintiff $1,000 with which to close his office and pay the expenses he had incurred in opening it some two months before. At that time he knew the approximate extent and value of Mrs. George's holdings.

Plaintiff moved into Mrs. George's home on July 11, 1940. On that day she and plaintiff entered into a written agreement. The agreement recited that plaintiff represented himself to be a physician and a careful and competent automobile driver; that Mrs. George was a widow, living with her aged mother (Mrs. Saba), alone and in ill health; that she desired to employ plaintiff as a companion, chauffeur, and physician for herself and her mother; and that plaintiff was desirous of entering the employment of Mrs. George for these purposes. By the agreement Mrs. George employed plaintiff for three months to act as chauffeur, companion, physician and medical advisor,—it being understood that Mrs. George retained the right to employ or consult any other physician,—and to render such other personal services as Mrs. George or her mother might designate. Plaintiff accepted the employment and agreed to perform the services in a careful, skillful and respectful manner in consideration of $300 a month, which Mrs. George agreed to pay. Mrs. George agreed to furnish plaintiff, without cost, his board and a bedroom in her residence. The agreement recites that the $1,000 theretofore paid by Mrs. George to the plaintiff was a loan. Plaintiff agreed to repay the same at the rate of $100 per month, without interest. Mrs. George was given an option to renew the agreement for a period of three additional months. She reserved the right to cancel the agreement at any time upon payment of $300 to plaintiff as liquidated damages. The agreement was prepared by Mr. George Breslin, a lawyer of ability, integrity, and of high standing. Plaintiff performed the services agreed to for the three months' period and was paid $300 per month. At the end of three months Mrs. George exercised the option for another three months and paid plaintiff $300 a month during that period.

On December 11, 1940, plaintiff and Mrs. George entered into another written agreement containing substantially the same provisions as the agreement of July 11, 1940. This agreement was prepared by Mr. Breslin and was for a term of 12 months from

January 10, 1941. Shortly after the execution of the agreement of December 11th, plaintiff expressed dissatisfaction with respect to the clause therein giving Mrs. George the right to cancel at any time upon payment of $300 liquidated damages. Mrs. George agreed to eliminate that provision. On January 9, 1941, plaintiff and Mrs. George entered into another written agreement, prepared by Mr. Breslin, identical with the agreement of December 11, 1940, except that it eliminated the provision to which plaintiff had objected.

In the summer of 1941, plaintiff left Mrs. George's service, taking his clothing and personal belongings with him, and accepted employment with a physician's service at $300 or $400 per month. Within a few days, at the request of Mrs. George and upon her offer to pay him $5,000 for the balance of the year, he returned to her home. When he returned Mrs. George asked him "for another contract." He told her he would not give her one. Mrs. George did not, at that time, say anything to plaintiff about leaving her property to him. He was paid the $5,000.

In February, 1942, plaintiff again left the George household. On February 10, 1942, plaintiff and Mrs. George executed a release in writing. By this instrument each acknowledged "having received of and from the other payment in full of all considerations, debts or dues owing or claimed to be owing from the other," and each released the other from all obligations of every nature arising out of any verbal or written agreements. The release was prepared by Mr. Breslin. In conversations between plaintiff and Mrs. George and Mr. Breslin, had prior to the preparation of the agreements and the release, and in connection with the signing of them, neither plaintiff nor Mrs. George said anything to Mr. Breslin about any verbal agreement to the effect that Mrs. George would will all of her property to plaintiff. The subject was not mentioned.

A few days after the execution of the release, plaintiff returned to the George household, performing the same services until November, 1942, when he left. Mrs. George communicated with him and he returned to her home. Plaintiff testified that on November 14, 1942, the day he returned to her home, Mrs. George told him that if he would continue with her until she died she would will all of her property to him and that he agreed to do so. No one was present at this conversation other than plaintiff and Mrs. George. This is the oral agreement upon which plaintiff relies for relief.

Plaintiff thereafter remained in the home of Mrs. George until her death on July 1, 1945, except for a brief period when he worked for California Shipyards. He performed the same services he had agreed to perform in the written agreements. Mrs. George owned a fleet of trucks which she leased to one of the large metropolitan newspapers. The newspaper used the trucks in making deliveries to newsboys and newsstands. Beginning about July, 1943, and until her death, plaintiff assisted Mrs. George in the operation of the trucking business. He was paid $400 a month for the first six months of 1942, $5,000 for the last six months of 1942, $500 a month during the first six months of 1943, and $600 per month thereafter until the death of Mrs. George. During the period from July 11, 1940, to July 1, 1945, plaintiff had all of his meals with Mrs. George, all paid for by her, he had his lodging free, she bought him clothes, he accompanied her to bars and restaurants where she paid the bills.

On June 24, 1937, Mrs. George had made a will leaving her property to her mother. On March 17, 1939, she made a codicil giving her trucks to Frank F. Barham. On September 27, 1940, she made a will leaving her property to her mother, without mentioning plaintiff. On February 26, 1943, she made a will leaving a small bequest to charity, the residue to her mother, without mentioning plaintiff. Plaintiff repeatedly importuned Mrs. George to make a will giving him all of her property. On August 27, 1943, she made a will in which she devised her residence property, bequeathed $25,000 cash, and $100 per week, to her mother, and the residue, after the payment of a small legacy, to plaintiff. She showed plaintiff this will.

He expressed dissatisfaction, telling her that it did not give him all of her property. On September 2, 1943, she made a will in which she bequeathed $25,000, her jewelry and personal effects to her mother, devised her residence property, together with its furniture and furnishings, to her mother for life, remainder to plaintiff, and the residue of her estate to plaintiff, in trust, to pay taxes, expenses, insurance, and $100 a month to her mother for life, when the trust should terminate and go to plaintiff. This will provided that if Mrs. George's mother predeceased her the entire estate should go to plaintiff. She showed this will to plaintiff. He again expressed dissatisfaction, telling her that it did not give him all of her property. On September 15, 1943, she made a will in which she bequeathed her jewelry and personal effects to her mother, directed her executor to pay her mother $100 a week during probate, devised her residence property and its furniture and furnishings to her mother for life, remainder to plaintiff, the residue of the estate to plaintiff, in trust, to pay her mother $100 per week and any income, after payment of expenses and the $100 per week to her mother, to plaintiff. This will provided that the trust should terminate upon the death of her mother and go to the plaintiff and that should her mother predecease her, all of the estate should go to plaintiff. It appointed plaintiff executor. Mrs. George showed this will to plaintiff. Again he expressed dissatisfaction, telling Mrs. George that it did not give him all of her property.

On November 9, 1943, Mrs. George made a will in which she bequeathed $3,000 to plaintiff, left her trucks to Frank F. Barham and A. Laurence Mitchell, a legacy of $1,000 to charity, and the residue of her estate to her mother. She told the lawyer who prepared this will that she was not under any obligation to plaintiff and that she was paying him in full for his services.

On January 25, 1944, Mrs. George went to the lawyer who prepared the September 15th and November 9th wills, and asked him to prepare a will leaving all of her property to plaintiff; she said that plaintiff had learned of the will of November 9th leaving the bulk of her estate to her mother; that "he is very incensed, very angry, and he insists I make a will leaving everything, or the bulk of the estate to him"; she said that she did not want to do that, "I will have to do it, though, because I am getting these injections from the doctor, and if I don't make such a will he will leave me." Asked by the lawyer if she wanted to make a will leaving all of her property to plaintiff and omitting her mother, she replied, "No, I don't, but I thought if I made a will like this today, I could come in tomorrow and make another will." The lawyer refused to draw the will. Plaintiff then took Mrs. George to another lawyer. This other lawyer drew a will dated January 25, 1944, in which Mrs. George left all of her property to plaintiff and appointed him executor. Mrs. George showed this will to plaintiff the night of January 25th. He read it, expressed satisfaction and together they put the will away in a highboy. A short time before this will was made Mrs. George had been very ill and in a hospital.

The next day Mrs. George went back to the lawyer who had refused to draw the will on January 25, 1944. He prepared a will dated January 26, 1944. Mrs. George told this lawyer that she did not want plaintiff to know about the will of January 26, 1944, because she thought he might leave her. The will of January 26, 1944, was identical with the will of November 9, 1943. On May 22, 1944, she made a will identical with the will of January 26, 1944, except that it added a legacy of $500 to a friend. This will was admitted to probate as the last will of Mrs. George.

Upon the taking of his deposition plaintiff testified that he did not know the content of any will during the lifetime of Mrs. George. He also testified upon his deposition that he did not see the will of January 25, 1944, before her death. At the trial he testified that Mrs. George showed him the will of August 27, 1943; that he read it and protested to her that it did not leave all of her property to him; that she showed him the will of September 2, 1943; that he read it and again protested that it did not leave him all of her property; that she showed him the will of September 15, 1943; that he read it and again protested that it did not leave him all of her property; that she showed him the will of January 25, 1944; that he read it to her; that together they put it away.

During the time plaintiff was in the George home Mrs. George had sclerosis of the liver, alcoholic in nature, "her stomach was practically burned up with alcohol," she had severe heart trouble and she required daily intravenous medication. A joint tenancy bank account was opened in the names of Mrs. George and plaintiff about December, 1943. Mrs. George deposited all money ever placed in the account. Plaintiff withdrew and retained the balance of $2,100, a few days before Mrs. George died.

Upon the death of Mrs. George, plaintiff took possession of all her jewelry and some, if not all, of the jewelry of her mother. The executors of the will of Mrs. George brought suit against plaintiff to recover the jewelry. Her mother intervened in the action. In that suit, plaintiff here claimed that Mrs. George had made a gift of the jewelry to him. The executors and Mrs. George's mother recovered judgment for the jewelry. Plaintiff appealed and the judgment was affirmed. (See Barham v. Khoury, 78 Cal.App.2d 204, 177 P.2d 579.) Reference may be made to the opinion in that case for further light upon the dealings had between plaintiff and Mrs. George.

The foregoing recital of facts is made from the evidence by accepting its full force and every inference favorable to respondents which may be drawn therefrom and excluding all evidence in conflict therewith.

The court found that on November 14, 1942, decedent re-employed plaintiff, he having been previously employed by her, and having voluntarily quit the employment shortly before that day; that on that day she employed him to serve her as companion, nurse, business assistant, household assistant, errand runner and message carrier, and to serve, under the directions of other physicians, as her medical doctor; that she agreed to pay him a salary, provide him with lodging in her home, meals, and the usual conveniences of a household, such as telephone service, use of automobile, etc.; that plaintiff accepted the employment and continued therein until her death; that the compensation paid plaintiff for his services during that period was not less than the fair, reasonable value thereof, and was paid and received as salary and wages for his services; that at the time of accepting such employment plaintiff had no practice as a physician, no office, and no patients, except the deceased; that at the time of entering into the agreement of November 14, 1942, decedent was a frail woman, in bad health; that plaintiff knew her condition would grow progressively worse and that her life expectancy extended, at the most, for only a few years; that the agreement was not reduced to writing and no note or memorandum thereof was ever signed by either party; that in the capacities mentioned, plaintiff served decedent from November 14, 1942, to her death; that he faithfully and ably performed the services; that plaintiff and decedent did not on November 14, 1942, or at any other time, enter into an agreement whereby decedent promised that if plaintiff would serve her in the manner requested, or in any other manner, during the balance of her life, or otherwise, she would leave to him by last will, or otherwise, all or any of her property; that plaintiff suffered no substantial pecuniary loss in having served decedent from November 14, 1942, to her death, and that the compensation he received for such services was commensurate with what he might have received from any other employment or from his profession; that plaintiff's alleged cause of action is barred by the provisions of Civil Code section 1624, subd. 6, and Code of Civil Procedure, section 1973, subd. 6. Judgment followed for defendants. Plaintiff appealed.

[1-3] It is first contended that the evidence is insufficient to support the findings of fact. Appellant completely overlooks the limitations on the power of a reviewing court. The principles governing the consideration of the case are succinctly stated in Barham v. Khoury, 78 Cal.App.2d 204, 211, 177 P.2d 579, 583, thus: "When a judgment is challenged on the ground of the insufficiency of the evidence to sup-

port the findings, four principles govern the conduct of the reviewing court, namely: (1) When two inferences are reasonably deducible from the facts the appellate court is forbidden to substitute its deductions for those of the trial court; (2) all conflicts must be resolved in favor of respondent and all reasonable inferences must be indulged in favor of the findings; (3) the power of the appellate court begins and ends with its determination that there is or is not substantial evidence to support the finding. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Federal Construction Co. v. Brady, 122 Cal.App. 446, 447, 10 P.2d 130; (4) evidence which may in the transcript appear relatively unsubstantial may have been 'overwhelming in its persuasiveness' when recited in the presence of the court. In re Estate of Bristol, supra."

[4, 5] The burden was on the plaintiff to establish: (1) the oral agreement by full, clear, and convincing evidence (Wilson v. Bailey, 8 Cal.2d 416, 424, 65 P.2d 770; Notten v. Mensing, 3 Cal.2d 469, 477, 45 P.2d 198); (2) that the agreement was founded upon an adequate consideration (Notten v. Mensing, 20 Cal.App.2d 694, 698, 67 P.2d 734); and (3) that plaintiff suffered an unjust and unconscionable injury and loss by reason of the failure of decedent to bequeath and devise all of her property to him—estoppel. Wilson v. Bailey, 8 Cal.2d 416, 421, 65 P.2d 770; Notten v. Mensing, 3 Cal.2d 469, 476, 45 P.2d 198. If plaintiff failed to prove the alleged oral agreement by full, clear and convincing evidence, or if from the evidence the trial court was justified in finding that the alleged oral agreement was never made, then the findings are supported and the other issues are immaterial. Whether the evidence is full, clear and convincing is primarily a question for the trial court. Viner v. Untrecht, 26 Cal.2d 261, 267, 158 P.2d 3; Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583. The only testimony of the alleged agreement was that of plaintiff in which he purported to give the statements or declarations of a deceased person. Such evidence is said "to be in its nature the weakest and most unsatisfactory." Smellie v. Southern Pacific Co., 212 Cal. 540, 560, 299 P. 529, 537. "No weaker kind of testimony could be produced." Belletich v. Pollock, 75 Cal.App.2d 142, 147, 171 P.2d 57, 61. We may not say that the evidence is, or is not, full, clear, and convincing. The credibility and weight of the evidence are exclusively for the trial court. Viner v. Untrecht, supra. It is most significant that the written agreements of July 11th, 1940, December 11th, 1940, and January 9th, 1941, did not contain any provision with respect to Mrs. George's leaving her property to plaintiff and that he did not mention the subject to Mr. Breslin.

[6, 7] A confidential relationship existed between plaintiff and decedent. The law presumes that any agreement made between plaintiff and decedent was obtained by the exercise of undue influence by plaintiff upon decedent. In Ross v. Conway, 92 Cal. 632, at page 635, 28 P. 785, at page 786, the court said: "The rule is inflexible that no one who holds a confidential relation towards another shall take advantage of that relation in favor of himself, or deal with the other upon terms of his own making; that in every such transaction between persons standing in that relation the law will presume that he who held an influence over the other exercised it unduly to his own advantage; or, in the words of Lord Langdale in Casborne v. Barnsham, 2 Beav. 78, the inequality between the transacting parties is so great 'that, without proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this court will impute an exercise of undue influence;' that the transaction will not be upheld unless it shall be shown that such other had independent advice, and that his act was not only the result of his own volition, but that he both understood the act he was doing and comprehended its result and effect. This rule finds its application with peculiar force in a case where the effect of the transaction is to divert an estate from those who, by the ties of nature, would be its natural recipients, to the person through whose influence the diversion is made, whether such diversion be for his own personal advantage, or for the advantage of some interest of which he is the representative.

It has been more frequently applied to transactions between attorney and client or guardian and ward than to any other relation between the parties, but the rule itself has its source in principles which underlie and govern all confidential relations, and is to be applied to all transactions arising out of any relation in which the principle is applicable." See, also, In re Estate of Cover, 188 Cal. 133, 144, 204 P. 583; Herbert v. Lankershim, 9 Cal.2d 409, 426, 71 P.2d 220. This presumption is evidence. Standing alone it supports a finding against contradictory evidence offered by plaintiff. (Lieher v. Rigby, 34 Cal.App.2d 582, 584, 94 P.2d 49. It was for the trial court to say whether the evidence offered by plaintiff outweighs the presumption. Smellie v. Southern Pacific Co., 212 Cal. 540, 555, 299 P. 529; People v. Chamberlain, 7 Cal.2d 257, 260, 60 P.2d 299; Lane v. Whitaker, 50 Cal.App.2d 327, 330, 123 P.2d 53; Fortier v. Hogan, 115 Cal.App. 50, 58, 1 P.2d 23.

[8] Application of these rules of law to the evidence recited warranted the trial judge in finding that Mrs. George did not at any time make an oral agreement with plaintiff to bequeath and devise all or any of her property to him.

[9] Appellant claims that the court failed to make findings upon material issues of fact. There is no basis for the claim. The vital issues were: Was the oral contract made? If so, was the consideration adequate? If so, did plaintiff suffer an unjust and unconscionable injury and loss? The court found against plaintiff on these and all other material issues. The findings support the judgment. The matters as to which complaint is made are evidentiary or immaterial matters, or covered by the findings made. As the finding that the alleged oral contract was not made is supported by the evidence, or lack of it, all other issues are immaterial and findings with respect to them unnecessary. A failure to find on an issue not necessary to support a judgment is harmless. (2 Cal. Jur., sec. 614, p. 1032.)

[10] Appellant says that in any event he is entitled to a judgment for damages upon the theory that he should recover the reasonable value of the services rendered. The complaint did not allege the reasonable value of the services. It did not allege that plaintiff had duly presented a claim against the estate of decedent and that it had been rejected. It did not pray for anything except quasi specific performance. The case was not tried upon the theory that plaintiff was seeking to recover the reasonable value of the services rendered. Recovery can be had on a quantum meruit only upon pleading and proof that the plaintiff duly presented a claim against the estate of the decedent, which was rejected by the executor. Neel v. Barnard, 24 Cal.2d 406, 414, 150 P.2d 177; Hays v. Bank of America, etc., 71 Cal. App.2d 301, 304, 162 P.2d 679. Zellner v. Wassman, 184 Cal. 80, 193 P. 84, cited by appellant, is not in point. The distinction is obvious from the statement of the court that (on page 84 of 184 Cal., on page 86 of 193 P.) "The complaint is drawn upon two theories: (1) That plaintiff is entitled to specific performance of the alleged agreement; (2) that the action is a suit at law upon a claim against the estate of the decedent, duly presented and rejected by the administrator." Further, the court found that appellant was fully paid for his services at the rate contracted for.

Judgment affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

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MILANI et al. v. SMITH.

Civ. 13576.

District Court of Appeal, First District,
Division 2, California.
April 26, 1948.

1. Trade-marks and trade-names and unfair competition 🔑97

Partners operating taxicab business under name "Yellow Cab Company," with cabs and office painted yellow and lettered "Yellow Cab," were entitled to have such alterations made by subsequent competitor in his yellow cabs as would enable public to distinguish the two competitors' cabs.

2. Trade-marks and trade-names and unfair competition 🔑97

Injunctions against taxicab operator's use of word "yellow" to identify his business and use of such color on his taxicabs in manner calculated to deceive public and lead members thereof to believe that such cabs belonged to or were operated by competitors, using same word in their business name and yellow color on their taxicabs, were not too broad because of failure to limit prohibition to extent necessary to curb pirating of competitors' business.

3. Trade-marks and trade-names and unfair competition 🔑97

A permanent injunction restraining taxicab operator from using yellow color in manner calculated or liable to deceive public after he painted black checkers over yellow background on lower parts of his taxicabs, with judicial sanction, superseded previous preliminary injunction against use of such color on his taxicabs, and all other equipment, so as to obviate objection that preliminary injunction required him to repaint his entire business equipment and eradicate every vestige of yellow color therefrom.

4. Monopolies 🔑5

A preliminary injunction against taxicab operator's use of word "yellow" to identify his business and use of yellow color on his taxicabs and permanent injunction against such use of word and use of such color in manner calculated to deceive public or lead members thereof to believe that his taxicabs belonged to or were operated by competitors, using same name and color, were not invalid as granting such competitors a monopoly.

5. Trade-marks and trade-names and unfair competition 🔑97

A taxicab operator, granted right to use trade name "Yellow Cab Company" and yellow color in his business within certain county by owner of such name and trade-mark, was not entitled to modification of permanent injunction against his use of such color on his equipment by eliminating trade marked "Yellow Cab" type of drivers' caps from prohibition of injunction.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Suit by Joe Milani and another, copartners, doing business under the firm name and style of the Yellow Cab Company, against Jack Smith, doing business under the firm name and style of Checker Cab Company, to enjoin unfair competition. From an order granting a preliminary injunction and a judgment and decree containing a permanent injunction, defendant appeals.

Affirmed.

Lawrence A. Cowen, of San Rafael, for appellant.

Phillip A. Kennedy, of San Rafael, and Leonard J. Bloom, of San Francisco, for respondent.

GOODELL, Justice.

The defendant appeals from an order granting a preliminary injunction and from a judgment and decree containing a permanent injunction in a suit brought to stop unfair competition.

The plaintiff, Joe Milani, entered the taxicab business in San Rafael in 1925. In 1933 he took over a business in that city known as Yellow Cab Co. Later on his son Frank joined him as a partner. They operate six cabs, five of which are painted yellow, with black fenders, and lettered "Yellow Cab". Their office is painted yellow and lettered "Yellow Cab". The use of that name in connection with their business dates back to 1935; their cabs have been yellow since 1942, and the drivers have worn yellow caps since 1943.

The defendant entered the taxicab business in San Rafael in 1942, first calling it Blue Line, next Checker Blue Line, then Checker Cab Co., and finally Yellow Checker Cab Co. His cabs at first were painted in colors other than yellow, but in August, 1946, he had all six of them painted a shade of yellow approximately the same as plaintiffs' fleet, but with red fenders. At the same time he changed the color of his drivers' caps from black to yellow. The defendant's office, painted yellow and red and lettered "Yellow Checker Cab", is about 75 feet from plaintiffs' place on the same street.

After two hearings the preliminary injunction was issued enjoining defendant, "from using the word 'Yellow', orally, in writing, or otherwise, and in any manner whatsoever to identify the operation of his taxicab business * * *" and "from using the color yellow on his taxicabs, offices and stands, drivers caps and uniforms, signs, and all other equipment, used in his taxicab business in * * * San Rafael * * *."

At the trial all evidence admitted at the earlier hearings went in by stipulation and immediately after submission the court ordered judgment for plaintiff for one dollar damages and a permanent injunction. Findings were filed and a decree entered, enjoining the defendant "from using the word 'yellow' orally, in writing, in advertising, or otherwise, or in any manner whatsoever to identify the operation of any taxicab business owned or operated * * * by the defendant * * *" and "from using the color 'yellow' on defendant's taxicabs, offices and stands, driver's caps and uniforms, signs, and all other equipment used * * * in any taxicab business owned or operated * * * by defendant * * * in * * * San Rafael * * * in such a manner as may be calculated or liable to deceive the public generally, or to lead members thereof, while exercising ordinary care and prudence in selecting a taxicab, to believe that the taxicab operated by the defendant is a taxicab belonging to or operated by the plaintiffs, * * *."

The preliminary injunction gave the defendant 13 days within which to comply but did not specify how he should do so. After its issuance and before the trial the defendant altered the appearance of his taxicabs. A colored photograph shows that the yellow paint was left on the lower part of the cabs' bodies (below the windows) but that black checkers had been painted over the yellow background, resulting in a yellow-and-black checker combination. The upper parts and tops of the bodies are a cream buff color. The fenders remained red. The same photograph shows that the word "Yellow" on the front of defendant's office, which had appeared above "Checker" and above "Taxi", had been erased, and that two panels, above the lettering, and other spots on the front, had been painted with a checker pattern. In announcing his decision the judge remarked: "I see no reason for changing the ruling of the Court on the action of the temporary injunction. I must say that the view I have had of the cabs since they have been recheckered and the view presented in court convinces me if that condition is continued there would be no liklihood of deception for anybody. I think the defendant has fully complied with the ideas of the Court, and anybody who claims to be deceived now, even a child would know the difference." Thereupon plaintiffs' counsel admitted that "we too are satisfied with the present color scheme in that it is not competitive."

[1] The evidence, which is practically without conflict, presents a typical case of unfair business competition, squarely within the doctrine of Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 P. 142, 146, 30 L.R.A. 182, 50 Am.St.Rep. 57. In that case the plaintiffs had used "Mechanics' Store" as their trade name. The defendant, next door, called his store "Mechanical Store". The court restrained the use of the latter name and required that the defendant should distinguish his place of business from that of the plaintiff "in some mode or form that shall be a sufficient indication to the public that it is a different place of business from that of the

plaintiff". In the present case the plaintiffs were entitled under that rule to have such alterations made as would enable the public to distinguish the cabs of the two competitors and the "recheckering" accomplished that result and eliminated the probability of future deception.

[2] The defendant's principal contention is that the preliminary injunction went too far and was too broad in flatly prohibiting the use of the word "Yellow" and the color yellow, without any qualifying language. The same attack is made on the permanent injunction in so far as it prohibits the use of the word "Yellow". In that connection defendant argues that he "had a broad right to use the word yellow and the color yellow in his business. That broad right" he says, "could be narrowed only in the event he exercised it to pirate the business of the plaintiffs and only to the extent necessary to curb the pirating." The injunctions specify the several methods of operation in and by which the word and color shall not be used. It is not at all apparent how either the word or the color could possibly be used in such specified ways e.g., in advertising, or on cabs, stands or signs without unfair competition resulting, and the defendant does not suggest how he thinks it could be done. "Yellow" in this case is the same as "Mechanical Store" was in the Weinstock, Lubin case, where its use was flatly and unqualifiedly enjoined. In Eastern Columbia, Inc. v. Waldman, 30 Cal.2d 268, 181 P.2d 865, 867, the trial court enjoined the use of "Western Columbia" with qualifying language added. On an appeal by plaintiff the Supreme Court struck out the qualifying words, saying, "An absolute injunction is proper where defendant's conduct is unlawful."

[3] As to color, defendant says the preliminary injunction "required appellant to repaint his entire business equipment with a color or colors other than yellow, and to eradicate from his business every vestige of the color yellow." As we have already seen, on a broad surface of the cabs the yellow was not eradicated; it was "checkered" over the yellow background, leaving a yellow-and-black checker effect. This put far less burden on the defendant than literal compliance would have done, and of this he cannot complain. This process of "recheckering" was a departure, with judicial sanction, from the literal requirements of the preliminary injunction, amounting to a practical modification of it. When, several weeks later, the permanent injunction issued, the court therein restrained the use of yellow "in such a manner as may be calculated or liable to deceive the public * * *." This qualification was presumably added in the light of the alterations already made, and the defendant admits that that part of the decree is not subject to criticism. The permanent injunction containing these broader terms of course superseded the preliminary injunction, which was but a provisional remedy, and which by its own terms was effective only pending the further order of the Court. Sheward v. Citizens' Water Co., 90 Cal. 635, 638, 27 P. 439.

[4] Defendant's argument that the injunctions granted a monopoly to plaintiffs is wholly devoid of merit.

Defendant relies on Southern California Fish Co. v. White Star Canning Co., 45 Cal.App. 426, 187 P. 981, and on American Automobile Ass'n v. American Automobile Owners Ass'n, 216 Cal. 125, 13 P.2d 707, 82 A.L.R. 699. Neither case is in point for the reasons stated in Rosenthal v. Brasley–Krieger Shoe Co., 19 Cal.App.2d 257, at page 260, 64 P.2d 1109, at page 1110.

[5] Defendant placed in evidence a writing signed by Yellow Cab Co. (of San Francisco) granting the right to use the trade name and color "Yellow Cab Company" within Marin County. He claims that the right to enjoin the use of the "Yellow Cab" type of cap (which is trademarked) resides in that company (the trade mark owner) and not in the plaintiffs, and that the permanent injunction should be modified to eliminate yellow caps from its prohibitions. Plaintiffs' drivers have been wearing this type of cap since 1943, while defendant's drivers have done so only since August, 1946. The answer to this contention is that a prospective passenger could be just as easily deceived by a patented yellow cap (worn by permission of its pat-

entee) as by an unpatented one, and it is deception, and not infringement of trade mark, that is the gist of such actions as this.

The order and judgment are, and each of them is, affirmed.

NOURSE, P. J., and DOOLING, J., concur.

85 Cal.App.2d 226

PEOPLE v. O'NEAL.

Cr. 4201.

District Court of Appeal, Second District, Division 1, California.

April 28, 1948.

1. Bigamy ⇨5

Pleading and proof of bigamy must show previously established status of defendant as married person and his additional marriage during continuance of that status. Pen.Code, § 1106.

2. Bigamy ⇨7

In bigamy prosecution, where former marriage is proved, there is rebuttable presumption of its validity, and state need not show that there were no impediments to it. Pen.Code, § 1106.

3. Bigamy ⇨7

In bigamy prosecution, burden is on defendant to establish invalidity of prior marriage proved by state.

4. Bigamy ⇨13

In bigamy prosecution, weight to be given conflicting presumptions and inferences regarding prior marriage proved by state is for jury. Pen.Code, § 1106.

5. Bigamy ⇨13

In bigamy prosecution, defendant's testimony that wife had told him that she did not know whether her former husband had obtained a divorce was not sufficient to establish as matter of law that defendant's marriage to wife was invalid, in face of prima facie showing by state that such marriage was valid and existing at time of bigamous marriages entered into by defendant. Pen.Code, § 1106.

6. Bigamy ⇨11

Testimony by successive witnesses that they married defendant outside of California and thereafter cohabited with him in the state sustained conviction of bigamy. Pen.Code, § 1106.

7. Criminal law ⇨1169(2)

In bigamy prosecution, admission of marriage licenses was not prejudicial, in view of testimony by women involved that they had married defendant outside of California and that they had thereafter cohabited with him in the state, particularly where defendant introduced in evidence by reference final decree of divorce secured by the one, and judgment of anullment in favor of another. Pen.Code, § 1106.

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Gerald J. O'Neal was convicted of bigamy on three counts, and he appeals.

Affirmed.

Richard E. Erwin, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged with four counts of bigamy, a felony, and with prior convictions of felonies. Defendant admitted the three prior convictions, and on motion of the District Attorney count II of the information was dismissed. The court sitting without a jury found defendant guilty of bigamy, as charged in counts, 1, 3 and 4 of the information, and sentenced him to state's prison for the term prescribed by law. From the ensuing judgments of conviction and from an order denying his motion for a new trial, defendant prosecutes this appeal.

An examination of the record herein discloses that in the absence of Stella O. Frank her testimony at the preliminary examination was introduced by stipulation at the instant trial. She testified that she met appellant in 1941 and went through a marriage ceremony with him on February 7, 1942 at Las Vegas. She produced a marriage certificate issued by the County of Clark, State of Nevada, which bore the names of Stella O. Frank, the witness, and Jerald U. O'Neill, the name by which she knew appellant. The ceremony was performed by Albert C. Melton, a minister, and Nancy Jane Webb and her father, J. Edward Webb, were present as witnesses. The witness Frank stated that she commenced proceedings for divorce or annulment from appellant: "I had the papers served on him on the 23d day of February, 1944, but they never come to the Judge." After the marriage ceremony, the witness testified that she and appellant lived in California and cohabited for a period of two years in Los Angeles County, separating on February 1, 1944.

Margaret Williams testified that she married appellant on June 21, 1945, at Las Vegas, Nevada; that a marriage license was issued to her and appellant and that a marriage ceremony was performed by F. C. Lovett, who stated that he was a minister; that thereafter she and appellant cohabited in Los Angeles County until the latter part of December, 1945. Later in the trial, appellant introduced by reference a Los Angeles County Superior Court case file, containing a final decree of divorce dated February 18, 1947, in which said Margaret Williams was the plaintiff and appellant was the defendant.

Julia Twitchell testified that she married appellant on March 23, 1947, at Las Vegas, Nevada; that a marriage license was issued to them, and a marriage ceremony was performed by F. C. Lovett, who she supposed was a minister; that thereafter she and appellant lived together as husband and wife in the County of Los Angeles for a period of about nine days. Appellant later in the trial introduced by reference a Los Angeles County Superior Court file containing a judgment of annulment entered May 27, 1947 in which he was named defendant and Julia Twitchell was named plaintiff.

Anna Gwendolyn Ashley testified that she was married to appellant at Yuma, Arizona, on June 1, 1947; that a marriage license was issued to her and appellant; that there were two persons present who called themselves "Reverends" but that she did not know which one performed the marriage ceremony; that they returned to Los Angeles where they lived as man and wife for about a week, during which time she introduced appellant as her husband to her relatives and friends.

Appellant took the stand in his own defense, and testified that he had a conversation with Stella O. Frank in the "latter part of 1942 or 1941"; that she told him that she had been married to a man named Miller in Kansas and had two growing children; that she had married a man named Frank in Chicago, and also mentioned having married a doctor in San Francisco by the name of Pierce, a dentist; "she said he treated her so bad and he was a dope fiend and beat her, and she just picked up and left * * * about the latter part of 1941—1942—no—yes, 1942. * * * she told me she did not know whether he got a divorce or not * * * and I told her * * * that I was just through doing time and that I was working for M. G. M. and trying to get along and I did not want any more trouble, and I picked up and put my stuff in my car and I left."

Appellant first contends that the trial court erred in finding that the prosecution had established a valid and existing marriage between him and Stella O. Frank, urging that while the "correct rule seems to be that admissions by the defendant together with proof of cohabitation and repute are sufficient to prove the marriage * * * no attempt was made by the prosecution to prove either admissions by the defendant or reputation of marriage of the parties. Nor was there any evidence that the person who performed the ceremony was a minister, or that he was authorized by the law to perform the marriage ceremony."

[1] With respect to a prosecution for the crime of bigamy, it was stated in People v. LaMarr, 20 Cal.2d 705, 709, 128 P.2d 345, 347: "The essential things for the pleading and proof to show are (1) the *previously established status* of the defendant as a married person and (2) his additional marriage *during perdurance* of that status. It is the *additional* marriage which identifies the particular crime." (Emphasis included.)

Section 1106, Penal Code, provides that "Upon a trial for bigamy, it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; and when the second marriage took place out of this state, proof of that fact, accompanied with proof of cohabitation thereafter in this state, is sufficient to sustain the charge."

[2-4] In People v. Van Wie, 72 Cal.App.2d 227, 230, 164 P.2d 290, 292, it was held:

"Where a former marriage is proved, there is a rebuttable presumption of its validity, and it is not necessary for the state to show that there were no impediments to it. See cases collected and commented upon 10 C.J.S., Bigamy, § 16, p. 372. Inasmuch as the facts are peculiarly within the knowledge of the defendant, the burden is on him to establish the invalidity of a prior marriage proved by the State. (People v. Huntley, 93 Cal.App. 504, 269 P. 750. The weight to be given to the conflicting presumptions and inferences is for the jury. People v. Burke, 43 Cal.App.2d 316, 110 P.2d 685.

"Under these rules, while it is necessary for the prosecution to establish that defendant had a lawful wife living at the time of the alleged bigamous marriages, the burden is on the accused to establish the invalidity of the prior marriage."

[5] Appellant's testimony to the effect that Stella O. Frank told him that she did not know whether a former husband of hers had obtained a divorce or not, is not sufficient to establish, as a matter of law, that appellant's marriage to Stella O. Frank was invalid, in the face of the prima facie showing by the prosecution that such marriage was valid and existing at the time the bigamous marriages were entered into by appellant. At any rate, this was an issue for the determination of the trial court upon the evidence.

[6, 7] Appellant urges that the trial court erred in admitting in evidence over his objection the marriage licenses marked People's Exhibits 1 (A), 4, 5, and 7, to wit: the licenses or marriage certificates of Stella O. Frank, Margaret Williams, Julia Twitchell and Anna Gwendolyn Ashley. All of these women testified that they married appellant outside of California and thereafter cohabited with him in this state. Such evidence was sufficient under section 1106 of the Penal Code, supra, to sustain the charge of bigamy. Moreover, appellant introduced in evidence by reference the final decree of divorce secured by Margaret Williams, and the judgment of annulment in favor of Julia Twitchell. As a result, the admission in evidence of the marriage licenses here objected to was not prejudicial to appellant's cause.

The evidence adduced at the trial of this action is amply sufficient to sustain the judgments of conviction. For the reasons stated, the judgments and the order appealed from are, and each of them is affirmed.

DORAN and WHITE, JJ., concur.

31 Cal.2d 842

STATE BAR v. TURNER.

S. F. 17595.

Supreme Court of California.
May 11, 1948.

1. Attorney and client ⚷53(1)

Where applicant for admission to bar has a criminal record, examining committee is justified in declining to recommend him for admission in absence of proof of rehabilitation.

2. Attorney and client ⚷46

Where recommendation of examining committee of State Bar that applicant be admitted, and order of Supreme Court admitting applicant, to bar were made under misapprehension of fact, and true facts, had they been known, would have justified committee in declining to make recommendation, on application of State Bar for order of admission would be revoked notwithstanding that applicant may not have been guilty of intentional concealment because of a mental condition.

◆

Proceeding on the petition of the State Bar of California for revocation of an order admitting William Edward J. Turner to practice as an attorney.

Order revoked.

Jerold E. Weil, of Los Angeles, for petitioner.

Maury & Harrington and George R. Maury, all of Los Angeles, for respondent.

PER CURIAM.

In this proceeding, the State Bar is seeking revocation of an order admitting respondent to practice as an attorney at law upon the ground that he concealed from the Committee of Bar Examiners material facts with respect to his moral and other qualifications.

In his application to take the bar examination, respondent represented that his full name was William Edward James Monroe Tipton Turner, that he had attended the University of Kansas and Grinnell College, that he had received an A. B. degree prior to the commencement of his law school studies, and that he had never been charged with or arrested for the violation of any law. Respondent received a passing grade in the examination and thereafter the examining committee, relying upon the statements in the application, certified to this court that respondent had met the requirements for admission to practice, and recommended that he be admitted.

By his answer to the petition, respondent admits that at different times in the years between 1931 and 1934, and under different aliases, he was convicted of petit larceny, unlawfully obtaining food and lodging from a hotel and for issuing checks without sufficient funds. He further admits that he used the name and academic record of James Monroe Tipton, deceased, in gaining admission to law school and in applying to take the bar examination. Respondent asserts, however, that at the time he made his application and for a period of several years prior thereto he was suffering from a nervous and mental illness which made him incapable of formulating a willful and fraudulent intent.

The State Bar demurred to the answer, and we required respondent to show cause why the order admitting him to practice should not be vacated and set aside. In his reply, respondent has requested permission to present evidence which he claims will show that by reason of his mental condition he had no memory of the events in question when he applied for admission and, consequently, no intention to conceal the facts from the committee.

[1, 2] It is clear, however, that had the committee known the facts with respect to respondent's criminal record, it would have been justified in declining to recommend him for admission in the absence of proof of rehabilitation. The recommendation of the committee and the order of this court were made under a serious misapprehension of the facts, and in these circumstances it is immaterial that respondent, because of his mental condition, may not have been guilty of intentional concealment. The cases of In re Jung, 13 Cal.2d 199, 88 P.2d 679, and State Bar v. Rollinson, 213 Cal. 36, 1 P.2d 428, are not in point because in neither of those proceedings was it shown that the facts concealed would have justified the

committee in refusing to recommend admission.

The order admitting William Edward J. Turner to practice law is set aside, and it is ordered that the license to practice law heretofore granted be and it is hereby revoked and canceled, and that his name be stricken from the roll of attorneys in this state.

31 Cal.2d 813

SEBRELL v. LOS ANGELES RY. CORPORATION.

L. A. 20433.

Supreme Court of California, in Bank.

May 4, 1948.

1. Trial 🔑243

Instruction, which in effect advised jury that it should not assume that defendant was negligent and pass immediately to discussion of damages and should not be swayed by sympathy or sentiment because of injuries in determining issues of liability, did not create a conflict with further instruction that a grievously injured person losing her memory is entitled to presumption that she exercised reasonable care.

2. Appeal and error 🔑1064(1)

Instructions that are contradictory in essential elements may warrant reversal of a judgment on ground that it cannot be ascertained which instruction was followed by jury.

3. Trial 🔑243

Decisive question in determining whether instructions are conflicting is whether instructions read as a whole and in light of circumstances of case in which they were given are apt to confuse a person of ordinary intelligence.

4. Evidence 🔑42

It is common knowledge that instructions, like statutes, may include, in addition to a general rule, a special rule applicable only in particular circumstances, and that special rule qualifies the general. Civ.Code, § 3534; Code Civ.Proc. § 1859.

CARTER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Elizabeth Sebrell against the Los Angeles Railway Corporation to recover damages sustained in a collision between plaintiff's automobile and defendant's streetcar. From a judgment for defendant and from an order denying plaintiff's motion for a new trial, plaintiff appeals.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

Prior opinion 184 P.2d 927.

Forrest A. Betts, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Sherman Welpton, Jr., all of Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff appeals from a judgment entered on a jury verdict for defendant in an action for damages for injuries to person and property sustained in a collision between her automobile and a streetcar owned by defendant. Plaintiff's automobile, proceeding south on New Hampshire Avenue in Los Angeles, and defendant's streetcar, proceeding west on Sixth Street, collided at the intersection. A boulevard stop sign on the northwest corner of the intersection of the two streets requires southbound vehicles on New Hampshire Avenue to stop before crossing Sixth Street. There are no stop signs on Sixth Street requiring vehicles approaching New Hampshire Avenue to stop. Plaintiff testified that she made the required stop and carefully looked to her right and left; that the intersection is a blind intersection; that she did not see the streetcar or any "moving traffic" on Sixth Street; and that she remembers "nothing at all" from the time she brought her automobile to a stop until after the collision, since injuries from the collision deprived her of any memory of the events related to the accident. The streetcar operator testified that he could not see north on New Hampshire Avenue until he was within a distance of a few feet from the intersection; that when he was ten or fifteen feet from the east curbline of New Hampshire Avenue, he first saw plaintiff's automobile travelling at a speed of 25 to

30 miles per hour; that plaintiff crossed the white line on New Hampshire Avenue, at which southbound vehicles were required to stop, and never applied the brakes; that he applied the emergency brake as quickly as he could; that the front of the streetcar collided with the door of the automobile on the side where plaintiff was sitting; that plaintiff did not vary her speed after he first saw her or "look up" before the streetcar struck the automobile; that he rang the bell intermittently while he was proceeding on Sixth Street, and that "I am pretty sure I rang it as fast as I could ring it when I seen danger." Other witnesses testified that they heard the streetcar bell ringing before the accident occurred. One of the streetcar passengers testified that as it approached the scene of the accident the streeetcar proceeded at a speed of approximately 20 miles per hour; that she first saw plaintiff's automobile when it was approximately ten feet north of the boulevard stop sign; that it looked "like it would come through the stop sign and strike" her; that the automobile did not stop before entering the intersection; that she felt the streetcar slow down a little when the brakes were applied.

[1] Plaintiff does not contend that the verdict was not supported by the evidence. The sole issue on appeal is raised by her contention that the trial court committed prejudicial error in instructing the jury. The jury was instructed: "I instruct you that it would be a violation of your duty as jurors to consider the question of injuries or damages, if any, prior to determining the issue of liability or to allow the question of injuries or damages, if any, to affect your judgment in any way in determining the issue of liability. The first question for you to decide is whether or not the plaintiff is entitled to recover in this action against the defendant. If you find from the evidence that plaintiff is not entitled to recover, then it is your duty to immediately return the verdict in favor of said defendant." The jury was also instructed: "It is the testimony of plaintiff in this case that she does not recollect any event related to the accident, and that her last recollection is that of having brought her automobile to a stop with the front end of it approximately even with the boulevard stop sign which is located at the northwest corner of the intersection. A person who has been so grievously injured in an accident as to be deprived of her memory is entitled to the presumption that she exercised reasonable care for her own protection. * * *"

Plaintiff contends that the first instruction withheld from the jury the right to consider plaintiff's injuries in determining the issue of liability, and therefore conflicted with the instruction that the jury consider whether as a result of her injuries plaintiff had been deprived of her memory and was thus entitled to the presumption that she exercised reasonable care for her own protection. The latter instruction directed the jury to consider plaintiff's injuries in determining liability for the question whether her injuries resulted in a loss of memory entitling her to the presumption was a material issue concerning liability. Plaintiff contends that the conflict between the instructions substantially affected her right to the presumption that she exercised reasonable care for her own protection. She relies on Simmons v. Lamb, 35 Cal.App.2d 109, 94 P.2d 814, 815, in which the jury was instructed "that it would be a violation of your duty as jurors to discuss the nature and extent of plaintiff's injuries, if any, until you shall have first determined the question of whether or not the defendant is liable. The question of liability should first be determined by you before it would be proper for you in any wise to discuss the nature and extent of the plaintiff's injuries, if any, because unless the defendant is liable, the nature and extent of the plaintiff's injuries, if any, shall not enter into your deliberations." In that case it was important for the determination of the issue of liability whether the plaintiff or her allegedly intoxicated companion was driving the plaintiff's automobile when it collided with the defendants' truck. As to that question the defendants relied on the fact that flesh, blood, and hair, which according to the nature of the injuries of the plaintiff were likely to be hers, were found on the broken windshield in front of the place where a passenger would be sitting. The District Court of Appeal held that, although in some cases the instruction as given would be proper, "Nevertheless, in the circumstances here presented, it was prejudicial error to instruct the jury not to consider the nature and extent of respondent's injuries until they had determined the question of liability therefor. Before the jury could decide whether respondent or appellants were responsible for the collision, it was necesary to determine whether respondent or her companion * * * was driving the Chevrolet, and in order to do that, it was necessary for the jurors to consider the nature and extent of respondent's injuries." 35 Cal.App.2d 113, 94 P.2d 816.

In the present case the jury was not instructed as it was in Simmons v. Lamb, supra, that the issue of liability should first be determined "before it would be proper for you in any wise to discuss the nature and extent of the plaintiff's injuries," or that "unless the defendant is liable, the nature and extent of the plaintiff's injuries, if any, shall not enter into your deliberations." The jury was instructed that they should not "consider the *question of injuries or damages,* if any, prior to determining the issue of liability or to allow the *question of injuries or damages,* if any, to affect your judgment in any way in determining the issue of liability." (Italics added.) This instruction in effect advised the jury that they should not assume that defendant was negligent and pass immediately to a discussion of the question of damages and that they should not be swayed by sympathy or sentiment because of the injuries in determining the issue of liability. The instruction could reasonably be understood as requiring the jury merely to separate in its deliberations the *question* of injuries and damages from the *question* of liability. Such separation of the two distinct issues in the deliberations of the jury could be observed even though the jury would have to consider plaintiff's injuries in determining whether she suffered a loss of memory entitling her to the presumption. If the two instructions are read together, it is clear the jury could not reasonably doubt that it could consider plaintiff's injuries in determining whether plaintiff suffered the loss of memory on which her right to the presumption depended.

In the Simmons case the instruction withholding from the jury consideration of plaintiff's injuries in determining the issue of liability stood alone; it was not supplemented by an instruction requiring the jury to consider the injuries sustained by plaintiff in determining whether the plaintiff or her companion was driving the plaintiff's automobile when the collision occurred. Thus, the jury was precluded from considering the injuries of the plaintiff even for the purpose of determining who was driving the plaintiff's automobile at the time of the accident. In that case there was therefore no problem as to conflicting instructions, whereas in the present case the question is whether there is such a conflict between the two instructions in question that the jury could reasonably doubt that it was entitled to follow the instruction requiring it to consider plaintiff's injuries in determining whether she suffered a loss of memory.

[2-4] Instructions that are contradictory in essential elements may warrant the reversal of a judgment on the ground that it cannot be ascertained which instruction was followed by the jury. Chidester v. Consolidated People's Ditch Co., 53 Cal. 56, 58; Starr v. Los Angeles Railway Corporation, 187 Cal. 270, 280, 201 P. 599; Soda v. Marriott, 118 Cal.App. 635, 643, 5 P.2d 675. In determining whether there is such a conflict the decisive question is whether the instructions read as a whole and in the light of the circumstances of the case in which they were given, are apt to confuse a person of ordinary intelligence. It is common knowledge that instructions, like statutes, may include in addition to a general rule a special rule applicable only in particular circumstances and that the special rule qualifies the general. See, Civil Code, sec. 3534; Code Civ.Proc. § 1859; Fassett v. Nascimiento, 108 Cal.App. 14, 19, 291 P. 269. In the present case the instruction relating to the presumption required the jury to consider a particular consequence of plaintiff's injuries for the purpose specified in the instruction. No explicit statement was necessary to make a person of ordinary intelligence understand that a consideration of plaintiff's injuries in conformity with this instruction would

not violate the general instruction that the jury determine the question of liability before it considered the question of injuries or damages.

The judgment is affirmed and the appeal from the order denying a new trial is dismissed.

EDMONDS, SCHAUER, and SPENCE, JJ., concur.

GIBSON, Chief Justice (concurring).

I concur in the judgment. Although in my opinion the instructions could have more clearly stated the principles of law involved, it does not appear that there has been a miscarriage of justice in this case.

SHENK, J., concurs.

CARTER, Justice (dissenting).

I dissent.

By a process of fine spun legalistic reasoning the majority has arrived at the conclusion that there is no conflict in the instructions which, in effect, tell the jury that it *must* or *must not* consider certain evidence. No amount of verbiage, however artistically arranged, can erase this conflict. It is so apparent "that he may run that readeth it."

The majority opinion does not set forth the criticized instructions in the order in which they appear in the transcript. It places the instructions in reverse order without comment as to the order in which they were read to the jury or the space of time which elapsed between the reading of the two instructions. The record discloses that the instructions given by the court to the jury covered 36 pages of the transcript. They commence at page 201 and end on page 237. Plaintiff's instruction No. 51 appears at page 205 and is as follows: "It is the testimony of the plaintiff in this case that she does not recollect any event related to the accident, and that her last recollection is that of having brought her automobile to a stop with the front end of it approximately even with the boulevard stop sign, which is located at the northwest corner of the intersection. A person who has been so grievously injured in an accident as to be deprived of her memory is entitled to the presumption that she exercised reasonable care for her own protection. This is a rebuttable presumption, but is one to which the plaintiff is entitled to have you give consideration at all points in the case, and even unto the deliberation in the jury room." The instruction which is said to conflict with the foregoing instruction is defendant's instruction No. XI and it appears in the transcript at page 231. It is as follows: "I instruct you that it would be a violation of your duty as jurors to consider the question of injuries or damages, if any, prior to determining the issue of liability or to allow the question of injuries or damages, if any, to affect your judgment in any way in determining the issue of liability. The first question for you to decide is whether or not the plaintiff is entitled to recover in this action against the defendant. If you find from the evidence that plaintiff is not entitled to recover, then it is your duty to immediately return a verdict in favor of said defendant."

So it appears from the record that after reading to the jury plaintiff's instruction No. 51 above quoted, the court read some 26 pages of other instructions before coming to defendant's instruction No. XI. After reading six more pages of instructions, the case was submitted to the jury. To those who have had experience in the trial of jury cases the foregoing procedure is a matter of considerable significance. Even a trained legal mind cannot retain the phraseology contained in plaintiff's instruction No. 51 while listening to some 26 pages of other instructions and differentiate its phraseology from that contained in defendant's instruction No. XI. Even if the two instructions had been read in consecutive order, they would have been confusing and misleading. But when we consider the fact that defendant's instruction No. XI was read to the jury near the end of the charge, and after 26 pages of other instructions had been read since the reading of plaintiff's instruction No. 51, it presents a picture, which any one familiar with the modusoperandi of a jury trial would say, was very unfavorable to plaintiff's case.

Without giving any consideration to the foregoing factual situation, the majority opinion states: "The jury was instructed that they should not 'consider the *question of injuries or damages*, if any, prior to determining the issue of liability or to allow the *question of injuries or damages*, if any, to affect your judgment in any way in determining the issue of liability.' (Italics added.) This instruction in effect advised the jury that they should not assume that defendant was negligent and pass immediately to a discussion of the question of damages and *that they should not be swayed by sympathy or sentiment because of the injuries in determining the issue of liability.* The instruction could reasonably be understood as requiring the jury merely to separate in its deliberations the *question* of injuries and damages from the *question* of liability. *Such separation of the two distinct issues in the deliberations of the jury could be observed even though the jury would have to consider plaintiff's injuries in determining whether she suffered a loss of memory entitling her to the presumption.* If the two instructions are read together, it is clear the jury could not reasonably doubt that it could consider plaintiff's injuries in determining whether plaintiff suffered the loss of memory on which her right to the presumption depended." [Emphasis added.] The absurdity of the reasoning in the majority opinion stands out boldly when it is observed that the author found it necessary to emphasize the fine spun distinction between the phrases "*question* of injuries and damages" and "*issue* of liability."

One who has had experience in the trial forum knows that the only opportunity the juror has to consider an instruction is when he listens to it as it is read to the jury by the trial judge. Even without such experience or unusual imaginative powers, ordinary common sense should dictate that the reasoning in the above quoted excerpt is so highly fallacious and unsound that it amounts to an utter absurdity. Furthermore, the premise for such reasoning is false. There is not the slightest intimation in the instruction in question to the effect "that [the jury] should not be swayed by sympathy or sentiment because of the injuries in determining the issue of liability." This statement in the majority opinion is without foundation in fact and is indicative of the absurd lengths to which the majority is willing to go in order to find support for its unsound and illogical conclusion. The opinion then states that: "The instruction could reasonably be understood as requiring the jury *merely to separate in its deliberations the question of injuries and damages from the question of liability.*" [Emphasis added.] Any one who has had experience in the trial of jury cases knows that the suggested requirement is far beyond the capacity of the average juror even in cases where the instructions are clear and explicit and beyond the realm of conflict. From the discussion in the majority opinion on this proposition it is obvious that no consideration has been given to the practical aspects of a jury trial. The majority opinion further states: "Such separation of the two distinct issues in the deliberations of the jury could be observed even though the jury would have to consider plaintiff's injuries in determining whether she suffered a loss of memory entitling her to the presumption." The majority opinion makes this statement notwithstanding the clear, positive and explicit statement in the instruction that: *"I instruct you that it would be a violation of your duty as jurors to consider the question of injuries or damages, if any, prior to determining the issue of liability or to allow the question of injuries or damages, if any, to affect your judgment in any way in determining the issue of liability."* [Emphasis added.] I do not believe that it is possible on any basis of reason or common sense to reconcile the portion of the instruction just quoted with the last quoted statement in the majority opinion. To say that the jury would not be misled by such an instruction in a case of this character is, in my opinion, altogether too much to expect of the average juror. I believe, however, that the average juror is a person of ordinary intelligence, and, in my opinion, a person of ordinary intelligence would understand from these instructions that he should not consider the nature or extent of the injuries suffered by plaintiff until he determined that defendant was liable for such injuries. In other words, he could not consider the effect of plaintiff's injuries in determining whether defendant was guilty of negligence which was the proximate cause of the accident, or whether plaintiff was guilty of contributory negligence which proximately contributed thereto. Therefore, he could not consider plaintiff's injuries as causing unconsciousness or lack of memory which would entitle her to the presumption that she exercised ordinary care for her own protection until he had determined, independent of the presumption, that defendant was guilty of negligence and that plaintiff was not. Of course, this view of the instructions would deprive plaintiff of the benefit of the presumption that she exercised ordinary care.

It should be remembered that defendant's instruction No. XI was read to the jury long after the reading of plaintiff's instruction No. 51, and just before the case was submitted to the jury. By such procedure the last command of the trial judge was that the jury must not "consider the question of injuries or damages, if any, prior to determining the issue of liability or to allow the question of injuries or damages, if any, to affect your judgment in any way in determining the issue of liability." With this command ringing in their ears as they retired to deliberate, it is not probable that the members of the jury gave any consideration to plaintiff's instruction No. 51 which advised them that they could consider plaintiff's injuries in determining whether she exercised reasonable care for her own protection. Without giving plaintiff the benefit of this presumption, the jury may well have concluded that she and not the defendant was guilty of the negligence which was the proximate cause of the accident. All this the majority has failed to consider. It contents itself with groundless, theoretical assumptions which are wholly lacking in reality or practical considerations in the technique of jury trials.

The appeal of this case was first heard and determined by the District Court of Appeal, Second Appellate District, Division Three, and a decision was rendered therein reversing the judgment upon the sole ground that the above mentioned instructions were so conflicting that they constituted prejudicial error. 184 P.2d *927, 929.* The opinion of the District Court of Appeal was prepared by Mr. Justice Parker Wood and was concurred in by Acting Presiding Justice Clement L. Shinn and Justice Pro Tem. Clarence L. Kincaid. This opinion is so logical and well reasoned that I am constrained to adopt the following portion thereof, which discussed the problems here involved, as a part of this dissent:

"The court instructed the jury, at the request of defendant, 'that it would be a violation of your duty as jurors to consider the question of injuries or damages, if any, prior to determining the issue of liability or to allow the question of injuries or damages, if any, to affect your judgment in any way in determining the issue of liability.' Prior to giving that instruction, the court had instructed the jury, at the request of plaintiff, as follows: 'It is the testimony of the plaintiff in this case that she does not recollect any event related to the accident, and that her last recollection is that of having brought her automobile to a stop with the front end of it approximately even with the boulevard stop sign, which is located at the northwest corner of the intersection. A person who has been so grievously injured in an accident as to be deprived of her memory is entitled to the presumption that she exercised reasonable care for her own protection. That is a rebuttable presumption, but is one to which the plaintiff is entitled to have you give consideration at all points in the case, and even unto the deliberation in the jury room.' The evidence on behalf of plaintiff, under plaintiff's theory of the case that she was entitled to such presumption, was sufficient to justify the giving of the last quoted instruction. The effect of that instruction was that if the jury found that plaintiff had been injured to the extent that she had been deprived of her memory she was entitled to the presumption that she exercised reasonable care. In other words, the jury was directed that it should consider plaintiff's injuries in order to determine whether the presumption should be applied in plaintiff's behalf. Such a presumption is a form of evidence, and, if applicable herein, it would of course be evidence on the question of liability. It therefore appears that the jury was instructed in effect to consider the injuries of plaintiff in determining the question of liability. As shown by the other instruction, first above quoted, the jury was instructed that it should not consider the question of plaintiff's injuries in any way in determining the issue of liability. Those two instructions were conflicting. According to plaintiff's theory of the case, namely, that by reason of her personal injuries she did not remember what happened after she made the boulevard stop, the question as to whether the facts were such that she was entitled to the presumption that she exercised reasonable care for her own protection was an important and material issue concerning liability. The conflict in those instructions pertained to a material matter, namely, as to whether the personal injuries of plaintiff should have been considered by the jury in determining the question of liability. It cannot be ascertained, of course, which instruction was followed by the jury. The giving of those instructions was prejudicially erroneous.

"In the case of Simmons v. Lamb, 35 Cal.App.2d 109, 94 P.2d 814, 816, it was held to be prejudicial error to give an instruction that 'it would be a violation of your duty as jurors to discuss the nature and extent of plaintiff's injuries, if any, until you shall have first determined the question of whether or not the defendant is liable.' In that case material questions were: (1) whether the plaintiff or an alleged intoxicated person, who was also riding in the front seat, was driving plaintiff's automobile when it collided with defendants' parked truck from which oil pipe extended about 8 feet beyond the rear thereof, and (2) where the truck was standing at the time of the collision. As a result of the accident therein the plaintiff's throat was cut from ear to ear, and there was a large hole in the right side of the windshield, and a small hole in the windshield in front of the driver's seat. Plaintiff therein testified that she was driving the automobile, but defendants argued that she was not driving 'because her throat was cut and because after the accident flesh, blood and hair were found on the broken windshield' in front of the place where a passenger would be sitting. There was other evidence therein that three of plaintiff's left ribs were broken at a place where the lower part of the steering wheel would touch her body if she were driving the automobile, and she testified that she was not cut by glass—her theory being that the oil pipe pierced the windshield in front of the driver's seat and cut her throat. There was also evidence that plaintiff's daughter, who was riding in the rear seat, was thrown into the front seat and received a cut in her scalp above the hairline; and that there was blood on the shoulder of the highway. The court said therein 35 Cal.App.2d at page 114, 94 P.2d at page 816: 'It was therefore necessary for the jury to consider all of this evidence with reference to respondent's injuries in order to determine whether or not she was driving her car at the time of the collision.' It was also said on that page: 'The instruction as given, [referring to the instruction that the jury should not consider plaintiff's injuries] * * * withdrew from the consideration of the jury certain facts which they should have had before them when they fixed the liability for the accident.' In that case, as above stated, plaintiff's injuries were material upon the questions as to who was driving the automobile and where the truck was standing, and those questions, of course, were material in determining liability. In the present case, as above stated, plaintiff's injuries were material upon the question as to whether she suffered a loss of memory to the extent that she would be entitled to the presumption that she exercised reasonable care, which question, of course, was material in determining liability.

"[Respondent] herein argues that the instruction in Simmons v. Lamb, supra, is distinguishable from the instruction herein that the instruction herein states that the jurors should not consider 'the *question* of injuries or damages' in determining liability, whereas the instruction in the Simmons case states that they should not consider 'the nature and extent of plaintiff's injuries.' [Respondent] argues further that the instruction given herein, that the jurors should not consider the *question* of injuries or damages in determining liability, 'is far different from instructing the jury that they should not consider the injuries or damages in determining liability,' and that under the instruction given herein 'the jury would certainly be at liberty to give consideration to the injuries or damages in determining the *question* of liability.' The difference in meaning between the expression 'the *question* of injuries,' and 'the nature and extent of injuries' is not significant.

"As to the matter of liability, the court instructed the jury: 'In determining how the accident happened * * * you are entitled to take into consideration those physical facts as are established by the evidence to have existed, insofar as they are pertinent to the accident. Such matters as the measurement of the highways * * * the surface thereof * * * the comparative sizes of the vehicles, the physical damage done to the vehicles * * * the distances which the vehicles traveled or were knocked as a result of the accident * * * also, all of such other physical facts as are established to your satisfaction, are matters which you may take into consideration in arriving at what the facts were.' It therefore appears that the court instructed the jury specifically that in determining liability the jury might consider the physical damage to property. Such instruction is a further indication that the court withdrew from the jury a consideration of plaintiff's personal injuries in determining liability.

"The judgment is reversed. The appeal from the order denying the motion for a new trial is dismissed."

For the foregoing reasons I would reverse the judgment.

31 Cal.2d 784

GALLAGHER v. MUNICIPAL COURT OF CITY OF LOS ANGELES et al.

L. A. 20243.

Supreme Court of California, in Bank.

May 3, 1948.

1. Contempt 🔑10

Attempt of attorney for person suspected of interfering with jurors to take part in investigation of reported attempt to influence jurors was not improper or contemptuous, though attorneys had no right to do so.

2. Trial 🔑305

In conducting inquiry into reported interference with jurors in civil action, trial judge's refusal to permit attorney for person suspected of interference to participate in the inquiry was discretionary.

3. Contempt 🔑10

A mere mistaken act by counsel cannot render him in contempt of court.

4. Attorney and client 🔑32
Contempt 🔑10

Counsel may urge an untenable legal proposition in good faith, even though he may not expect to be successful, if he does not resort to deceit or willful obstruction of orderly processes.

5. Contempt 🔑10
Trial 🔑305

Attorney for person suspected of interfering with jurors had no right to cross-examine witnesses in investigation to determine whether mistrial should be declared because of such interference, but could not be held in contempt for requesting the privilege of doing so.

6. Action 🔑36
Criminal law 🔑641(1)

Character of proceedings to inquire into alleged interference with jurors in civil action was changed when trial judge directed that person suspected of interference be taken by bailiff to district attorney's office, and such person became entitled to be heard in person or through counsel. Pen.Code, §§ 95, 849.

7. Contempt 🔑10

Where trial judge, conducting inquiry into alleged interference with jurors, directed bailiff to take person suspected of such interference to district attorney's office, conduct of attorney for such person should be appraised in relation to representation of a client under arrest, and attorney was not guilty of contempt in asking court the purpose of court's action, asking whether client was under arrest, and seeking to be heard in argument. Pen. Code, §§ 95, 849.

8. Contempt 🔑66(7)

If record fails to reveal improper conduct of attorney and does reveal arbitrary or incorrect rulings by trial judge, order holding attorney in contempt must be annulled despite recitals in order that attorney was boisterous or insolent.

9. Contempt 🔑66(7)

Record showing that attorney, representing person accused of interfering with jurors, attempted without right to participate in inquiry into such interference, but properly sought to aid client when court directed bailiff to take her to district attorney's office, and not showing that attorney made such attempts in offensive manner or was warned against manner of making them, did not show contemptuous interference with progress of trial, despite recitals in contempt order that attorney's tone, facial expression and demeanor were offensive and contemptuous in specified respects.

10. Contempt 🔑51

Generally, judges are empowered to punish summarily for contempt to facilitate orderly administration of justice.

11. Contempt 🔑63(4)

Order adjudicating a person in direct contempt of court should recite in detail the facts constituting alleged transgression, rather than bare conclusions of trial judge.

12. Contempt 🔑40

In a criminal contempt proceeding, accused is afforded many of the protections provided in regular criminal cases.

13. Attorney and client 🔑32
Contempt 🔑10

Attorneys must be given substantial freedom of expression in representing clients.

14. Attorney and client 🔑32
Contempt 🔑10

An advocate may, when addressing court in regular course, combat and contest strongly any adverse view of judge or judges expressed on case during argument, object to and protest against any course taken by judge which advocate thinks irregular or detrimental to client's interests, and caution juries against judge's interference with their functions or with advocate addressing them, or against any strong view adverse to client expressed by presiding judge upon facts before verdict.

15. Contempt 🔑60(3)

Judges may not punish attorneys summarily for contempt on purely subjective reactions to their conduct or statements.

16. Attorney and client 🔑32
Contempt 🔑10

Attorney has duty to protect client's interests, and right to press legitimate argument and protest an erroneous ruling.

17. Attorney and client 🔑32
Contempt 🔑10

An attorney may assert what he believes correct in a forthright manner, if acting in due course of judicial proceedings.

18. Contempt 🔑10

Though judge may protect dignity of court if attorney subjects judge to ridicule and insult by intonations and gestures accompanying words wholly innocuous, attorney should be curbed by first warning him of his misconduct and by disciplinary action if he persists.

19. Contempt 🔑10

If words used by counsel are respectful and pertinent to matter before court, judge must first warn attorney that tone and facial expressions are offensive and tend to interrupt due course of proceeding, before proceeding against attorney for contempt.

SHENK, EDMOND and SPENCE, JJ., dissenting.

Certiorari proceeding by Leo Gallagher against the Municipal Court of the City of Los Angeles and Byron J. Walters, Judge of said court, to annul an order adjudging petitioner in contempt of court.

Order annulled.

Katz, Gallagher & Margolis, Charles J. Katz, A. L. Wirin, Ben Margolis, Samuel W. Blum and Nathaniel Holtzman, all of Los Angeles, for petitioner.

Clore Warne, of Beverley Hills, George Altman, Morris Cohn, Loren Miller and

Charles Christopher, all of Los Angeles, amici curiæ on behalf of petitioner.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., for respondents.

TRAYNOR, Justice.

In this proceeding in certiorari petitioner, an attorney, seeks to annul an order of the Los Angeles municipal court adjudging him in contempt of court and committing him to the city jail for five days. The alleged contempt occurred in open court during the course of a judicial proceeding.

The order adjudging petitioner in contempt was the culmination of an extraordinary sequence of events. In the course of a jury trial, three of the jurors complained to the trial judge that a Mrs. Hill approached them in the corridor of the courthouse and conversed with them. The judge declared a recess, stating: "The court will examine into an alleged and reported matter of interference with the jurors in this case." Mr. Allen, counsel for the defendants in the recessed trial, advised Mrs. Hill that she should be represented by counsel. Mrs. Hill told him that she wished to retain petitioner who was in the courtroom at that time. Petitioner talked to Mrs. Hill and, upon her direct request, consented to represent her.

The trial judge conducted the examination and caused the first witness to be sworn. The pertinent portions of the proceedings are as follows:

"The Court: Mrs. Morehouse, did someone approach you and make a remark?

Mr. Gallagher [Petitioner]: Just a minute, if the Court please. My name is Leo Gallagher and I am attorney for Mrs. Hill. I am going to object to that question as a leading question propounded by the Court to the witness.

The Court: Mrs. Hill is not on trial. I am making an investigation, counsel.

"Mr. Gallagher: I understand that.

"The Court: You are attorney for Mrs. Hill?

"Mr. Gallagher: Yes.

"The Court: The objection is overruled."

The trial judge then questioned the witness and obtained her version of a conversation with Mrs. Hill.

"The Court: That's all.

"Mr. Gallagher: I would like to ask a question. Did you have a sign across the front of your chest indicating that you were a juror?

"The Court: I don't know that you have any place in here. I am investigating this case.

"Mr. Gallagher: You want a fair investigation, don't you?

"The Court: It is not a trial.

"Mr. Gallagher: But you want a fair investigation?

"The Court: It is not a trial.

"Mr. Gallagher: I know that, but you want a fair investigation?

"The Court: Step down, madam.

"Mr. Gallagher: Don't you want a fair investigation of this?

"The Court: Mr. Gallagher, will you please stay out of these proceedings?"

The judge nevertheless allowed Mr. Allen to question the witness before dismissing her. The second complaining juror was then sworn and examined at length by the court and Mr. Allen, after which occurred the following interchange:

"Mr. Gallagher: I would like to ask a question.

"The Court: Denied.

"Mr. Gallagher: Denied? You are not going to let me ask her a question?

"The Court: Call Mrs. Carlquist.

"Mr. Gallagher: As a friend of the Court I would like to ask a question so that you will get a full picture of what happened here.

"The Court: Denied."

The third complaining juror was next sworn and examined first by the court and then by Mr. Allen. After they finished, petitioner spoke to the court:

"Mr. Gallagher: I would like to ask a question.

"The Court: Denied. Mrs. Hill will be taken by the Bailiff of this court to the District Attorney's office.

"Mr. Gallagher: To the District Attorney's office?

The Court: Yes.

"Mr. Gallagher: For what purpose, please? Are you putting her under arrest, if the Court please? Is she under arrest Will you kindly answer that question, Judge, whether she is under arrest at this time? Won't you hear my argument?

"The Court: Mr. Gallagher, you are declared in contempt of court and sentenced to five days in the City Jail. The Clerk will prepare the commitment and take Mr. Gallagher into custody."

The order of the trial judge stated: "Whereas, said statements were made by said Leo Gallagher in a loud, insolent, aggressive, belligerent, boisterous, harsh, offensive and contemptuous tone of voice and with a sneering and contemptuous expression on his face and a threatening demeanor toward said court and the judge thereof and in disobedience of the lawful orders of the court, and in a disorderly and insolent manner toward the judge of said court. That said statements and conduct of said Leo Gallagher tended to and did interrupt the due course of said trial and did obstruct the administration of justice and interfere with the orderly proceedings of the court at said time and place aforesaid, and said statements, acts and conduct did tend to and did bring the court into contempt and tended to and did interrupt its proceedings and did impair respect for said court and the judge thereof and their authority, and tended to and did breach the peace of said judicial proceedings and created a violent disturbance thereof, interfering with the due and orderly course of said trial. * * *"

According to the order of the trial judge, the alleged contempt took place while the court was "engaged in the hearing on a matter of tampering with jurors" in a case then before the court. The trial judge presumably commenced the investigation to determine whether the jury had been influenced, since it was possible that Mrs. Hill's alleged conduct would lead him to declare a mistrial. Respondent contends that Mrs. Hill was not entitled, as a matter of constitutional right, to interrogate the witnesses through her counsel, since she was not charged with any crime and was not called as a witness. Mrs. Hill was apparently required to remain in the courtroom during the investigation. This investigation might have resulted in the filing of a complaint charging Mrs. Hill with the felony of jury tampering (Penal Code § 95) or with some other crime. (See Penal Code § 849.) It is not disputed that Mrs. Hill was entitled to advice of counsel and to the presence of her counsel in the event that she should be called as a witness or should be charged with a crime, and the fact that the hearing did not immediately result in the filing of a complaint does not alter the seriousness of her position. Indeed, she was taken to the district attorney under arrest, for some undisclosed purpose, at the conclusion of the examination.

[1] Respondent contends, however, that despite Mrs. Hill's right to be accompanied and advised by counsel, her counsel was not authorized to cross-examine witnesses and to inject himself into the proceedings unless and until Mrs. Hill was called as a witness or charged with a public offense. It is unnecessary to hold that petitioner, as counsel for Mrs. Hill, had any such right. It is sufficient merely to state that there was no impropriety in his attempt to take part in the investigation. Mrs. Hill and petitioner had no way of knowing how the investigation might affect her rights, but they had reasonable grounds for the conclusion that she would be affected in some way.

[2-4] The trial judge acted within the law and within reasonable limits of judicial discretion in denying to petitioner any participation in the inquiry that he was conducting into the matter of possible tampering with the jury. Mr. Gallagher was not an attorney representing any party in the case on trial; the fact that Mrs. Hill was named by jurors as having perhaps improperly communicated with them did not give her or her attorney a right to take part in proceedings in that case. But certainly a mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel

may properly urge it in good faith; he may do so even though he may not expect to be successful, provided of course, that he does not resort to deceit or to wilful obstruction of the orderly processes. Here the transcript indicates—and there seems to be nothing whatsoever equivocal about this—that petitioner respected the rulings of the court and abided by them down to the point where the judge directed that "Mrs. Hill will be taken by the Bailiff of this court to the District Attorney's office."

[5] Petitioner's participation in the investigation consisted of his attempt to cross-examine witnesses who testified that Mrs. Hill had tried to influence them while they were acting as jurors. There was nothing contemptuous in the words used by petitioner in this connection, and the record shows that the trial judge was not concerned with petitioner's manner but was determined to bar him from participation in the proceedings. The judge did not caution petitioner or even remark about petitioner's demeanor or facial expressions or tone of voice. Thus, although petitioner had no right to cross-examine witnesses in an investigation to determine whether a mistrial should be declared, petitioner cannot be held in contempt for requesting the privilege of doing so. After the judge asked petitioner to "stay out of these proceedings," petitioner directed his requests to the court and these requests were summarily denied. Until the trial judge gave his order to the bailiff, therefore, petitioner did nothing to interfere with the normal course of the investigation, and nowhere up to that point does the record show any criticism or admonition by the trial judge regarding petitioner's conduct or manner.

[6, 7] When Mrs. Hill was ordered taken to the district attorney's office, petitioner asked, "To the District Attorney's office? * * * For what purpose, please? Are you putting her under arrest, if the Court please? Is she under arrest? Will you kindly answer that question, Judge, whether she is under arrest at this time? Won't you hear my argument?" These were the statements that led directly to the order of contempt. When the trial judge directed that Mrs. Hill be taken by the bailiff to the district attorney's office, he changed the character of the proceedings. At that point he went beyond the bounds of conducting the trial of the case before him. That order was not material to the determination of any issue in the case; it directly affected Mrs. Hill and entitled her to be heard in person or through her counsel. Mr. Gallagher's conduct from that point on is to be appraised in relation to representation of a client under arrest and not in relation to the rulings that had been made during the inquiry that was part of or incidental to the case on trial. Mrs. Hill had a right to know the purpose of ordering her into the custody of the bailiff and, since she was represented by counsel present at the time, her counsel was a proper person to discover it; indeed, he would clearly have been guilty of dereliction of duty to his client if he failed to do so. The trial judge, in turn, as the one who made the order of disposition, was the logical person to answer counsel's questions.

The record therefore shows that an attorney has been adjudged in contempt of court for regularly and faithfully representing the interests of his client. There is nothing contemptuous in petitioner's words and nothing in the record to show that his conduct tended to interrupt the due course of the examination. Accordingly, the question presented in this proceeding is whether the trial court's description of petitioner's facial expressions and tone of voice is sufficient to support the order of contempt, when all that appears from the record shows that petitioner addressed the court properly in the regular course of litigation. This question has been considered in several cases by the district courts of appeal, but with apparently conflicting results.

In re Shortridge, 5 Cal.App. 371, 90 P. 478, was a case in which an attorney was held in contempt for addressing the court while a witness was being examined, after the court had ordered him not to do so. Petitioner was discharged on habeas corpus because the district court of appeal decided that the recital of facts in the order was insufficient; the opinion of the court stated that the petitioner might have had the right and the duty to address the court and, in the absence of additional information, the mere fact that he did so was an insufficient ground for contempt. With respect to a statement in the contempt order that petitioner's conduct was "boisterous and offensive" the court stated that "reading this statement in connection with the context in which it occurs, it is clear that the order means no more by this than to state a conclusion from the fact that he persisted in adressing the court against the order of the court." In re Shortridge, 5 Cal.App. 378, 90 P. 480.

In Platnauer v. Superior Court, 32 Cal. App. 463, 163 P. 237, petitioner was counsel for the contestee in an election contest. Petitioner objected to the use of the county clerk's deputies in counting the ballots, on the ground that the clerk was prejudiced against his client. The trial judge refused to hear his argument, ordered petitioner to sit down and told petitioner's associate to conduct the case for the contestee. The associate objected to this ruling and the trial judge informed him that petitioner could participate in the case but could not conduct it. When petitioner made an objection to the introduction of certain evidence immediately thereafter, he was adjudged in contempt. The trial judge stated in his order that petitioner refused to sit down; that he continued to argue with the court; that he resisted the bailiff; and that he created noise and confusion in open court by loud talking and tripping over chairs. The district court of appeal annulled the order on certiorari, finding that the trial judge had been arbitrary and that petitioner had used respectful language in the performance of his duty. The court stated the following rule as applicable to an attorney: "If, in discharging his duty, he happens to be persistent or vehement, or both, in the presentation of his points, he is still, nevertheless, within his legitimate rights as an attorney, so long as his language is not offensive or in contravention of the common rules of decorum and propriety. As well may be expected in forensic polemics, he cannot always be right, and may wholly be wrong in his position upon the legal question under argument and to the mind of the court so plainly wrong that the latter may conceive that it requires no enlightenment from the argument of counsel. But whether right or wrong, he has the right to an opportunity to present his theory of the case on any occasion where the exigency of the pending point in his judgment requires or justifies it." Platnauer v. Superior Court, supra at page 475 of 32 Cal.App., page 242 of 163 P.

Curran v. Superior Court, 72 Cal.App. 258, 236 P. 975, is closely analogous to the instant case. There petitioner asked a question of a witness and the district attorney objected to the form of the question. The court sustained the objection and petitioner assigned the ruling as error. The trial judge then ordered petitioner to sit down while questioning the witness. Petitioner asserted his right to stand up while questioning witnesses, and was adjudged in contempt. The trial court's order used a number of adjectives to describe petitioner's conduct: "* * * said statements above outlined were disorderly, contemptuous, and insolent to the court on your part * * * and directly tended to interrupt the proceedings of said court, and to impair the respect due to the authority of said court. * * * Said statements addressed to the court were spoken in a very loud, combative, and antagonistic tone of voice, and * * * said attitude and intonations and loud expressions by you were disorderly, contemptuous, and insulting to the court * * *." Curran v. Superior Court, supra at pages 262, 263, of 72 Cal.App., page 977 of 236 P.

The district court of appeal annulled the order on certiorari. It stated that "The language used by petitioner was not in itself insulting, but was brief and directly to the point," and that the court's order was "due to a momentary forgetfulness of the rights of petitioner as an officer of the court in the discharge of his duty to his client and the public, and [the order] was not made necessary or proper by any preceding act or misconduct on the part of petitioner." Curran v. Superior Court, supra at pages 265, 266, of 72 Cal.App., page 978 of 236 P. With respect to petitioner's tone of voice and manner, the court quoted with approval from the Platnauer case, and added: "While the courts in other jurisdictions have held that the tone of voice and attitude of counsel in making on proper occasions proper statements to the court may constitute contempt, yet we are reluctant to extend the rule farther than was done in the Platnauer and Shortridge cases, supra, and to hold that, the occasion and the language being proper the intonations of the voice, the vehemence of the objections or the physical attitude of counsel in making them would alone support the conclusion of the judge that such behavior was disorderly, contemptuous, or insolent toward the court, and tended to interrupt the due course of the trial, and thus subject the offender to a judgment of fine and imprisonment. The relations between court and counsel may and often do during the course of a trial become strained; mutual conditions of irritation may be created in the heat of debate, leading to tones and demeanor which in other situations would clearly manifest contempt, but which, under the conditions often existing in a hotly contested criminal case, such as is indicated by the record here, should lead to no such conclusion. Much must be pardoned under the circumstances to the infirmities of human nature, and as much to the liberty of speech, which cannot in court always insure the employment of expressions coldly precise and unmarked by tones indicating excitement or even anger." Curran v. Superior Court, supra at pages 267, 268, of 72 Cal.App., page 979 of 263 P. See also, Bennett v. Superior Court, 73 Cal. App.2d 203, 225, 166 P.2d 318; Ex parte Crenshaw, 96 Tex.Cr.R. 657, 259 S.W. 587, 31 A.L.R. 1181.

It is contended that the foregoing cases are opposed in the district courts of appeal by another line of authority, which holds that the manner and tone used by an attorney may alone constitute contempt regardless of the propriety of his remarks. Although such statements can be found in the cases of In re Hallinan, 126 Cal.App. 121, 14 P.2d 797, and Rose v. Superior Court, 140 Cal.App. 418, 35 P.2d 605, an examination of the facts contained in those cases shows that they rest upon a different basis.

In the Hallinan case, the contempt order was occasioned by the attorney's persistent interruption of the district attorney during the latter's closing argument. Petitioner and the district attorney had stipulated that petitioner's objections would be saved for him in order to expedite the remainder of the trial. The trial judge ordered petitioner several times to refrain from interrupting the district attorney, reminding him of his stipulation. Petitioner nevertheless repeatedly disobeyed the court and was finally found in contempt The trial judge's order recited the facts and added that petitioner's conduct, "in manner, tone and method, was disorderly, contemptuous, and that his attitude and behavior toward this Court, while the Court was holding said session, was insolent * * *." In re Hallinan, supra at page 125 of 126 Cal.App., page 798 of 14 P.2d. The district court of appeal stated in its opinion that petitioner's persistent interruptions contrary to the stipulation and to the orders of the trial judge constituted contempt. The court went on to state, however, that "* * * whether or not petitioner had the right to interrupt said proceedings for the purpose mentioned, it is apparent that the manner in which he conducted himself in seeking to exercise such right brought him clearly within the operation of the provisions of said section 1209 [C.C.P.], and subjected him to punishment for contempt. * * * Under all the authorities it is held that a contempt may be shown either by language or behavior, and that although the language itself may not be contemptuous, it may become so if uttered in an insolent or defiant manner; and in determining whether the language used was a contempt, regard must be had not only to the very words used but to the surrounding circumstances, the connections in which they were used, the tone, the look, the manner, and the emphasis." In re Hallinan, supra at page 128 of 126 Cal.App., page 799 of 14 P.2d.

In Rose v. Superior Court, 140 Cal.App. 418, 35 P.2d 605, 606, petitioner asked questions during the empanelling of the jury that had been asked and answered many times. The trial judge directed petitioner to refrain from repeating such questions and finally, immediately after an admonition, petitioner proceeded to repeat the same question; he did this in a sneering and loud manner, according to the order of contempt. The court again cautioned petitioner but he persisted in his manner of questioning and directed sarcastic remarks to the trial judge. When the trial judge ordered the jury to disregard certain of petitioner's remarks, the latter stated, "I demand an apology for that." One of the jurors asked the trial judge to be excused since petitioner was so rude that she did not feel that she could treat his client fairly. Petitioner continued in his behavior, however, and threatened and shouted at witnesses after still other admonitions by the trial judge. The district court of appeal of course refused to annul the order of contempt; but in affirming the order, the court quoted at length from In re Hallinan to show that petitioner's manner alone constituted contempt. Rose v. Superior Court, supra at pages 425-427 of 140 Cal.App. 35 P.2d 605. See also, Gillen v. Municipal Court, 37 Cal.App.2d 428, 431, 99 P.2d 555, where the court held that petitioner's words were contemptuous in themselves but added that the trial judge correctly noted in his order the tone and manner in which the words were spoken.

[8, 9] The results reached in both the Hallinan and Rose cases were undoubtedly correct. We cannot agree with the dictum contained in those cases, however, that if the words spoken were proper the order of contempt must be affirmed on the basis of a mere recital in the order that the "tone, the look, the manner and the emphasis" were contemptuous. We find greater wisdom in the reasoning of the Platnauer and Curran cases, which squarely considered the question of tone and manner and decided that if the record fails to reveal improper conduct on the part of the attorney and does reveal arbitrary or incorrect rulings by the trial judge, the order of contempt must be annulled despite the recitals in the judge's order that the attorney was boisterous or insolent. In the present case, the purported contempt is alleged to have extended over many pages of court record, yet no mention is made of it in the record. The record therefore fails to disclose a contemptuous interference by counsel with the progress of the trial.

[10-12] Broadly speaking, judges are empowered to punish summarily for contempt of court in order to facilitate the orderly administration of justice. Disobedience of court orders tends to lessen the effect of those orders; intemperate behavior in the course of a trial, as illustrated by In re Hallinan and Rose v. Superior Court, supra, lessens the mastery of the trial judge over the progress of the proceedings and thus tends to obstruct the course of the trial. Considerable summary power, not usually available to the officers of any other branch of the government, is therefore vested in judges. If that power is not wisely exercised it can readily become an instrument of oppression. In a summary contempt proceeding the judge who metes out the punishment is usually the injured party and the prosecutor as well. Since such a situation invites caprice, appellate courts almost without exception require that the order adjudging a person in direct contempt of court recite in detail the facts constituting the alleged transgression rather than the bare conclusions of the trial judge. C.C.P. § 1211; see Anno., 154 A.L.R. 1227. This rule in itself demonstrates, if only by implication, that some objective support must be present to support the order of contempt. If a trial judge had only to state that the contemnor raised his voice and twisted his features, no contempt order could be attacked. The well recognized principle that in a criminal contempt proceeding the accused is afforded many of the protections provided in regular criminal cases would be rendered meaningless. Wilde v. Superior Court, 53 Cal.App.2d 168, 177, 127 P.2d 560; see, Dangel on Contempt, §§ 162 et seq.; and the burden of proof would be sustained by the subjective reactions of the offended judicial officer. The vagaries of human temperament alone cast doubt upon the wisdom of applying the dictum of In re Hallinan to a case where the

facts do not show the aggravated misconduct present in that case.

[13-15] Another consideration is the fundamental interest of the public in maintaining an independent bar. Attorneys must be given a substantial freedom of expression in representing their clients. "An advocate is at liberty, when addressing the Court in regular course, to combat and contest strongly any adverse views of the Judge or Judges expressed on the case during its argument, to object to and protest against any course which the Judge may take and which the advocate thinks irregular or detrimental to the interests of his client, and to caution juries against any interference by the Judge with their functions, or with the advocate when addressing them, or against any strong view adverse to his client expressed by the presiding Judge upon the facts of a case before the verdict of the jury thereon. An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case." Oswald, Contempt of Court, 3d Ed., pp. 56, 57. See People v. Rongetti, 344 Ill. 107, 122, 176 N.E. 292. The public interest in an independent bar would be subverted if judges were allowed to punish attorneys summarily for contempt on purely subjective reactions to their conduct or statements.

[16, 17] An attorney has the duty to protect the interests of his client. He has a right to press legitimate argument and to protest an erroneous ruling. It is reported in Oswald on Contempt of Court that the following interchange occurred between Erskine and Buller, J.: "At length Erskine said, 'I stand here as an advocate for a brother citizen, and I desire that the word "only" be recorded;' whereupon Buller, J., said, 'Sit down, sir! remember your duty or I shall be obliged to proceed in another manner,'—to which Erskine retorted, 'Your Lordship may proceed in whatever manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct.' The Judge took no notice of this reply. Lord Campbell speaks of the conduct of Erskine as 'a noble stand for the independence of the Bar.'" Oswald, 3d Ed., pp. 51, 52. The foregoing quotation is illustrative of the rule in the Platnauer and Curran cases, that an attorney may assert that which he believes to be correct in a forthright manner, if he is acting in the due course of a judicial proceeding. Matter of Rotwein, 291 N.Y. 116, 122, 123, 51 N.E.2d 669.

[18] We do not mean to suggest, by anything said herein, that it is impossible for an attorney to subject a judge to ridicule and insult by intonations and gestures accompanying words wholly innocuous, nor that, in such event, the judge is powerless to protect the dignity of the court. We merely recognize, as anyone must, that such a thing would be most unusual, and that an attorney so skilled in the art of speech and at the same time so lacking in an understanding of his obligations, could be curbed by first warning him of his misconduct, and, if he persisted, by disciplinary action. In the present case, however, petitioner was never warned that his tone of voice was "loud, insolent, aggressive, belligerent, boisterous, harsh, offensive and contemptuous" or that there was a "sneering and contemptuous expression" on his face. The record does not show that the trial judge rebuked him for his alleged "threatening demeanor" or his "disorderly and insolent manner." The only warning to petitioner was to refrain from participation in the investigation; it was when petitioner endeavored to discover whether his client was under arrest that he was declared to be in contempt. Nor does the record reveal that petitioner disobeyed the lawful orders of the court. After he was told to "stay out of these proceedings" he asked no questions of the witness. He thereafter requested the court to be heard. The trial judge did not censure him for these requests, but promptly denied them. His final request for information regarding the arrest of his client, which resulted in the order of contempt, was not in disobedience of any lawful order of the court.

[19] The record shows, therefore, only that an attorney was persistent in his efforts to determine what was to be done with his client, who was being escorted to the district attorney, presumably under arrest. The heat of courtroom debate,

particularly where liberty is concerned, often gives rise to persistence on the part of counsel. If the words used by counsel are respectful and pertinent to the matter before the court, it is not unnecessarily burdensome to require the judge first to warn the attorney that his tone and facial expressions are offensive and tend to interrupt the due course of the proceeding. Otherwise, attorneys could be subjected to fines and jail sentences because of personal annoyance and pique on the part of trial judges; and these penalties could be rendered unassailable, as is contended here, by lengthy recitals in the orders of contempt respecting the demeanor of the contemner. There is nothing in the reported decisions or in the experience of our courts that makes necessary such an extraordinary authority on the part of the trial judge. Indeed, the recognition of such an authority would involve the surrender of a substantial amount of the independence of the bar, and in many instances would deprive litigants of a fair hearing.

The order adjudging petitioner in contempt is annulled.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concur.

SHENK, Justice.

I dissent.

This case comes directly within the rule of the cases (In re Hallinan, 126 Cal. App. 121, 14 P.2d 797; Rose v. Superior Court, 140 Cal.App. 418, 35 P.2d 605) which the majority opinion refuses to follow but seeks to distinguish for insufficient reasons. By disapproving the general doctrine followed in those cases the majority opinion has upset the settled rule concerning the scope of inquiry in a certiorari proceeding to review an order of contempt.

For the purpose of determining the lawful exercise of jurisdiction in a summary contempt proceeding the recitals of the facts in the order of commitment must be deemed to be true. There is no procedure for the taking of evidence to contradict the facts so recited. This the majority opinion implicitly concedes; and it is not questioned that the recitals of the attorney's tone, manner and attitude, being matters within the observation of the court, are findings of fact. (Rose v. Superior Court, supra, 140 Cal.App. at page 426, 35 P.2d 605; Gillen v. Municipal Court, 37 Cal. App.2d 428, 431, 99 P.2d 555, with citation of In re Hallinan, supra.)

A court is the judge of its own contempts, its judgment is subject to review only on the question of jurisdiction, and the judgment of contempt is valid if the recital of facts therein shows acts which come within the legal definition of a direct contempt. (Otis v. Superior Court, 148 Cal. 129, 82 P. 853; In re Hallinan, supra.) As said in Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405, whether the attorney's conduct justified the punishment was for the court to determine under its responsibility to do justice and to maintain its own authority, and its findings upon the facts are conclusive.

The foregoing rules are of long standing and are sound guiding principles for both trial and appellate courts in order to maintain the balance between the required respect for judicial authority and the asserted necessity for an independent bar. Abrogation thereof would destroy the functional power of the court.

It is now held by the majority that the requirement for the jurisdictional recital of facts in the contempt order is not complied with merely by stating in the order that the words uttered by the attorney were "in a loud, insolent, aggressive, belligerent, boisterous, harsh, offensive and contemptuous tone of voice and with a sneering and contemptuous expression on his face and a threatening demeanor toward" the court and the judge, and "in a disorderly and insolent manner", followed by the conclusion that such manner and conduct tended to and did interrupt the due course of the trial and interfered with the orderly proceedings of the court. It should not be required, as it would now seem to be, that the court have a sound-recording device and a motion picture camera in effectual operation at all times in the court room in order to make a record in the trial or proceeding of the insolent tone of voice and the offensive nature of the conduct of the attorney, including his facial expressions, before its recital of the facts may be taken as true and be sufficient to show that its order was not arbitrary or in excess of jurisdiction. The majority opinion does not question that the constant interruptions and disobedience of the court's rulings, in respectful words but in the manner and with the intemperate tones and attitudes which tend to interfere with the due course of the proceeding would constitute contempt. However, before the court may commit the contemner it is required that the facts so found must also be shown by the record of the proceedings, that is, by appropriate admonitions and warnings regarding the attorney's tone and manner. In other words, a record of repetition of rulings and admonitions to obey, the continued disobedience on the part of the attorney, together with the findings of other matters of tone, expression, and conduct within the court's observation, no longer support the exercise of jurisdiction to declare a direct contempt.

Section 1209 of the Code of Civil Procedure provides: "The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: 1. Disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to interrupt the due course of a trial or other judicial proceeding; 2. * * * boisterous conduct * * * tending to interrupt the due course of a trial or other judicial proceeding; * * *." The law thus imposes upon the judicial officer the duty to see that court proceedings are conducted in an orderly manner. Confidence must be reposed somewhere in the matter of upholding the authority and integrity of the courts as a forum for the orderly settlement of disputes. And indeed it will come as a surprise to those charged with the orderly conduct of judicial proceedings that credence will not be accorded the recital of matters within their observation and which cannot always conveniently be reflected by the record of the trial or proceeding. In my opinion the line has correctly been drawn by the prior decisions of our appellate courts. The additional element now required before jurisdiction attaches to declare contemptuous an attorney's persistent offensive or intemperate tone or manner is a burden for which there is no authority beyond the majority's ipsi dixit.

Furthermore, the proceeding in progress in the respondent court was unquestionably a proper inquiry for the purpose of determining whether the minds of the particular jurors approached by Mrs. Hill had become prejudiced so that the trial should not proceed. The court correctly announced that Mrs. Hill was not on trial. In that proceeding the court had no power to mete out punishment to Mrs. Hill, nor was it sitting as a committing magistrate. Her attorney had no proper place in the proceeding unless Mrs. Hill was called to the witness stand, which she was not, in which event he might then counsel her concerning her rights and make appropriate objections. In fact, the majority opinion concedes that the trial court correctly ruled that Mrs. Hill and her attorney had no right to participate in the proceeding. There was no ruling or order of the court which might be said to have changed the nature of the investigation. The cases followed in the majority opinion (Curran v. Superior Court, 72 Cal.App. 258, 236 P. 975; Platnauer v. Superior Court, 32 Cal.App. 463, 163 P. 237; and In re Shortridge, 5 Cal.App. 371, 90 P. 478) from all that appeared in the order or the record, involved the persistence of an attorney in advocating a point which he had a right to make in a trial where he had the right and the duty to be. The present case involves the officious and persistent disobedience of an order excluding the attorney from participation in a proceeding where he had no right and where interference would becloud the issue and unnecessarily prolong the investigation.

It is but to cavil with the facts to state that the only foundation for the contempt order was the incident which occurred after the judge ordered Mrs. Hill to be taken to the district attorney. The petitioner's remarks at that time were but the culmination of his persistent and officious conduct from which he had been properly advised by the court to refrain.

On this view of the record it is unnecessary to consider whether the words uttered by the petitioner were in themselves disrespectful or whether, as a separate question, the findings that they were loud, boisterous, contemptuous, sneering, etc. were alone sufficient to constitute a contempt. Where the basic conduct of the attorney is improper, and is persisted in against the repeated admonitions and orders of the court, we have a situation which is ruled by the Hallinan, Rose and other cases attempted to be distinguished, and the offensiveness of manner thereupon becomes merely cumulative.

In my opinion the order should be affirmed.

EDMONDS and SPENCE, JJ., concur.

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31 Cal.2d 720

MODERN BARBER COLLEGES, Inc. v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.

S. F. 17507.

Supreme Court of California, in Bank.

April 29, 1948.

1. Mandamus 🔑119
Taxation 🔑607

Provision of Constitution that no injunction or writ of mandamus or other legal or equitable process shall ever issue in any proceeding against the state or any officer thereof, to prevent or enjoin collection of any "tax" levied under provisions of Article XIII, does not apply to contributions under the Unemployment Insurance Act. Gen.Laws, Act 8780d, as amended; Const. art. 13, § 15.

See Words and Phrases, Permanent Edition, for all other definitions of "Tax".

2. Constitutional law 🔑284(1)

Due process does not guarantee the right to judicial review of tax liability before payment but only the right to recover overpayments made. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 13.

3. Constitutional law 🔑308
Injunction 🔑37
Mandamus 🔑2

Provision of Unemployment Insurance Act that no injunction or writ of mandate or other legal or equitable process shall issue in any proceeding against state or against any officer thereof to prevent or enjoin collection of any contributions sought to be collected under the act, does not deny due process. Gen.Laws, Act 8780d, § 45.11(d); U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 13.

4. Constitutional law 🔑50

The legislature has complete power to determine the rights of individuals, except as the Constitution otherwise provides.

5. Constitutional law 🔑55

Constitutional provison giving superior courts power to issue mandate and other extraordinary legal remedies, does not mean that rights which those remedies were intended to protect, have been fixed in the Constitution as of the time of its adoption and are thereafter immune from legislative change or regulation. Const. art. 6, § 5.

6. Constitutional law 🔑55
Mandamus 🔑2

Provision of the Unemployment Insurance Act that no injunction or writ of mandate or other legal or equitable process shall issue in any proceeding against the state or against any officer thereof to prevent or enjoin the collection of any contributions sought to be collected under the Act, does not violate constitutional provisions giving superior courts the power to issue mandate and other extraordinary legal remedies. Gen.Laws, Act 8780 d, § 45.11(d); Const. art. 6, § 5.

7. Mandamus 🔑73(1)

A mandamus action would not lie to compel state Employment Stabilization Commission to vacate its decision that petitioner was employer and that certain persons were employees of petitioner within Unemployment Insurance Act and to cancel charges against petitioner on commission's books, in view of prohibition contained in the act. Gen.Laws, Act 8780d, § 45.11(d).

8. Mandamus ⚷73(1)

Fact that payment by petitioner of claims asserted against him by the state Employment Stabilization Commission under the Unemployment Insurance Act, would render petitioner insolvent, would not give petitioner right to maintain a mandamus action against the commission to compel it to vacate its decision that petitioner came within the act, where provisions of the act specifically prohibited the maintenance of a mandamus action for such purpose. Gen.Laws, Act 8780d, § 45.11(d).

SCHAUER and CARTER, JJ., dissenting.

◆

Appeal from Superior Court, San Francisco County; George W. Schonfeld, Judge.

Action by the Modern Barber Colleges, Inc., against the California Employment Stabilization Commission and its members for a writ of mandate to compel defendants to vacate the Commission's decision that petitioner was an employer and that certain persons were employees of petitioner within the Unemployment Insurance Act and to cancel any charges against petitioner on Commission's books and records. From a judgment for defendants, the petitioner appeals.

Affirmed.

Prior opinion, 175 P.2d 576.

Ralph Robinson, of Fresno, for appellant.

Robert W. Kenny, of Los Angeles, and Fred N. Howser, Atty. Gen., Clarence A. Linn, Doris H. Maier and Charles W. Johnson, Deputy Attys. Gen., for respondents.

GIBSON, Chief Justice.

This is a proceeding in madamus to compel the respondent commission to vacate its findings that certain students, the bookkeeper and the proprietor of the petitioning corporation are employees within the meaning of the Unemployment Insurance Act, Deering's Gen.Laws, Act 8780d, as amended, and to cancel the charges made against the petitioner by virtue of these findings. The trial court sustained a general demurrer to the petition without leave to amend, and the petitioner appeals from the judgment for the respondent.

The petition alleges that E. M. Robinson is the sole owner of the petitioning corporation, which has never issued any capital stock and has no directors, officers or assets, and that Robinson is operating a barber college "as if no corporation had ever been formed." Students are admitted according to the requirements of the Board of Barber Examiners and can be dismissed only for violation of the Board's regulations. The students are not required to be present at regular hours but may attend as they please until the course of instruction is completed. After the students have reached a certain degree of proficiency they are allowed to practice on patrons who pay a small fee to the petitioner. Out of these fees a commission is paid to each student in the form of cash or as a credit against equipment which the student may purchase from the petitioner. The petitioner has obtained the services of a part-time bookkeeper who is obliged only to maintain various records but is not required to keep regular hours of employment. The petitioner challenges the respondents' determination that E. M. Robinson, the students and the bookkeeper, are employees within the meaning of the act. The question on this appeal, however, is not whether Robinson, the students and the bookkeeper are employees within the meaning of the act, but rather whether an action or proceeding for judicial review of a determination of the respondent board may be had prior to the payment of the contributions which the board claims to be due, the petitioner admitting in its petition that it has never paid any contributions under the act. Such judicial review in advance of payment is expressly prohibited by section 45.11(d) of the Unemployment Insurance Act, which provides in part as follows: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any contributions sought to be collected."

Since the matter is before us on the petition and the commission's general demurrer, the record in this case presents the single issue of the availability of the remedy of mandamus. Other questions of law or fact, and particularly the liability of petitioner for the contributions, are beyond the scope of this proceeding.

We may at the outset dispose of the suggestion by petitioner that this proceeding is not one to "prevent or enjoin" the collection of a contribution because the only relief prayed for is the vacation of the findings of the existence of the employer-employee relationship made by the commission. It is obvious that a judgment directing the commission to vacate its findings would in effect amount to a declaration by the court that the relationship did not exist; the commission after such a judgment could not "properly undertake to enforce a tax against plaintiff corporation as an employer in defiance of an adjudication that the latter [asserted employer] did not maintain that relationship with the other parties." Louis Eckert Brewing Co. v. Unemployment Reserves Comm., 47 Cal. App.2d 844, 846, 119 P.2d 227, 228. The Eckert case held that because of the statute above quoted an action for declaratory relief cannot be maintained to determine the existence of the employer-employee relationship prior to the payment of the tax. Since the net result of the relief prayed for herein would be to restrain the collection of the tax allegedly due, the action must be treated as one having that purpose. See Helms Bakeries v. State Bd. Equalization, 53 Cal.App.2d 417, 422, 128 P.2d 167.

[1] It follows, therefore, that this proceeding in mandamus is prohibited by the statute, and, unless the statute is void, the writ must be denied. In this connection, it is appropriate to pass upon a minor contention of respondent. It is argued that the statute is not the only bar to this action, for it is merely declaratory of section 15 of Article XIII of the Constitution. That section provides: "No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of any tax levied under the provisions of this article." It would seem, however, that contributions under the Unemployment Insurance Act, while in the nature of taxes, are not taxes levied under the provisions of Article XIII. They are not specifically mentioned therein, and they do not appear to be included within the general provisions of Article XIII relating to taxes for revenue. On the contrary, the act specifically provides (§ 19) that contributions shall be held in a specific fund, separate and apart from all public moneys or funds of the state, and shall be administered exclusively for the purposes of the act. The contributions therefore constitute special taxes for a special purpose distinct from the general revenues of the state. For this, as well as other reasons, we see no basis upon which the constitutional provisions can apply to this case.

It will also assist in clarifying the issue before us to notice briefly at this time the contention that petitioner is entitled to mandamus solely on the ground that his remedy at law is allegedly inadequate. The cases cited for this proposition (see, e. g., Bodinson Mfg. Co. v. California E. Comm., 17 Cal.2d 321, 109 P.2d 935; Lockhart v. Wolden, 17 Cal.2d 628, 111 P.2d 319; Dufton v. Daniels, 190 Cal. 577, 213 P. 949) are merely declaratory of the general rule set forth in section 1086 of the Code of Civil Procedure and are clearly applicable to the normal situation where no specific statute bars the remedy of mandamus. We may concede, therefore, that were it not for section 45.11(d) of the Unemployment Insurance Act, mandamus might lie in the instant case, and that is the extent of the holding of the cases cited and of numerous others which might be cited.

This principle, however, has no application to the instant case, in which the remedy of mandamus has been expressly prohibited, and the remedy of suit to recover taxes paid has expressly been made the exclusive means of obtaining a judicial review of the legality of the assessment. No decision has been called to our attention where it has been held that mandamus may be issued despite an express statutory prohibition merely because the court may deem the normal remedy less satisfactory than mandamus. Such a holding would, as stated above, be equivalent to declaring the statute unconstitutional; therefore, the ultimate inquiry in this case is whether the Legislature may constitutionally limit the use of mandamus as it has done in section 45.11(d) of the Unemployment Insurance Act. Unlike R.S. section 3224 26 U.S.C.A. Int.Rev.Code, § 3653 (restricting the use of injunctions to prevent the collection of federal taxes), section 45.11(d) of the Unemployment Insurance Act is not merely declaratory of the traditional equity practice under which an injunction might be granted in various exceptional circumstances. As this court has just said in Eisley v. Mohan, Cal.Sup., 192 P.2d 5, 8, in discussing Constitution article XIII, section 15, "The provision of the California Constitution is much more than a mere declaration of the rules generally applicable in proceedings for injunction, mandamus, or other legal or equitable relief." The same is true of section 45.11(d) of the Unemployment Insurance Act which almost duplicates the language of article XIII, section 15. It follows that cases such as Miller v. Standard Nut Margarine Co., 284 U.S. 498, 52 S.Ct. 260, 76 L.Ed. 422, which discuss the various instances under which an injunction may be available according to the common-law rules of equity or under statutes restating them are not relevant here. Even under the federal statute, however, the financial hardship caused by remitting the taxpayer to his remedy by a suit to recover excess payments is not an exceptional circumstance warranting the issuance of an injunction (Kaus v. Huston, 8 Cir., 120 F.2d 183), and financial distress is the principal ground of relief urged here.

[2, 3] Implicit in the contention that the statute is unconstitutional is the assumption that the petitioner has some constitutional right which can be protected only by mandamus. The petitioner relies strongly on Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457. That case held that under the due process clauses of the federal and California Constitutions, U.S.Const. Amend. 14, Const.Cal. art. 1, § 13, and under the doctrine of separation of powers in our Constitution, the petitioner was entitled to a type of review of administrative activity which, under our practice, mandate alone could provide. But in the present case it is clear that depriving the petitioner of the remedy of mandate would not deprive him of due process of law, and no other constitutional right under which he might claim this particular form of relief has been suggested. The due process clause does not guarantee the right to judicial review of tax liability before payment. The power of a state to provide the remedy of suit to recover alleged overpayments as the exclusive means of judicial review of tax proceedings has long been unquestioned. Cary v. Curtis, 3 How. 236, 44 U.S. 236, 11 L.Ed. 576; Steinhagen Rice Milling Co. v. Scofield, 5 Cir., 87 F.2d 804; Note 77 A.L.R. 629; see Plumb, Tax Refund Suits v. Collectors of Internal Revenue, 60 Harv.L.Rev. 685. This is also the law in this state: "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every tax-payer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make Congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government." Shenk, J., in People v. Skinner, 18 Cal.2d 349, 355, 115 P.2d 488, 492, 149 A.L.R. 299, quoting approvingly from Springer v. United States, 102 U.S. 586, 26 L.Ed. 253.

It is accordingly clear that unconstitutionality of the statute cannot be predicated on the violation of any fundamental right protected by either the state or federal Constitution, and we now proceed to consider the only other ground of attack on the statute, namely, that it purports to interfere with the jurisdiction of the courts of the state as outlined in the Constitution. The Constitution gives the superior courts power to issue mandate and other extraordinary legal remedies (Art. VI, § 5), and it is argued that these remedies are always available in any case in which the court may deem them appropriate and that the Legislature has no power to define, curtail or enlarge the circumstances under which they may be issued.

[4, 5] The fallacy in this argument lies in the failure to distinguish between jurisdiction to grant the remedy and the right which is to be vindicated. Except as the Constitution otherwise provides, the Legislature has complete power to determine the rights of individuals. See Delaney v. Lowery, 25 Cal.2d 561, 568, 154 P.2d 674. It may create new rights or provide that rights which have previously existed shall no longer arise, and it has full power to regulate and circumscribe the methods and means of enjoying those rights, so long as there is no interference with constitutional guaranties. To reach the conclusion that the statute is invalid we would have to disapprove the course of decision for more than a century or hold that the power given to the courts to issue writs of mandate (Const. art. VI, §§ 4, 4b and 5) confers on the parties constitutional rights unrecognized elsewhere in the Constitution. The mere statement in the Constitution that a court has the power to grant certain *remedies,* however, does not mean that the *rights* which those remedies were intended to protect have been fixed in the Constitution as of the time of its adoption and are thereafter immune from legislative change or regulation. This reasoning is fortified, and the position of petitioner is seen to be wholly untenable, upon an examination of the authorities bearing on the analogous situations involving the right to civil relief generally, the right of appeal, the right to injunctions and the right to habeas corpus.

The Constitution (Art. VI, § 5) grants the superior court jurisdiction "in all civil cases," except insofar as the Legislature or Constitution places jurisdiction in other courts. Notwithstanding this constitutional grant of jurisdiction over the remedies ("in all civil cases"), it has consistently been held, in accordance with the overwhelming majority view, that the Legislature has complete power over the rights involved in such actions and may either create or abolish particular causes of action. Thus, in Langdon v. Sayre, 74 Cal. App.2d 41, 168 P.2d 57, it was held that Civil Code section 43.5, abolishing the cause of action for breach of promise to marry, was constitutional. And in Hanfgarn v. Mark, 274 N.Y. 22, 8 N.E.2d 47, the court upheld the constitutionality of a statute abolishing the cause of action for breach of promise, observing that a contrary decision "if carried to its logical conclusion, would result in a stagnation of law and be directly in conflict with many decisions of this court." 274 N.Y. at page 26, 8 N.E.2d at page 48. (See also, Note, 158 A.L.R. 617; 32 Ill.L.Rev. 738 [on the upholding of a similar statute in Indiana. "* * * to accept the argument advanced by those who seek to invalidate this legislation would result in leaving the only power to alter common law rights in the courts."].)

A similar development has taken place with respect to injunctions. The Constitution (Art. VI, § 5) formerly provided that the superior court should have "original jurisdiction in all cases in equity." Nevertheless, it has been consistently held that the Legislature has power to determine what are grounds for equitable relief and when and under what circumstances injunctions may be granted. A typical example is the provision of the Civil Code, restated in the Code of Civil Procedure, forbidding injunctions to restrain public officers, held constitutional in a number of cases. See Loftis v. Superior Court, 25 Cal. App.2d 346, 77 P.2d 491. As was said in Spreckels v. Hawaiian Commercial Sugar Co., 117 Cal. 377, 49 P. 353:

"Statutory changes are almost perpetual. New rights are created under which new equities arise. These make new cases in equity, of which the courts at once take cognizance. The jurisdiction of courts of equity is not thereby enlarged. Neither is it diminished when by statutory changes some rights cease to exist, and certain cases which courts of equity once entertained can no longer arise. The grant of power [to the court in equity cases] is not confined to cases in equity which could exist under the law as it stood when the constitution was adopted. It includes all cases in equity at all times. It was not intended as a limitation upon the power to legislate upon the rights of persons." 117 Cal. at page 381, 49 P. at page 354.

On the other hand, if the right to be vindicated is one granted by the Constitution, an injunction may be granted regardless of the statute if injunction is an appropriate remedy, because the right is one which the Legislature cannot abridge. (See 14 Cal.Jur. p. 202.)

The fallacy of petitioner's position is again exposed when we consider the law governing appeals. The Constitution (Art. VI, §§ 4, 4b) provides that the Supreme Court and the District Courts of Appeal "shall have appellate jurisdiction on appeal from the superior court * * *." In interpreting this provision, the courts have held that the Legislature has the power to declare by statute what orders are appealable, and, unless a statute does so declare, the order is not appealable. Gale v. Tuolumne County Water Co., 169 Cal. 46, 145 P. 532; see Trede v. Superior Court, 21 Cal.2d 630, 634, 134 P.2d 745; cf. Byers v. Smith, 4 Cal.2d 209, 47 P.2d 705 (express constitutional right of appeal in cases involving removal from public office); In re Sutter-Butte By-Pass Assessment, 190 Cal. 532, 213 P. 974 (express constitutional right of appeal in cases involving legality of tax assessments).

A similar result has been reached under Penal Code section 1506 which gives the state the right of appeal in certain situations where a person is discharged from confinement on habeas corpus and provides that the confinement may continue pending the appeal. Under the Constitution the Superior Courts, the District Courts of Appeal and the Supreme Court have the power to issue writs of habeas corpus. Prior to enactment of section 1506 of the Penal Code, if a District Court of Appeal or a superior court discharged a person on habeas corpus, the discharge, no matter how patently erroneous, could not be reviewed by any higher court. In other words, the superior courts and the District Courts of Appeal had the final and conclusive power to discharge a prisoner; or, conversely, a prisoner had the right to obtain a discharge from either of these courts without being subjected to the harrassment and further confinement attending upon an appeal. Matter of Hughes, 159 Cal. 360, 113 P. 684; Matter of Zany, 164 Cal. 724, 130 P. 710. Section 1506, providing for an appeal, was enacted in 1927, and it has been applied in a number of cases decided by this court. See In re Alpine, 203 Cal. 731, 265 P. 947, 58 A.L.R. 1500; In re Murdock, 5 Cal.2d 644, 55 P. 2d 843; In re Marquez, 3 Cal.2d 625, 45 P.2d 342. Its constitutionality has never been questioned even though it clearly changes the effect of a writ of habeas corpus as it was formerly used in this state.

There is no inconsistency between the foregoing authorities and decisions which declare, in substance, that the Legislature cannot alter the jurisdiction over extraordinary writs which is prescribed by the Constitution. The controlling distinction between an unconstitutional enlargement of the jurisdiction of a court and a mere regulation of private rights and remedies, or the substitution of one remedy for another, becomes obvious upon an examination of these decisions. Maurer v. Mitchell, 53 Cal. 289, is apparently the leading case, and is typical of the group. The petitioner applied for a writ of prohibition to prevent the respondent tax collector (a nonjudicial officer) from selling petitioner's property for non-payment of delinquent taxes. Petitioner's theory was that section 1102 of the Code of Civil Procedure made prohibition the "counterpart" of mandamus, and that since mandamus could be used to compel action by a nonjudicial officer, prohibition, its counterpart, would similarly lie to restrain action by a nonjudicial officer. The court rejected this interpretation of the code as untenable and also unconstitutional, pointing out that the writ of prohibition mentioned in the Constitution is the writ known to the common law, and that its "office" or function was to restrain subordinate *judicial* tribunals. Thus, the opinion stands for the incontrovertible propositions that the jurisdiction to issue a writ of prohibition is a particular kind of jurisdiction, the meaning of which was long established at the time the Constitution was adopted; that, in using the term "prohibition" in the Constitution, the framers conferred this particular kind of jurisdiction on certain courts; and that this particular kind of jurisdiction consisted of the power to restrain the acts of a lower *judicial* tribunal.

The matter becomes even clearer when we understand that the petitioner in the Maurer case, in seeking to restrain the acts of a nonjudicial officer, was really asking for another traditionally established and constitutional defined remedy, namely, an *injunction.* The difficulty is, however, that the Constitution does not give the appellate courts the jurisdiction to issue an injunction, and that to issue an injunction in the guise of some other writ, e. g., supersedeas (see McCann v. Union Bank & Trust Co., 4 Cal.2d 24, 47 P.2d 283) or prohibition (Maurer v. Mitchell, 53 Cal. 289) would constitute an unconstitutional interference with the jurisdiction granted to the trial courts, as well as an unconstitutional enlargement of the jurisdiction of the appellate courts.

Maurer v. Mitchell, 53 Cal. 289, was followed and reinforced by Camron v. Kenfield, 57 Cal. 550, where prohibition was sought to prevent the State Controller, another nonjudicial officer, from drawing warrants in payment of certain claims. Again it was declared that if section 1102 were interpreted to authorize the issuance of a writ of prohibition in such a situation, the statute would be an unconstitutional enlargement of the jurisdiction of the Supreme Court. Later cases, too remote in their facts to justify discussion, repeat the basic proposition that the Legislature cannot enlarge the constitutional jurisdiction of the Supreme Court (see Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640, 648, 652, 694, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann.Cas.1915C, 822, [dealing with writ of certiorari, but finding no unconstitutional enlargement]; Saxton v. Board of Education, 206 Cal. 758, 768, 276 P. 998, [dealing with writ of mandate, but holding that no such enlargement was attempted]). Finally, in Standard Oil Co. v. State Board of Equal., 6 Cal.2d 557, 562, 59 P.2d 119, the principle was again declared in a situation similar to that presented in the Maurer case; a statutory provision for review of the acts of a nonjudicial administrative board by writ of certiorari was held invalid on the ground that the writ lies only to review the acts of judicial tribunals, and that the statute making it applicable to nonjudicial bodies was an attempt to enlarge the constitutional jurisdiction of the court.

[5] It is therefore clear that in the various pronouncements of our courts condemning attempts by the Legislature to interfere with the constitutional power to issue extraordinary writs, the matter involved was the jurisdiction of the court; and the cases held that such jurisdiction could not be enlarged, and occasionally added by way of dictum that it could not be curtailed (see Standard Oil Co. v. State Board of Equal., supra, 6 Cal.2d 557, 562, 59 P.2d 119). So here, if the Legislature had sought to provide that the writ of mandate might lie to compel a judicial act of a court, such as a particular decision on the merits in a particular litigated action, this would manifestly be an unconstitutional enlargement of the nature, function and scope of mandamus; and if the Legislature repealed section 1102 of the Code of Civil Procedure and the other statutes dealing with mandamus, and substituted a statute providing that no *ministerial action* by officers of any court could be compelled, this legislation would necessarily fall as an unconstitutional curtailment of the constitutional power to issue mandamus to compel performance of ministerial duty. But where the Legislature has not sought either to enlarge or curtail the jurisdiction to issue the writ, nor to change its nature or function, there is nothing unconstitutional in its regulation either of the procedure for invoking the writs or of the substantive rights of parties and the remedies available for their enforcement. The legislative enactment of reasonable procedural conditions precedent to invoking a particular remedy, or the substitution of one remedy (such as an action at law in the superior court) for another (such as a proceeding in mandamus), cannot be considered an interference with the jurisdiction over such remedies vested in courts by the Constitution.

[7] The validity of section 45.11(d) of the Unemployment Insurance Act is supported not only by these authorities, but also by what has long been accepted as the public policy of the federal, state and local governments. The fear that persistent interference with the collection of public revenues, for whatever reason, will destroy the effectiveness of government has been expressed in many judicial opinions. See People v. Skinner, supra, 18 Cal.2d 349, 355, 115 P.2d 488, 149 A.L.R. 299. As was said by Mr. Justice Field in Dows v. City of Chicago, 11 Wall 108, 78 U.S. 108, 110, 20 L.Ed. 65, "Any delay in the proceedings of the officer, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." This policy is carried out in Article XIII, section 15, of our Constitution, applying to nearly all of the important state taxes, and again in section 45.11(d) of the Unemployment Insurance Act, which repeats the constitutional prohibition against mandamus.

This policy, applicable to taxation generally, is even more vital in connection with the administration of the system of unemployment insurance. The Unemployment Insurance Act expressly provides for the creation, from the deposits of individual contributions, of a specific fund which is to be the source of benefits thereafter paid. (See §§ 19, 20, 25.) If proceedings which halt the collection of the tax were allowed to be brought before the payments are made, the power would be placed in the hands of employers to so delay the creation of the fund as to frustrate the purposes of the act. It has been expressly declared by this court that these purposes are of great public importance, and that procedural obstacles which would delay or prevent their fulfillment are to be avoided. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 298, 109 P.2d 942, 132 A.L.R. 715.

[8] The petitioner's allegation that payment of the claims asserted against it will render it insolvent is one which could be made against any tax, and can have no relevancy in a situation where this court, by express legislative provision, is prohibited from interfering in advance of payment of the tax. The argument that compliance with the statute may cause hardship in some instances is one which can be addressed only to the Legislature. Furthermore, the allegations show that petitioner never paid any of the sums required under the act although it was financially able to do so when the contributions should have been paid. It would be strange indeed if this court were to sanction a practice whereby a taxpayer could regularly refrain from paying taxes, the obligation of which he disputes, and then urge that, by reason of his large delinquency, the ordinary remedies provided for reviewing his liability are inadequate in his particular case.

It should be emphasized, in conclusion, that to accept the position of petitioner would not only result in impeding the collection of these contributions and in jeopardizing the state's system of social security benefits; it would also have a far-reaching and destructive effect on the administration of justice. It would mean that every right which now, formerly or in the future might be enforceable by mandate or by the extraordinary writs would be a constitutional right beyond the reach of the Legislature and solely in the control of the courts. This prospect is made more alarming by the fact that the scope of the extraordinary writs was not clearly defined at common law. (See Gordon, Certiorari to An Ecclesiastical Court, 68 L.Q.Rev. 208, 212; Note, 14 U.Chi.L.Rev. 270; Freund, Administrative Power Over Persons and Property, p. 261.)

Since it appears that the petitioner has no right under the federal or California Constitutions to obtain judicial review of his tax liability before he had paid the amount allegedly due, the Legislature can constitutionally provide that his only remedy is the suit to recover alleged overpayments, and it can prohibit the use of mandamus in advance of payment.

It follows that the judgment must be, and it is hereby, affirmed.

SHENK, EDMONDS, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. This is an appeal from a judgment of dismissal after order sustaining a demurrer to the petition without leave to amend; accordingly, upon this appeal all of the well pleaded facts must be accepted as true. It is not disputed that upon the facts pleaded the petitioner at all times concerned was not an employer, was not subject to any contributions under the act, and the assessment sought to be collected by respondent is wholly illegal.

The majority opinion holds that the respondent commission has the absolute right and the power to cause petitioner's assets to be summarily sold at public auction in order to collect from petitioner the illegal exaction, amounting, with claimed penalties, to over $3000, which the commission arbitrarily undertook to assess against it[1] as "contributions" assertedly accruing since January 1, 1936, under the California Unemployment Insurance Act [Deerings Gen.Laws, Act. 8780d], although, as above indicated, it is admitted that petitioner was not at any time an "employer" subject to the act; it is further held that the courts of this state are without power to stay or in any way interfere with the collection of the illegally assessed "contributions" even though admittedly such collection will force petitioner into "receivership and bankruptcy."

The majority opinion frankly states that "The question on this appeal * * * is not [on the merits] * * *, but rather whether an action or proceeding for judicial review of a determination of the respondent board may be had prior to the payment [which it is admitted that the petitioner cannot in reality make] of the contributions which the board claims to be due [but on the pleadings admits to be illegal] * * * Such judicial review in advance of payment is expressly prohibited by section 45.11(d) of the Unemployment Insurance Act, which provides in part as follows: 'No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any contributions sought to be collected.'" The opinion then admits that the relief sought is not barred by constitutional provision (§ 15 of Art. XIII of the Calif. Const.) and goes on to declare "We may concede, therefore, that were it not for section 45.11(d) of the Unemployment Insurance Act, mandamus might lie in the instant case * * *." The opinion then undertakes to sustain the statute by declaring a technical distinction "between jurisdiction to grant the remedy [mandate] and the right which is to be vindicated."

Apparently the thesis of the argument is that while the legislature concededly cannot deprive the courts of constitutionally vested powers it can deprive persons of the right to invoke those powers. That distinction is too fine for me; of the holding I think the words of Dean Pound (33 American Bar Assoc. Journal (Nov. 1947) No. 11, p. 1094) in his article "Annual Survey of Law: Decisions of Courts Show Some Dangerous Trends," are appropriate. Mr. Pound says: "[P]ublic law is swallowing up private law * * *. Also, the reviews of the different subjects seem to reflect a steady growth of extralegal if not often lawless exercise of official power and rise of official absolutism. * * * In connection with the tendency to concede the widest power and freedom from judicial scrutiny to administrative agencies, this suggests a change in our polity in the direction of centralized absolutism * * * [p. 1097] [T]he complacent acceptance of remaking of the Constitution or abrogation of it through judicial decision * * * is significant. It is in line with a general rejection of law and with a cult of absolute exercise of power throughout the world." Certainly the lawless assessment of contributions against a person not subject to the act, the summary sale of petitioner's assets to collect the illegal exaction, the resultant destruction of petitioner's business, and the avowed impotence of the courts to interfere in the process because the administrative commission is beyond the reach of the equity powers of the courts, all combine to suggest that the "cult of absolute exercise of power" has gained a hold in California.

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[1] Modern Barber College, Inc., is the alter ego of E. M. Robinson; either the corporation or Mr. Robinson may be deemed to constitute the petitioner.

Petitioner has sought relief from the courts through a petition for writ of mandate, filed in the superior court in September, 1945. The petition alleges that petitioner is a California corporation engaged, with the approval of the State Board of Barber Examiners under the laws of this state, in teaching the barber trade in the City and County of San Francisco; that no capital stock has ever been issued by the corporation and that one E. M. Robinson owns all of its assets and operates the barber college as if no corporation had been formed; that since January 1, 1936 (the date an employer's liability for contributions began to accrue, § 37 of the act), petitioner has at all times employed one or two instructors and during most of the time has "employed" a part-time bookkeeper; that students of the college as part of their training practice barbering on paying patrons and receive a percentage of the fees paid by such patrons; that respondent has found that petitioner is an employer as defined by subdivision (a) of section 9 of the act[2] and has counted as petitioner's employes the following persons: E. M. Robinson (alleged by petitioner to own all of the assets, and to be in fact the sole operator of the college), the two instructors, the part-time bookkeeper, and the students who as described above received commissions for services performed during the course of instruction; that petitioner contends that none of such persons except the two instructors were employes and therefore, upon the theory that it was not an employer under the act (since it employed less than four individuals), petitioner neither collected from any of such persons nor paid to respondent any contributions; that respondent is attempting to collect from petitioner over $3000 alleged to be due as contributions (including interest and penalties) which petitioner assertedly should have paid on behalf of itself and its asserted employes; that petitioner has no funds with which to pay the sum demanded; that a portion of such sum is barred by the statute of limitations (§ 45.5 and former § 45.2 of the act; and see Code of Civil Procedure, § 338); that petitioner is informed and believes and upon that ground alleges that unless payment is made (or, impliedly, unless the relief here sought is granted) respondent commission will issue a summary certificate as provided under section 45.9 (see also present § 45.10) of the act and cause petitioner's assets to be sold at public auction thereby forcing petitioner "into receivership and bankruptcy"; that petitioner has no plain, speedy and adequate remedy in the ordinary course of law to prevent the issuance of the summary certificate; that petitioner "has requested and petitioned the Respondents and the various departments thereof, including the Appeals Board to withdraw their alleged claim, all of which petitions have been denied and refused, and your petitioner has exhausted all of the administrative and appellant provisions as provided for under the Unemployment Insurance Act and the rules and Regulations of the Respondents." Also included in the petition are various allegations concerning the conditions and circumstances of the relationship between petitioner college on the one hand and its students and part-time bookkeeper as well as the individual E. M. Robinson, on the other.

Respondent states that on this appeal "The sole issue * * * is whether the trial court erred in holding that a petition for writ of mandate would not lie where the petition does not allege the payment of the tax in question in view of the specific provisions of Section 45.10 of the California Unemployment Insurance Act." Of course, the demurrer, at this stage of the proceeding, admits all factual allegations of the petition, and inasmuch as respondent does not contend that the facts alleged, when taken to be true, do not establish that for the period here involved petitioner was not an employer under the act, this court's decision must be deemed to be predicated upon the assumption that petitioner actually owes no portion whatsoever of the sum respondent seeks to collect.

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[2] It should be noted that, as set forth in subdivision (a) of section 9 of the act, "'Employer' means: (a) Any employing unit, which * * * has * * * in employment *one or more individuals* * * *, *provided that prior to January 1, 1946*, employer means any employing unit which * * * has * * * or had * * * in employment *four or more* individuals." (Italics added.) Thus, if petitioner had less than four employes for the period of time involved in this controversy, it was not then subject to the act.

The majority opinion, despite the nature of the issue now before this court and despite the remark in that opinion that the "question of * * * the liability of petitioner for the contributions, * * * [is] beyond the scope of this proceeding," is based in part upon the assertions that "The petitioner's allegation that payment of the claims asserted against it will render it insolvent * * * could be made against any tax * * * The argument that compliance with the statute may cause hardship * * * is one which can be addressed only to the Legislature. Furthermore, the allegations show that petitioner never paid any of the *sums required* under the act although it was financially able to do so when the contributions *should have been paid.* It would be strange * * * if this court were to sanction a practice whereby a taxpayer could regularly refrain from paying taxes, * * * and then urge that, by reason of his large *delinquency,* the ordinary remedies provided for reviewing his liability are inadequate in his particular case." (Italics added.) The quoted assertions are abhorrent to an accurate or fair appraisal of the controversy before this court they assume, utterly without foundation and contrary to all the admissions and presumptions controlling when ruling upon a demurrer, that petitioner owed and *was required* to pay the sums now claimed by respondent, and that petitioner *actually is delinquent;* they ignore the fact that for the ten-year period involved, petitioner may actually not (and should be presumed not to) have been required to pay any sums whatever under the act and may not at any time, or now, be delinquent in any respect or in any amount; they would, upon legally false premises and illogical deductions, compel a small businessman to endure financial ruin because he has not the cash with which to meet an exaction which is, under the rules of pleading, presumptively unlawful (respondent does not even urge otherwise on this appeal), before he can get before the courts of this state to determine the factual issues, if any there should be.

It seems to me also that if it is the view of this court that upon the pleadings petitioner is liable for and is delinquent in paying the contributions sought by respondent, then it should in reason and fairness to both parties unequivocally so declare at this time, rather than to subject the parties and the courts to the burden of another suit by petitioner (provided it is able to raise the funds to prosecute it) to recover contributions which on this appeal, under applicable rules of law, respondent concedes it is not entitled to.

As is stated (and expounded with unchallenged documentation) in my concurring opinion in Eisley v. Mohan, Cal.Sup., 192 P.2d 5, it is my view that it is sounder procedure, and better law, to follow the general rule of the federal, and many other jurisdictions, and to maintain the extraordinary remedies as available when extraordinary circumstances are presented and when another adequate remedy is not provided.

Concerning petitioner's contention that it is entitled to mandamus on the ground that its remedy at law is inadequate, the opinion of the Chief Justice recognizes that the cases of Bodinson Mfg. Co. v. California E. Com. (1941), 17 Cal.2d 321, 109 P.2d 935, Lockhart v. Wolden (1941), 17 Cal.2d 628, 111 P.2d 319, and Dufton v. Daniels (1923), 190 Cal. 577, 213 P. 949, upon which petitioner relies, are "merely declaratory of the general rule set forth in section 1086 of the Code of Civil Procedure." It seems to me that the statute in question (sec. 45.11(d) of the Unemployment Insurance Act) is also "merely declaratory" of the same general rule as to the situations in which mandamus will lie, and that we are here presented with just such a situation.

As appears from the authorities discussed in my concurring opinion in Eisley v. Mohan, Cal.Sup., 192 P.2d 5, a similar federal statute (26 U.S.C.A.Int.Rev.Code, § 3653(a), formerly R.S. 3224) is construed by the federal courts, including the United States Supreme Court, as being merely declaratory of the prior rule in equity and does not prohibit a suit in equity to restrain the collection of a tax where the tax is illegally exacted and the taxpayer has no adequate remedy at law.

It is a familiar principle that in adopting legislation the legislature is presumed to have "had knowledge of existing judicial decisions and enacted statutes in the light of such decisions as have a direct bearing upon them," (23 Cal.Jur. 783, sec. 159), and "It is settled that if a statute of another state or country, which has been construed by the courts of that jurisdiction, is adopted in California, it will be presumed to have been adopted with the construction so given it, unless the language is changed in some way to express a different intent. In construing such a statute, the decisions of the courts of the state or country from which the statute was derived are entitled to great consideration, and their interpretation of the statute will ordinarily be followed. This rule applies in construing a California statute modeled upon or adopted from a federal act." (23 Cal. Jur. 794-795, sec. 172; see also 59 C.J. 1065-1069; 50 Am.Jur. 315 and 357.)

I would follow the federal construction of the federal statute and hold that the California statute under discussion is merely declaratory of the prior equitable principles historically applied by courts and was not intended to forbid resort to those principles in cases involving exceptional circumstances. Here respendent seeks to exact from petitioner contributions, plus interest and penalties, extending back for a period of approximately ten years — contributions which respondent took no steps to claim during that period, which, by the manner of its attack on the petition, it now concedes are not legally owing, and which now aggregate such a total that payment will force petitioner into "receivership and bankrupacy," with the inevitable result that it may never be able to secure a refund. To hold that under such circumstances it may not apply to the courts for appropriate relief appears to me to be contrary to natural justice and to the fundamental principles of our system of government and courts. As aptly declared in Higgins Mfg. Co. v. Page (1927; D.C.), 20 F.2d 948, 949 (where defendant sought to collect a tax even though such tax was judicially determined to be illegal), "where there is no adequate remedy at law, the court should have power to grant relief; otherwise, the citizen will be more at the mercy of the departments of the * * * government than is consistent with life in a free country."

I would reverse the judgment on the further ground that the power to issue writs of mandate is expressly confirmed in the courts of California by the state constitution (Const. Art. VI, secs. 4, 4b, 5) and that the legislature may not, independently of constitutional provision, forbid the issuance of mandamus in any case in which there is no other adequate remedy. (See Miller & Lux v. Bd. of Supervisors (1922), 189 Cal. 254, 260, 208 P. 304.) "In this state * * * the law is now established that mandamus is the remedial writ which will be used to correct those acts and decisions of administrative agencies which are in violation of law, where no other adequate remedy is provided. [Citations.] * * * Thus, the writ has been used not only to compel administrative action which was refused in violation of law [Citations], but also to annul or restrain administrative action already taken which is in violation of law. [Citations.]" (Bodinson Mfg. Co. v. California E. Com. (1941), supra, 17 Cal.2d 321, 329, 109 P.2d 935, 940.) This court has declared, in a parallel situation involving its appellate jurisdiction, that "'The courts of this state derive their powers and jurisdiction from the Constitution of the state. The constitutional jurisdiction can neither be restricted nor enlarged by legislative act. An attempt to take away from the courts judicial power conferred upon them by the Constitution * * * is void.' Pacific Telephone etc. Co. v. Eshleman, 166 Cal. 640, 690, 137 P. 1119, 1138, (50 L.R.A.

[N.S.], 652, Ann.Cas.1915C, 822.) * * * And if the Legislature cannot take away this right by direct enactment, neither can it accomplish the same result by any indirect device. While the Legislature has, ordinarily, the power to create a new remedy for the enforcement of a right or a defense against a wrong, it cannot, under the guise of creating a new statutory remedy, deprive a litigant of an existing constitutionally guaranteed right to defend, even unto a court of last resort, against the enforcement of an alleged right. * * * In other words, the Legislature cannot, by the creation of a new remedy, deprive this court of its constitutional grant of appellate jurisdiction, if the right involved in the execution of the remedy is of a character which in its very essence is equitable and was of an equitable nature and character at the time of the adoption of the constitutional provision, which gave to this court appellate jurisdiction over the subject-matter of the remedy." (In re Sutter-Butte By-Pass Assessment (1923), 190 Cal.532, 536-537, 213 P. 974, 975.)

The opinion of the Chief Justice attempts to find support for the statute's purported curtailment of the constitutional powers of the courts in the undisputed proposition that "Except as the Constitution otherwise provides, the Legislature has complete power to determine the rights of individuals," provided the word "determine" be understood as being used in the sense of "defining in advance or prospectively" and not in the sense of either judicial decision or determination on the one hand, or of arbitrary termination on the other. Constitutionally, the legislature may not, of course, first specify the rights or obligations, whether personal or property, which shall arise under defined circumstances, and then either abolish the rights or provide for enforcement of the obligations, without a fair opportunity to the individual citizen to be heard and to protect himself, and, it seems to me, the legislature should be held to be without power to invest in others —whether individuals or agencies of government—the authority arbitrarily to make and to enforce, regardless of both law and equity, illegal exactions against any individual person. Under the statute the commission is authorized to perform certain ministerial acts; the law itself purports to levy certain contributions upon employers under specified circumstances and authorizes the collection of such contributions; but the majority opinion holds that the commission may levy and unrestrainedly collect exactions not authorized by the act from persons not subject to the act. Such opinion recognizes that the exaction is, or may be, illegal and that the "taxpayer" has a legal right to bring suit to recover it after payment under protest, but holds that the statute is valid in denying to the aggrieved person, whatever the showing, the remedy of mandate or injunction. (Cf. Seaside etc. Hospital v. Cal. Emp. Comm. (1944), 24 Cal.2d 681, 683, 151 P.2d 116.) Such holding, which vests a high degree of absolutism in the powers of the commission, in my view is unsound and undesirable.

In support of my view are the holdings in the situations where it is provided that a particular right or cause of action shall no longer exist, where a limitations statute is shortened, where curative taxation acts are adopted, etc.; in such cases the legislature must allow reasonable periods for the bringing of action to enforce existing rights, is barred from an arbitrary dissolution of those rights, etc. It seems but trite to point out that the so-called "abolition" of the cause of action for breach of promise, relied upon in the opinion of the Chief Justice, was not an abolition of an existing right but a provision that new rights of the proscribed nature should not arise in the future. As to existing causes of action, the legislature could only shorten the time for the bringing of action to enforce them, and such shortening still was required to allow reasonable time for the exercise of the prior existing rights. Furthermore, in respect to the attempt of the majority opinion to make so stout a crutch of the asserted distinction "between jurisdiction to grant the remedy and the right which is to be vindicated," it is to be noted that the statute in question does not on its face purport to lop off or destroy "the right which is to be vindicated" but, rather, appears to be directed squarely at the remedy; i. e., at the equitable powers of the courts. The pertinent language of the statute is: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit * * * in any court against this State or any officer thereof to prevent or enjoin under this act the collection of any contributions * * *." Authority to so limit the constitutional powers of the courts, it has already been shown, is not vested in the legislature.

In the present case the legislature certainly, provided other constitutional limitations are observed, had and has the right to define the circumstances under and the extent to which an employer's obligation to contribute under the Unemployment Insurance Act should arise.[3] That fact cannot, however, obscure the further circumstance that after so defining an employer's rights and obligations the legislature is without power, in the absence of providing another adequate legal remedy, to forbid his resort to mandamus to secure a judicial determination of whether he falls within those definitions; it is likewise without authority to curtail the constitutional power of the courts to issue mandamus to protect the rights of a person where, as here, it is admitted or shown that he is not an employer, that he is not subject to the act, that the assessment is illegal, that he will be irreparably damaged, and that there is no other adequate remedy available. And in any case the determination of whether any prescribed remedy is or is not adequate is a *judicial* function, not a legislative one. (See Bodinson Mfg. Co. v. California E. Com. (1941), supra, 17 Cal.2d 321, 326, 109 P.2d 935; People v. Assoc. Oil Co. (1930), 211 Cal. 93, 98, 294 P. 717.) I would not abandon that function or seek escape from the responsibility of exercising it.

The judgment should be reversed.

CARTER, J., concurs.

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[3] See Seaside etc. Hospital v. Cal. Emp. Com. (1944), supra, 24 Cal.2d 681, 683, 151 P.2d 116, 117, in which it was held that mandamus was a proper remedy "to compel appellant [commission] to rule that it [petitioner hospital] was exempt from the operation of the act * * *"; in the case at bar, it will be remembered, upon the record it is admitted that petitioner is not an "employer" within the act and is not subject to its operation.

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31 Cal.2d 833

AYLWARD et al. v. STATE BOARD OF CHIROPRACTIC EXAMINERS et al.

Sac. 5822.

Supreme Court of California, in Bank.

May 6, 1948.

Rehearing Denied June 3, 1948.

1. Administrative law and procedure 🔑453, 470

Physicians and surgeons 🔑11(3)

The State Board of Chiropractic Examiners had no power to cancel chiropractic license without giving licensee notice and hearing. Gen.Laws, Act 4811, §§ 10(a), 11, 12.

2. Administrative law and procedure 🔑501

Physicians and surgeons 🔑11(3)

The doctrine of "res judicata" in strict sense is not applicable to a statewide agency, such as State Board of Chiropractic Examiners, which is without power to make a final determination of a question of fact, and its decision will not be given res judicata effect in a subsequent action in court.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Administrative law and procedure 🔑482

A state-wide administrative agency may be bound by its prior action, where it has made a determination of a question of fact within its powers and it lacks authority to rehear or reopen the question.

4. Administrative law and procedure 🔑500

Where an administrative board's order is not based on a determination of fact, but on an erroneous conclusion of law and is without the board's authority, the order is void and subject to collateral attack.

5. Mandamus 🔑81

A court will refuse to grant writ of mandate to enforce a void order of administrative board, but writ will lie to compel the board to nullify or rescind its void act.

6. Administrative law and procedure ⚷501

Administrative board does not exhaust its power by doing an act which it has no power to do or by making a determination without sufficient evidence, and in such case the power to act legally has not been exercised and board may proceed within its jurisdiction.

7. Physicians and surgeons ⚷11(3)

The fact that applicants for chiropractic licenses, who had received emergency induction papers into armed forces, were granted privilege of writing special examination, that each applicant took examination from only one member of State Board of Chiropractic Examiners, that member giving examinations prepared and graded examinations without participations of other members, and that identity of each applicant was during examination known to board member conducting examination, did not render licenses void as matter of law, where all applicants acted in good faith and there was no evidence that favoritism was shown. Gen.Laws, Act 4811, §§ 1, 3, 4(b, c, e), 5, 6(a–c), 11, 12.

8. Administrative law and procedure ⚷322
Physicians and surgeons ⚷11(3)

The State Board of Chiropractic Examiners need not actually grade examination papers, but that task may be delegated to a member or officer of the board. Gen. Laws, Act 4811, §§ 3, 4, 6.

9. Administrative law and procedure ⚷331
Physicians and surgeons ⚷11(3)

Where examinations were graded by single member of State Board of Chiropractic Examiners, grades were impliedly approved by board when licenses were issued. Gen.Laws, Act 4811, §§ 3, 4, 6.

10. Physicians and surgeons ⚷11(3)

The statutory provision designed to conceal identity of applicant for chiropractic license should be observed whenever possible, but failure strictly to comply with such provision was not sufficient to render examinations void, where there was no evidence that favoritism was shown to any particular applicant or that fact that identity of applicant was known to examiner resulted in partiality. Gen.Laws, Act 4811, § 6.

11. Administrative law and procedure ⚷501
Mandamus ⚷87
Physicians and surgeons ⚷11(3)

The fact that State Board of Chiropractic Examiners had determined that there was no ground for revocation of licenses did not preclude board from taking action against licensee based on any proper legal ground, and provision of judgment ordering board to refrain from attempting to cancel license was improper. Gen.Laws, Act 4811, §§ 10(a), 11, 12.

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding by Alan J. Aylward and others for a writ of mandate commanding the State Board of Chiropractic Examiners, James Tobin, and others, to annul an order canceling petitioners' licenses and to refrain from attempting to cancel licenses or in any way interfere with the rights of any of the petitioners to follow their profession. From a judgment granting writ of mandate, the board appeals.

Judgment modified and, as modified, affirmed.

Prior opinion of District Court of Appeal 172 P.2d 903.

Morris Lavine, of Los Angeles, for petitioners.

Robert W. Kenny, of Los Angeles, Fred N. Howser, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Petitioners were licensed to practice chiropractic by the State Board of Chiropractic Examiners after passing special examinations, held pursuant to a resolution adopted in 1942, in which nearly all of the applicants were examined individually in separate written tests prepared, given, and graded by one board member. In 1943 the board held a hearing on charges that the method of conducting the examinations violated the statutes and that some of the licensees did not possess the required educational qualifications. The board found that no cause for revocation had been shown. In 1944 a new board, acting without notice, adopted a resolution canceling forty licenses, including those of petitioners. This proceeding was then instituted in the superior court to compel the board to annul its order and to refrain from attempting to cancel the licenses or in any way interfering with the rights of any of petitioners to follow their profession. The court issued a writ of mandate, and the board took this appeal therefrom.

The following proceedings were had before the board:

In *July, 1942*, the board adopted a resolution that applicants who received "emergency induction papers into the armed forces of the United States" be granted the privilege of writing special examinations, under the auspices of the member of the board closest to the applicant's residence, and that if the applicant passed the examination, the license might be sent to board members "by round robin for signature" and then forwarded to the new licentiate. All the licenses here involved were issued after each applicant had passed a "special examination" held pursuant to this resolution.

In *July, 1943,* after notice to the licensees, the board held a hearing upon charges, filed by an inspector of the board, that these licenses had been issued contrary to the provisions of the Chiropractic Act.[1] The charges were (a) that each applicant took an examination from only one member of the board, who prepared, gave and graded the examinations without participation by the other members, (b) that at the examinations the applicants were not designated by number instead of name and that the identity of each applicant was at all times during his examination known to the board member who conducted the examination, and (c) that the applicants did not then possess the educational qualifications required by the statute. The attorney general represented the board at the hearing, and some of the licensees appeared and were represented by counsel, while others, then in the armed forces, either were not served or were unable to be present.

At the close of the hearing the board concluded "that none of the matters presented were grounds under the Chiropractic Act[2] for revocation of any licenses." It found that all licenses were issued by the board after a resolution had been duly and regularly passed authorizing the giving of special examinations and that many of the applicants were in the armed forces at the time of the hearing, while others were still "awaiting call and practicing their profession." The board further found that each examination was given by a regular board member from questions of the same type as those used in previous examinations; that some applicants were given numbers, but that nearly all examinations were given to individuals, at individual times and sittings; that each of the persons examined passed; that the papers, together with the results, were forwarded to Sacramento, "after which the grades were duly entered, licenses were then voted and issued, and signed by four or five members of the board in regular session."

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[1] Stats. 1923, p. lxxxviii, Gen. Laws, Act 4811, Appendix to Deering's Business & Professions Code. The Chiropractic Act was an initiative measure approved November 7, 1922. Section 1 creates a board "to be known as the 'state board of chiropractic examiners,'" consisting of five members. The board has power to examine applicants and to issue and revoke licenses. (§ 4(c).) It may adopt "such rules and regulations as the board may deem proper and necessary for the performance of its work * * *," § 4(b), and it may "do any and all things necessary or incidental to the exercise of the powers and duties herein granted or imposed," § 4(e). A majority of the board constitutes a quorum, and the affirmative vote of three members is required to carry a resolution or motion, to adopt any rule, or to authorize issuance of a license. § 3. Section 6(a) provides that the board "shall meet as a board of examiners" in January and July, and at such other times as may be found necessary for the performance of their duties. Each applicant is to be "designated by a number instead of the name, so that the identity will not be disclosed to the examiners until the papers are graded." § 6(b). Written examinations are prescribed. § 6(c). Educational requirements, including number of hours of study for designated subjects are set forth in section 5 of the act.

[2] Section 10(a) of the Act provides that the "board shall refuse to grant, or may revoke, a license to practice chiropractic * * * upon any of the following grounds," including fraud or deception in applying for a license or passing the examination, conviction of a crime involving moral turpitude, and various other forms of misconduct not pertinent here. The section also provides that any licentiate or applicant "against whom any of the foregoing grounds for revoking or refusing a license" is charged, shall be furnished with a copy of the complaint and shall have a hearing before the board. Section 11 provides for cancellation or revocation for failure to record the license, and section 12 provides for forfeiture for failure to pay the annual renewal fee.

In *May, 1944,* after its entire membership had changed, the board adopted a resolution canceling the licenses of forty persons, including most, but apparently not all, of those involved in the 1943 hearing. No notice was given to any of the licensees and neither they nor their counsel were present at the meeting, but the secretary mailed a copy of the resolution to each of them. As grounds for the resolution it was stated that the licenses had been unlawfully issued by the board contrary to the Chiropractic Act in that each licensee took an examination from only one member of the board who exclusively prepared, gave and graded the examination; that the applicants were not designated by number instead of name, and the identity of each applicant was known to the board member who gave the examination; that certain applicants did not then possess the required educational qualifications; and that certain licensees had each paid the sum of $100 to the examiner for his personal use. The action of the board was based on the records in the board's files, including the transcript of the 1943 hearing.

Petitioners then brought this action in the superior court to annul the order of the board revoking the licenses. The foregoing proceedings were presented in the form of stipulations, exhibits, and the testimony of two board members.

The court found that each petitioner was given an examination by a member of the board which was of the same type and character as that used in regular previous examinations; that each license was issued, approved, and signed by more than a majority of the board; that the resolution of May, 1944, was adopted by the board without notice or hearing; that petitioners acted in good faith in taking the examinations; that none of them was guilty of fraud in securing a license; and that prior to May, 1944, the board had conducted a hearing after notice to petitioners and had fully investigated all the matters embraced in the May 1944 resolution and had acted upon them.

The court concluded that the prior action of the board was res judicata as to all matters embraced in the May 1944 resolution and that having declined to revoke the licenses after a full hearing, the board had no authority thereafter to cancel them without notice.

The judgment provides that petitioners are entitled to a writ of mandamus commanding the board "to annul its purported order canceling the said licenses and refrain from attempting to cancel the licenses heretofore issued to the applicants, or in any way interfering with the rights of them, or any of them, to follow his said profession as a chiropractor in the State of California, and to treat and accord the petitioners the same rights and privileges as other licensed chiropractors in the State of California, and to renew the said licenses in the usual way of renewals of licenses upon the payment of the renewal fees, and that said mandate direct and command said Board to refrain from interfering with the right of any of said petitioners to follow his said profession in the usual way hereafter."

[1] The trial court correctly determined that the board had no power to cancel the licenses without giving petitioners notice and a hearing. The statute (§ 10), in prescribing the procedure to be followed by the board in revoking licenses upon specified grounds, requires that the licensees be afforded a hearing. While invalidity of a license is not included in the grounds specified for revocation, the statute evidences the legislative intent that there should be notice and a hearing in any

case where a license is to be revoked. The judgment, therefore, must be affirmed insofar as it annuls the order canceling petitioners' licenses.

[2, 3] The judgment, however, goes much further and prohibits the board from taking any future action with respect to the cancellation of the licenses. In making this order the court apparently proceeded on the theory that the board in 1943 had exhausted its power to act when it determined that there was no ground for revocation. The doctrine of res judicata in the strict sense is not applicable to a statewide agency such as respondent, which is without power to make a final determination of a question of fact, and its decision will not be given res judicata effect in a subsequent action *in court*. See Empire Star Mines Co. v. California Emp. Comm., 28 Cal.2d 33, 47, 48, 168 P.2d 686. The *agency*, however, may be bound by its prior action where it has made a determination of a question of fact within its powers, and it lacks authority to rehear or reopen the question. Olive Proration etc. Committee v. Agricultural etc. Comm., 17 Cal.2d 204, 209, 109 P.2d 918; Heap v. City of Los Angeles, 6 Cal.2d 405, 57 P.2d 1323; Proud v. McGregor, 9 Cal.2d 178, 179, 70 P.2d 194; Pacheco v. Clark, 44 Cal.App.2d 147, 153, 112 P.2d 67; Hoertkorn v. Sullivan, 67 Cal.App.2d 151, 154, 153 P.2d 367; Matson Terminals, Inc., v. California Emp. Comm., 24 Cal.2d 695, 702, 151 P.2d 202.

[4-6] Implicit in the cases denying a board's power to review or re-examine a question, however, is the qualification that the board must have acted within its jurisdiction and within the powers conferred on it. Where a board's order is not based upon a determination of fact, but upon an erroneous conclusion of law, and is without the board's authority, the order is clearly void and hence subject to collateral attack, and there is no good reason for holding the order binding on the board. Not only will a court refuse to grant mandate to enforce a void order of such a board (Proud v. McGregor, 9 Cal.2d 178, 70 P.2d 194; Pacheco v. Clark, 44 Cal.App.2d 147, 112 P.2d 67), but mandate will lie to compel the board to nullify or rescind its void acts. Board of Trustees v. State Bd. of Equalization, 1 Cal.2d 784, 37 P.2d 84, 96 A.L.R. 775. While a board may have exhausted its power to act when it has proceeded within its powers, it cannot be said to have exhausted its power by doing an act which it had no power to do or by making a determination without sufficient evidence. In such a case, the power to act legally has not been exercised, the doing of the void act is a nullity, and the board still has unexercised power to proceed within its jurisdiction.

The question, therefore, is whether it has been erroneously determined as a matter of law that no cause for revocation has been established. As we have seen, the 1944 board purported to cancel licenses upon the grounds that some of the applicants did not possess the required educational qualifications, that some of them paid $100 to the examiner for his personal use, and that the examinations were not given in the manner prescribed by statute. The record indicates that the charge that some of the applicants did not have the required educational qualifications was based on information contained in the board's files, but neither the documents nor proof of their contents was placed in evidence in the trial court, and there is nothing before us which shows that petitioners did not have the necessary qualifications. Further, we do not find any evidence which substantiates the charge that any of petitioners paid any sum of money for the personal use of the examiner.

It is clear, however, that the procedure prescribed by statute was not strictly followed in giving the examinations, and we must determine whether there was such a substantial departure as to render the licenses void as a matter of law.

The Chiropractic Act provides that the board shall have power to "examine applicants and to issue and revoke licenses to practice chiropractic, as herein provided," and to adopt such rules and regulations as it may deem proper and necessary. § 4. A majority of the board shall constitute a quorum, and there must be an "affirmative vote of three members of said board to carry any motion or resolution, to adopt any rule, or to authorize the issuance of any license * * *." § 3. The requirements with reference to examinations are set forth in section 6, which prescribes that the board "shall meet as a board of examiners on the first Tuesday following the second Monday of January and July of each year, and at such other times and places as may be found necessary for the performance of their duties." The section also specifically directs that each applicant "shall be designated by a number instead of the name, so that the identity will not be disclosed to the examiners until the papers are graded," and that, with certain exceptions not pertinent here, all examinations "shall be in writing" and "shall be in each of the subjects as set forth" in the statutory schedule of minimum educational requirements.

[7-9] The fact that the board did not hold a meeting for each examination would not seem to be of vital importance. The statute does not require that a quorum be present in the room where the test is being held, and the supervision of the applicants while taking the examination could properly be delegated to any member or officer of the board. Nor would the facts that the questions were prepared and the papers were graded by a single member necessarily mean that the examinations were fatally defective. If the questions were approved by the board before the examinations were held, it would be entirely immaterial who prepared them. They were of the same type as those approved for previous examinations, and it must be assumed fairly tested the knowledge and fitness of applicants. There is nothing in the statute which requires that the board, as such, actually grade the papers. This task is customarily performed in board examinations by outsiders and certainly may be delegated to a member or officer of the board. In the present case the grades were impliedly approved by the board when the licenses were issued.

[10] The most serious criticism that can be made of the examinations is that the procedure used violated the provision of the statute which directs that each applicant "shall be designated by a number instead of the name, so that the identity will not be disclosed to the examiners until the papers are graded." Although some of the applicants were given numbers, "nearly all examinations were given to individuals at individual times and sittings." It must be conceded that the provisions designed to conceal the identity of the applicant were not observed in examining some of these licensees. Although the purpose is a wholesome one and should be observed whenever possible, the failure strictly to comply with this provision is not, under the circumstances of this case, sufficient to render the examinations void. There is no evidence that favoritism was shown to any particular individual or that the fact that the identity of the applicant was known to the examiner resulted in partiality in any case.

The court found upon the uncontroverted evidence that all of the petitioners acted in good faith in taking the examinations, and we should not hold their licenses to be void as a matter of law unless required to do so by compelling reasons of public policy. Although members of the board might be subject to censure for failing to follow the statutory provisions with more exactness, petitioners who were without fault should not be severely penalized solely because the board was lax in the performance of its duty.

The petitioners all passed an examination which was fairly given and which adequately tested their qualifications to practice chiropractic. The public was fully protected, and the licenses should not be revoked merely because the procedure followed in conducting the examination did not strictly conform to that prescribed by the statute.

[11] The judgment, however, goes too far in ordering the board to "refrain from attempting to cancel the licenses heretofore issued to the applicants, or in any way interfering with the rights of them, or any of them. * * *" The board should not be precluded from taking action against petitioners based on any proper legal ground and in accordance with the principles stated herein.

All portions of the judgment save that which annuls the order canceling the licenses are stricken therefrom, and, as so modified, the judgment is affirmed, with costs on appeal to petitioners.

SHENK, CARTER, EDMONDS, SPENCE, and SCHAUER, JJ., concur.

TRAYNOR, J., concurs in the judgment.

31 Cal.2d 744

BAGDASARIAN v. GRAGNON et al.

S. F. 17392.

Supreme Court of California, in Bank.
April 30, 1948.

As Modified on Denial of Rehearing
May 27, 1948.

1. Fraud 🔑58(1, 2, 3)

Evidence sustained determination that vendor's representation as to amount and value of crops were material, false and made for purpose of inducing purchasers to purchase farm.

2. Fraud 🔑23

An independent investigation or an examination of property does not preclude reliance on vendor's representations, where falsity of statement is not apparent from inspection, or person making representations has a superior knowledge, or party relying thereon is not competent to judge facts without expert assistance.

3. Fraud 🔑58(4)

Evidence sustained determination that purchasers relied on vendor's misrepresentations concerning amount and value of crops previously produced and value of current crops.

4. Fraud 🔑31, 35

When a party learns that he has been defrauded, he may, instead of rescinding, elect to stand on the contract and sue for damages, and in such case his continued performance of agreement does not constitute a waiver of his action for damages.

5. Fraud 🔑35

Mere asking of a favor does not deprive innocent person of rights arising from an unquestionably fraudulent act.

6. Fraud 🔑58(1)

Evidence sustained finding that assistance and advice given by vendor with respect to operation of ranch were volunteered by him to protect his interest as holder of mortgage on crops, and that none of other requests allegedly made by defrauded purchasers was granted by vendor who asserted that purchasers were barred by waiver and estoppel from asserting fraud.

7. Fraud 🔑38

Where vendor's misrepresentations as to amount and value of 1943 crops were not discovered by purchasers until after vendor had instituted foreclosure proceedings and full extent of misrepresentations as to growing crops could not have been discovered by purchasers until end of farming year after all crops were sold, purchasers' cross-complaint, which was filed within statutory period of limitations, for damages was not barred by laches.

8. Evidence 🔑113(1)

"Value", in connection with legal problems, ordinarily means market value.

See Words and Phrases, Permanent Edition, for all other definitions of "Value".

9. Fraud 🔑59(3)

Under statute providing that one who has been defrauded is entitled to recover difference between "actual value" of that with which defrauded party parted and actual value of that which he received, the quoted word means market value. Civ. Code, § 3343.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Value".

10. Appeal and error 🔑1048(1)

Although proper method for establishing actual value is by evidence of market value, vendor was not prejudiced by ruling which permitted defrauded purchasers' witnesses to testify directly as to actual value, where no improper elements of value were considered by experts in forming their opinions and court treated the phrases as synonymous in its findings. Civ.Code, § 3343.

11. Evidence ⚷543(3)

Farmers, farm appraisers and real estate brokers who were shown to be familiar with value of farming land in community were competent to give expert testimony on subject of value, and fact that some of them had not seen farm for some time was not fatal, where there was evidence that farm was then in substantially the same condition as when last seen.

12. Appeal and error ⚷1050(1)

Where purchasers sought damages for fraud, admitting card prepared by real estate broker containing vendor's name, a general description of property and notation "asked $90,000. Really a piece of junk", if error, was not prejudicial, where witness had already testified that he had not listed property for sale because in his opinion it was not worth price asked and subsequently he and another witness testified as valuation experts that property was worth $28,220.92, the precise figure adopted by trial court. Code Civ.Proc. § 1953f.

13. Evidence ⚷113(7)

Market value of a growing fruit crop as of a particular date may properly be determined by considering probable yield of crop and its probable market value per unit when it is to be harvested and sold, less cost of producing and marketing.

14. Evidence ⚷142(1), 323(1), 525

Market value of personal property may be established by testimony of experts, but that is not the only method, and, generally, reasonable value of marketable personal property may be shown by market prices or actual specific sales of other similar property, provided such sales are bona fide and not too remote in time or place.

15. Evidence ⚷113(8)

Market value of personalty may be shown by price paid for identical property or by price obtained for it at a subsequent sale.

16. Fraud ⚷57, 58(1)

Where purchasers sought damages for vendor's fraudulent representation as to value of growing crops, evidence of estimated yield which should have been produced was admissible, but not conclusive, and court properly considered purchasers' evidence of tonnage produced and price per ton for which it was sold as basis of an inference of market value of crop as a whole at time the fraud occurred, and objection that other factors could have resulted in lower yield went to weight and not admissibility of evidence. Civ.Code, § 3343.

17. Fraud ⚷59(3)

Under statute providing that defrauded party is entitled to recover difference between actual value of that with which defrauded party parted, and actual value of that which he received, benefit of bargain rule is not applicable to measure of recovery, but damages are limited to out of pocket loss. Civ.Code, § 3343.

18. Appeal and error ⚷1073(5)
Fraud ⚷60

Where purchases of realty, personal property, farm equipment and crops were part of same transaction, purchase of farm equipment could not be disregarded in determining amount of purchasers' damages for vendor's fraud, and failure to determine value of equipment and to include it in computing value of property received constituted prejudicial error. Civ.Code, §§ 1642, 3343.

19. Set-off and counterclaim ⚷18, 36

Where court awarded purchasers damages for vendor's fraud, vendor was entitled to a set-off with respect to matured installments on purchase price, but he had no right to set-off as to installments that were not due, and he could not complain because damages were set off against first payments to become due rather than against last payments. Code Civ.Proc. §§ 438, 440.

SCHAUER, J., dissenting.

◆

Appeal from Superior Court, Fresno County; Clark Clement, Judge Assigned.

Action by D H. Bagdasarian against P. G. Gragnon and others to foreclose a crop and chattel mortgage, wherein defendants filed a cross-complaint for damages. From a judgment for defendants on the cross-complaint, the plaintiff appeals.

Judgment appealed from, reversed and cause remanded with directions.

Prior opinion 181 P.2d 52.

W. M. Conley, Philip Conley, Matthew Conley, Conley, Conley & Conley and L. Kenneth Say, all of Fresno, for appellant.

Frank C. Lerrigo and Galen McKnight, both of Fresno, for respondents.

GIBSON, Chief Justice.

This controversy arose out of the sale in June, 1944, of a farm by appellant Bagdasarian to respondents Gragnon for $10,000 cash, a note for $34,000 payable in installments and secured by a deed of trust on the real property, and a note for $24,000 payable on or before December 1, 1944, and secured by a crop and chattel mortgage. Respondents, after paying $14,960.15 on the note for $24,000, defaulted on the balance. Appellant brought this suit to foreclose the crop and chattel mortgage, and respondents filed a cross-complaint for damages alleging that they had been induced to purchase the farm by fraudulent representations on which they had relied to their injury. The court found for respondents on their cross-complaint and awarded them damages in the sum of $27,916.23.

Appellant's contentions may be classified under the following headings: (1) that the evidence is insufficient to support the finding of fraud; (2) that recovery is barred by waiver, estoppel and laches, and (3) that the basis of damages is erroneous and the award is unsupported by the evidence.

Sufficiency of Evidence of Fraud

[1] In the spring of 1944 appellant listed the property with a real estate agent whom he furnished with information concerning the kind and amount of crops grown on the land. This data was later incorporated in a written statement which was used to induce respondents to purchase the farm. It was represented that there "is now offered $3,500 for plums and nectarines on the trees," that the 1943 crops included olives and figs which were sold for $1,100 on the trees, 600 tons of grapes, and 700 field boxes of oranges. Appellant's son, who assisted in making the sale, represented that the 1944 grape crop would yield approximately 540 tons and would be worth $45,000. Appellant never produced or identified the person whom he represented as having offered $3,500 for the plums and nectarines, and respondents sold the crop for $60. The records of the packing companies that purchased the 1943 crops showed that appellant had received only $622 for the olives and figs, and that only 252 tons of grapes and 145 boxes of oranges were produced that year. The grape crop for 1944 was less than one-third of the tonnage represented by appellant and yielded a net return of less than one-fourth the stated value. There can be no question that the representations were material, that they were false, and that they were made for the purpose of inducing respondents to purchase the farm.

The contention is made, however, that the evidence establishes as a matter of law that respondents did not rely upon the representations. The negotiations for the purchase were conducted by P. G. Gragnon, one of the respondents, who visited the farm several times before the deal was consummated and inspected the growing grape crop and the fruit trees. Gragnon was experienced in growing alfalfa, flax and cotton, but he was not a vineyardist and knew nothing about growing grapes or other fruit crops, and he testified that in making the purchase he relied on the representations of appellant and his agents.

[2, 3] An independent investigation or an examination of property does not preclude reliance on representations where the falsity of the statement is not apparent from an inspection, or the person making the representations has a superior knowledge, or the party relying thereon is not competent to judge the facts without expert assistance. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 434, 435, 159 P.2d 958; Shearer v. Cooper, 21 Cal.2d 695, 702, 704, 134 P.2d 764. Some of the statements

that were made to induce the purchase of the farm concerned the amount and value of crops produced in 1943, and there is no evidence in the record which would require a finding that the falsity of those representations was discoverable from the inspection made by Gragnon in 1944. Nor does the evidence compel a finding that the falsity of the representations concerning the value and tonnage of the 1944 grape crop was apparent from the inspection. Gragnon saw the farm in the spring, several months before the grapes reached maturity, and, in view of his lack of experience with vineyards, the court was justified in finding that the inspection did not preclude reliance on the representations concerning the tonnage and value of the grapes then growing on the land. Finally, there is no evidence that the falsity of the statement that $3,500 was being offered for the plums and nectarines then on the trees was apparent from an inspection of the crop.

While negotiations for the sale were in progress respondents asked a local bank for a report on the ranch, and after the escrow was opened, but before it was closed, respondents were informed by Mr. Elder, the bank appraiser, that in his opinion "it wasn't a very good ranch" and that he would estimate the grape crop then growing on the land "to be around 275 tons." There was evidence that this information was not received until after respondents had made a down payment of $10,000 and had gone into possession of the ranch; but even if we assume, as claimed by appellant, that the transaction was then still in an executory stage, we cannot say as a matter of law that respondents were precluded by the receipt of this information from relying on the representations made by appellant. The trial court could properly find that respondents believed appellant's estimate of the tonnage of the growing grape crop to be more nearly correct than that of Mr. Elder and that respondents were justified in their continued reliance on appellant's statements as to records of past production as well as the representations concerning the current crops.

Defenses of Waiver, Estoppel and Laches

Appellant contends that the charge of fraud in the cross-complaint is barred by waiver, estoppel, and laches because respondents, after discovering that the representations were false, assertedly made payments on the notes, sought and received appellant's advice and assistance in the operation of the farm, requested an extension of time for payment on the notes, and failed to make any claim of fraud until February, 1945, when the cross-complaint was filed.

[4] When a party learns that he has been defrauded, he may, instead of rescinding, elect to stand on the contract and sue for damages, and in such case his continued performance of the agreement does not constitute a waiver of his action for damages. Paolini v. Sulprizio, 201 Cal. 683, 685–687, 258 P. 380; Thompson v. Modern School, etc., 183 Cal. 112, 117, 118, 190 P. 451; see Prosser on Torts, 1941, 775; 12 Cal.Jur. 782. Appellant relies, however, on Schmidt v. Mesmer, 116 Cal. 267, 270, 271, 48 P. 54, 56, where the court said: "If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand toward the other party at arm's length; he must, on his part, comply with the terms of the contract; *he must not ask favors of the other party,* or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud." [Italics added.] This language has been quoted in several California cases, and the rule has been applied to situations where, as in the Schmidt case, *the requested favors were actually granted.* See for example, Tucker v. Beneke, 180 Cal. 588, 594, 595, 182 P. 299; Schied v. Bodinson Mfg. Co., 79 Cal.App.2d 134, 143, 179 P.2d 380; Howland v. Scott, 117 Cal.App. 275–279, 4 P.2d 200; Jackson v. Meinhardt, 99 Cal.App. 283, 289, 278 P. 462; Ball v. Warner, 80 Cal.App. 427, 430 et seq., 251 P. 929; Monahan v. Watson, 61 Cal.App. 417, 420, 214 P. 1001; Hough v. Ferguson, 36 Cal.App. 120, 121,

171 P. 804; cf. Schader v. White, 173 Cal. 441, 447, 160 P. 557; see also 106 A.L.R. 172 et seq.; Prosser on Torts, 1941, 775–776; 24 Am.Jur. 42–44; 1930, 14 Minn.L.Rev. 299–301.

On the other hand the courts of some jurisdictions have held, in cases where favors have been extended, either that there was no waiver or that the question of intent to waive was one of fact for the jury. Buob v. Feenaughty Machinery Co., 191 Wash. 477, 71 P.2d 559; Graham-Jones Motor Co. v. Nutter, 77 Colo. 74, 234 P. 1063; Bean v. Bickley, 187 Iowa 689, 174 N.W. 675, 686; Garrett v. Neitzel, 48 Idaho 727, 285 P. 472; see Timmerman v. Gurnsey, 206 Iowa 35, 217 N.W. 879, 880. In the Buob case the court said that it would not be reasonable to suppose that a waiver resulted either from an agreement by a seller to put the article sold in proper condition or from an extension of time for payments on the buyer's notes. Cf. 5 Williston on Contracts, Rev.Ed., 1937, 4268, § 1524, suggesting that an extension of time or change in terms of payment might not be given the effect of waiving fraud.

There appears to be no decision in California or elsewhere which squarely holds on its facts that the mere making of an unfulfilled request alone constitutes a waiver as a matter of law. The annotator in 106 A.L.R. 172, 180, states that no clear authority to this effect has been found (see also 24 Am.Jur. 44), and it has been squarely held in at least one case that the making of an ineffectual request does not constitute a waiver. Brustman v. Dunn, 161 Wis. 306, 154 N.W. 361; see also Bean v. Bickley, 187 Iowa 689, 174 N.W. 675, 686; 1930, 14 Minn.L.Rev. 299, 300. In Burne v. Lee, 156 Cal. 221, 227, 104 P. 438, 441, the court said: "Of course, if the mere effort to effect a rescission or compromise had both been ineffectual, it would not have disturbed plaintiff's rights to subsequently stand on the contract and sue for damages for the fraud." Although this may be distinguishable in principle from cases involving requests to extend time or the like, on the ground that attempts to rescind or compromise show no intent whatsoever to waive damages in the absence of a granting of the request, the Burne case is nevertheless some authority to the effect that a request may be made without running the risk of waiver, in the absence of a new agreement, provided the request is of such a nature that it indicates dissatisfaction with the original agreement.

[5] We think it unjust and unreasonable to hold as a matter of law that the mere asking of a favor should deprive an innocent person of rights arising from an unquestionably fraudulent act, and we therefore disapprove of the language in Schmidt v. Mesmer, 116 Cal. 267, 270, 271, 48 P. 54, to the extent that it indicates that the making of a request that is not complied with in itself constitutes a waiver without regard to the circumstances under which it is made.

[6] There is serious doubt whether even a granted request of a favor, such as an extension of time, should be held to constitute a waiver in the absence of estoppel or the making of a new agreement supported by consideration, but we need not determine that question here because the facts established by the record are not as claimed by appellant. The trial court found that the assistance and advice given by appellant with respect to the operation of the ranch were volunteered by him to protect his interest as holder of the mortgage on the crops, and that none of the other requests assertedly made by respondents was granted by appellant.

[7] The defense of laches is based primarily upon contentions which have already been disposed of in our discussion of reliance and waiver. It is also asserted that respondents acquired knowledge of the facts in issue through the operation of the farm in 1944, but that they nevertheless made no charge of fraud until the cross-complaint was filed in February, 1945. The evidence shows, however, that the misrepresentations as to the 1943 crop were not discovered until after the foreclosure proceedings were commenced, and that the full extent of the misrepresentations as to the growing crop could not have been

learned until the end of the farming year after all the crops were sold. In any event it is clear that respondents are not barred by any delay upon their part because the cross-complaint, which was filed well within the statutory period of limitations, was for damages and presented a cause of action at law and not in equity; accordingly, the defense of laches was not available. Brownrigg v. De Frees, 196 Cal. 534, 539, 238 P. 714; San Francisco Credit Clearing House v. Wells, 196 Cal. 701, 706, 239 P. 319; Smith v. City of Los Angeles, 66 Cal.App.2d 562, 586, 153 P.2d 69; Western Machinery Co. v. Graetz, 42 Cal. App.2d 296, 300, 108 P.2d 711.

Damages

Appellant contends, first, that in testifying relative to the value of the real property, respondents' experts erroneously used "actual value" instead of "reasonable market value" as the basis of their opinions. Section 3343 of the Civil Code provides that one who has been defrauded is entitled to recover "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received * * *." We held in a recent case involving this section that it was proper for the court to consider market value in determining actual value. Herzog v. Capital Co., 27 Cal. 2d 349, 354, 164 P.2d 8. A number of decisions have construed section 1249 of the Code of Civil Procedure which prescribes that "actual value" is the measure of compensation for property condemned for a public use. In People v. Ricciardi, 23 Cal.2d 390, 401, 144 P.2d 799, 805, it was held that "the law has adopted market value as establishing actual value." Similarly, in Sacramento etc. R. Co. v. Heilbron, 156 Cal. 408, 415, 104 P.979, 982, the court, in answer to the contention that actual value was the only test, stated that "the law universally has adopted market value as establishing actual value, and, however clumsy the appellant may think that the method is, it is the best one so far as known to the law." See also Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392, 399, 400, 153 P. 705 (foundation of the computation "is and necessarily must be the market value"); People v. Jones, 67 Cal.App.2d 531, 537, 155 P.2d 71.

[8] Other cases and texts clearly show that "value," in connection with legal problems, ordinarily means market value. See Wade v. Rathbun, 23 Cal.App.2d Supp. 758, 759 et seq., 67 P.2d 765; Yellen v. Fidelity & Casualty Co. of New York, 115 Cal.App. 434, 441, 1 P.2d 1019; Bunnell v. Baker, 104 Cal.App. 313, 317, 285 P. 877, 286 P. 1090; Continental Rubber Wks. v. Bernson, 91 Cal.App. 636, 638, 267 P. 553; Dean v. Hawes, 29 Cal.App. 689, 693, 157 P. 558; Wickersham Co. v. Nichols, 22 Cal.App. 731, 733, 136 P. 511; 2 Wigmore on Evidence, 3d Ed., 1940, § 463; 3 Wigmore, supra, §§ 719, 717; McCormick on Damages, 1935, 165. The Restatement, Torts, Comment c. to section 549, states that in deceit cases the value of an article "is normally determined by the price at which it could be resold in an open market or by private sale if its quality or other characteristics which affect its value were known." The theory is that when property is taken, or injured or destroyed by another's wrong, or not delivered pursuant to an obligation, etc., the law will protect the owner's *material* interest and award him such a sum of money as he could have obtained by selling or as would enable him to secure similar property from others. See McCormick on Damages, supra, 165. Another important reason for the rule is that real estate brokers and businessmen usually employ market value as the basic test. See May, The Valuation of Residential Real Estate, 1945, 13; McMichael's Appraising Manual, 3d Ed., 1944, 15. It has also been said that although appraisers do not necessarily attempt to arrive at market value, but rather the amount that a person would be warranted in paying for the property, nevertheless market value supplies a relatively objective and easily administered basis of valuation that no other method can supply. 1 Bonbright, Valuation of Property, 1937, 26 28, 29.

[9] Accordingly, neither sound policy nor business custom suggest that the words "actual value" as used in section 3343 should be construed differently from the identical language in the eminent domain

statutes. No California cases have been found which are contrary to this interpretation. Zinn v. Ex-Cell-O Corp., 24 Cal.2d 290, 297, 149 P.2d 177, and Kendrick, v. Schwartz, 69 Cal.App.2d 171, 175, 158 P.2d 405, involved the question of whether the value of corporate stock was to be ascertained from the worth of the corporate assets or the market price of the stock, and those cases have no bearing upon the problem raised here.

[10] Although the proper and generally accepted method of establishing actual value is by evidence of market value, it does not appear that appellant was prejudiced by the ruling which permitted respondents' witnesses to testify directly as to actual value. There is nothing in the record which indicates that in forming their opinions of value, respondents' witnesses included any proscribed elements or used an erroneous basis of valuation. Moreover, the court found that the sum of $28,220.92 was both the "actual and reasonable market value." Since no improper elements of value were considered by the experts in forming their opinions, and the court treated the phrases as synonymous in its findings, appellant was not prejudiced.

[11] There is no merit in appellant's contention that the farmers, farm appraisers and real estate brokers who gave expert testimony for respondents on the subject of value were not properly qualified. All of them were shown to be familiar with the value of farming land in the community, and, although some of them did not see the farm in 1944, there was evidence that it was then in substantially the same condition as at the time the appraisals were made.

[12] The trial court admitted over objection a listing or card prepared in August, 1944, by respondents' witness, Arthur Barnard, a real estate broker. The card contained the date August 14, 1944, the name of D. H. Bagdasarian, a general description of the property, and the notation "Asked $90,000. Really a piece of junk—remember it as a piece of trading stock—later on." Appellant asserts that the card was not admissible as a business record under section 1953f of the Code of Civil Procedure because there was no proper foundation, because it was not relevant, and, further, because it was governed by the general rule that a party calling a witness has no right to treat as evidence a memorandum used by the witness to refresh his recollection. Citing 27 Cal.Jur. 91. Appellant, however, fails to point out how the ruling, if error, was prejudicial, and in our opinion it was not. The witness had already testified that he had not listed the property for sale because in his opinion it was not worth the price asked, and subsequently he and another witness testified, as valuation experts, that the real property was worth $28,220.92, the precise figure adopted by the trial court. It is clear, therefore, that the court relied on this specific testimony rather than the general notation upon the card.

In fixing the value of the growing fruit crops, the trial court took the sum obtained from the sale of the fruit upon maturity, less respondents' costs of production and selling. It relied upon evidence of the tonnage actually produced and the price per ton for which the crops sold as the basis for an inference as to market value of the crops as a whole at the time the fraud occurred.

[13] Market value of a growing fruit crop as of a particular date may properly be determined by considering the probable yield of the crop and its probable market price per unit when it is to be harvested and sold, less the cost of producing and marketing. Cf. Teller v. Bay & River Dredging Co., 151 Cal. 209, 212–214, 90 P. 942, 12 L.R.A.,N.S., 267, 12 Ann.Cas. 779; 8 Cal.Jur. 719; 15 Am.Jur. 256; McCormick on Damages, 1935, p. 487; 4 Sutherland on Damages, 4th Ed., 1916, § 1023. The trial court apparently sought to follow this rule, since it fixed the "actual and reasonable market value" of the growing crops by taking their market price at the time they were harvested, less respondents' costs of production and marketing.

[14] The next question, therefore, is whether the trial court acted properly in accepting as evidence of *market* value the *actual* price per ton obtained upon sales

made by respondents from the *identical* crops involved in this litigation. Market value of personal property may, of course, be established by testimony of expert witnesses, but this is not the only method, and it has been generally held that the reasonable value of marketable personal property may be shown by market prices or actual specific sales of *other similar* property, provided such sales are bona fide and not too remote in time or place. Betts v. Souhern Cal. etc. Exchange, 144 Cal. 402, 77 P. 993; In re Estate of Goodhue, 127 Cal.App. 283, 15 P.2d 771; People v. Schwarz, 78 Cal.App. 561, 581, 248 P. 990; Holman v. Stockton Sav. and Loan Bank, 49 Cal.App.2d 500, 510, 122 P.2d 120; In re Estate of Spitly, 124 Cal.App. 642, 13 P.2d 385; see Davis v. Fyfe, 107 Cal.App. 281, 284, 290 P. 468; 2 Witkin, Summary of Calif.Law, 6th Ed., 1946, 1765; McBaine, California Evidence Manuel, 1945, § 173, pp. 242–244; 32 C.J.S., Evidence, § 593, pp. 444–452.

[15] Similarly it has been held that market value of personal property may be shown by the price paid for that identical property or by the price obtained for it at a subsequent sale. Moore v. Maryland Casualty Co., 100 Cal.App. 658, 280 P. 1008; Tatone v. Chin Bing, 12 Cal.App.2d 543, 55 P.2d 933; Mattechek v. Pugh, 153 Or. 1, 55 P.2d 730, 734, 168 A.L.R. 725, see Yukon River etc. Co. v. Gratto, 136 Cal. 538, 541, 69 P. 252; 4 Sedgwick on Damages, 9th Ed., 1913, pp. 2638–2639. In Moore v. Maryland Casualty Co., 100 Cal.App. 658, 280 P. 1008, the only evidence of the value of a crop of growing grapes which had been converted consisted of shipping statements showing that actual sales of grapes from the crop brought a net market price of over fifty cents per box, and the court held 100 Cal.App. at page 668, 280 P. at page 1012: "In the absence of evidence to the contrary, the price which a portion of the same variety and crop of grapes actually brought in that market at the time of the conversion furnishes ample proof of the reasonable market value thereof."

It must be recognized that in California a line of decisions has held the value of *real* property may not be proved by evidence of particular sales of *other similar* real property. See, for example, In re Estate of Ross, 171 Cal. 64, 151 P. 1138, and cases there cited. This is the minority view in the United States, and it has been severely criticized. See 118 A.L.R. 869–914; 32 C.J.S., Evidence, § 593, p. 444 et seq.; 2 Wigmore on Evidence, 3d Ed., 1940, § 463, p. 503 et seq. Although this court has recently held that a party in an eminent domain proceeding may not put in evidence the amount paid by a *condemning party* to the owners of similar adjacent lands (City of Los Angeles v. Cole, 28 Cal.2d 509, 170 P.2d 928; Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597, these decisions do not necessarily constitute a reiteration of the general rule of absolute exclusion, since a sale to a condemning party may be affected by factors not present in an ordinary private sale. As appears from the annotation in 118 A.L.R. at p. 893, the Cole and Heimann cases are in accord with the weight of authority in holding that evidence of this particular type of sale is not admissible to prove value.

In any event, as is apparent from the cases involving personal property which we have cited above, the exclusionary rule of the real property decisions has not been applied to personalty. There is some basis for the distinction, since, historically, parcels of real property have always been treated as unique and not similar to other parcels of realty. As stated in McCormick on Damages, 1935, p. 177: "In case of ordinary personal property, where market value is sought, of course the most obvious resort is to evidence of what other similar property, whether wheat, shoes, horses, or what not, currently sold for on the market at that place. * * * Where the property is not of a standardized sort, such as a pedigreed bull or a Rembrandt etching, one encounters difficulties as to whether any other like article sold was sufficiently similar for its price to be indicative. Any tract of land is unique, unless we except vacant lots in a subdivision, and consequently it is in cases of land valuation, and especially in condemnation cases, that the question of admissibility of evidence of prices paid on sales of other land is most frequently discussed." This reasoning is particularly applicable to cases like the present one where the evidence consists of the price obtained at a sale of the *identical* property in question, because in such a situation the only problem as to similarity arises from the possibility that the character or value of the property may have changed between the time of the sale and the time as of which it is to be valued.

In Thompson v. Stoakes, 46 Cal.App.2d 285, 293, 115 P.2d 830, 834, a case involving real property, it was held, however, without discussion or analysis, that "the rule is well settled in this state that on the direct examination of witnesses called to testify as to value, they cannot be permitted to testify as to particular transactions, such as sales of similar or the same property" and that the cases applied the rule "to sales of the very property the value of which is in issue." A similar statement was made by way of dictum in Keating v. Basich Bros. etc. Co., 66 Cal.App.2d 258, 262, 151 P.2d 892. But an examination of the authorities there cited shows that, with the possible exception of the Ramish case, Ramish v. Kirschbraun, 90 Cal. 581, 27 P. 433, discussed later, they did not relate to *actual* sales of the *identical* real property, but rather that they pertained either to *offers* to buy or sell the property in question or to sales of *other* similar property. See In re Estate of Ross, 171 Cal. 64, 151 P. 1138; Central Pac. R. Co. v. Pearson, 35 Cal. 247; Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 284 P. 1072; 10 Cal.Jur. 1027. Moreover, authorities elsewhere are practically unanimous in holding that evidence of other sales of the identical real property is admissible. See cases collected in 155 A.L.R. 262–278; cf. Orgel on Valuation, 1936, 454–455. There is no reason for extending the much-criticized exclusionary rule to evidence of sales of the *identical* property in question, whether realty or personalty, and, accordingly, the Thompson and Keating cases must be disapproved.

In Ramish v. Kirschbraun, 90 Cal. 581, 27 P. 433, it was held that a contract by a buyer of eggs to sell them to third persons was incompetent to establish the market value of the eggs. The court, however, may have believed that an incorrect standard of recovery had been followed by the trial court, since the opinion states, 90 Cal. at page 582, 27 P. at page 433, that the "evidence should have been confined to the inquiry, 'What was the *market value* of eggs between July 8th and July 14th?'" No authority or reason was given for the broad statement that the price agreed on between the buyer and other persons not connected with the sellers was incompetent to establish the market value of the eggs or the liability of the sellers, and this language should not be followed here inasmuch as it is inconsistent with all of the cases dealing with personal property.

It is claimed that the price actually obtained is not sufficient evidence of value because respondents may not have followed proper marketing practices. Similarly it is urged that the trial court should not have accepted the actual tonnage produced by respondents as evidence of the yield which could reasonably have been expected at the time the fraud occurred, because certain factors, such as unfavorable weather and poor farming practices, could have resulted in a lower yield. Appellant's contention is that, in arriving at value, the court should have accepted the estimates of the probable yield of the grape crop made by his experts as of the date of the fraud instead of taking respondents' testimony of tonnage actually produced.

[16] Evidence of the estimated yield which should have been produced was, of course, admissible, but it was not conclusive, and the court properly took into consideration respondents' evidence of the tonnage produced and the price per ton for which it sold as the basis of an inference of market value of the crop as a whole at the time the fraud occurred. The matters urged by appellant to show that this evidence was untrustworthy go merely to the weight of the evidence and, under the circumstances of this case, do not compel its rejection.

Appellant claims that the alfalfa crop was purchased together with the other growing crops but that the finding of the trial court erroneously failed to include the value of the alfalfa in determining the value of all the growing crops purchased. Respondent P. G. Gragnon testified, however, that the purchase of the crops did not include the alfalfa, and appellant admits that the alfalfa was specifically excluded as a crop from the crop and chattel mortgage. It is apparent that the alfalfa was purchased as a part of the real property and that its value was included in the testimony and findings relating to the value of the realty.

The trial court found that respondents suffered damages amounting to $27,916.23 because of the fraud—$15,779.08 with respect to the real property and $12,137.15 as to the growing crops. It is not claimed that any misrepresentations were made concerning the farm equipment, and the court in fixing the amount of damages did not take into consideration the purchase price and the reasonable market value of the equipment at the time of the transfer, although the uncontradicted evidence shows that it was reasonably worth more than respondents paid for it. Appellant contends that the damages should be reduced by the amount of such excess, arguing that under section 3343 of the Civil Code damages for fraud are limited to "out-of-pocket" loss.

Section 3343, enacted in 1935, provides: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction. Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled." The measure of damages set forth in the statute, referred to as the out-of-pocket loss rule, has been followed in England, the federal courts, and a few states. See McCormick on Damages, 1935, 448–454; 24 Am.Jur. 58–62; 1939, 13 So.Cal.L.Rev. 168–170. It has also been accepted by the Restatement as the preferable rule. Rest., Torts, § 549.

It is suggested, however that section 3343 was intended only as a permissive or alternative measure of damages and that the trial court could properly permit recovery of the difference between the actual value of what the defrauded person received and the value which it would have had if it had been as represented. This measure of recovery, known as the "benefit-of-the-bargain" rule, is followed in a majority of the states. See McCormick on Damages, 1935, 448–454; 24 Am.Jur. 55–58.

It has been said, however: "In few of the states have the courts seized upon one of these formulas and applied it with entire consistency in all classes of cases." McCormick, op. cit. supra, 452; see also 24 Am.Jur. 60–62. This statement is applicable to the cases in California which were decided before the adoption of section 3343 of the Civil Code. Although it was generally stated that California applied the benefit-of-the-bargain rule (see Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 679, 67 P.2d 1039; Wood v. Niemeyer, 185 Cal. 526, 532, 197 P. 795; Hines v. Brode, 168 Cal. 507, 510, 143 P. 729; 25 Cal.Jur. 563), it is apparent that there was considerable confusion and that the rule was not always followed. Cf. Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 192, 25 P.2d 839, 91 A.L.R. 1357; Divani v. Donovan, 214 Cal. 447, 454, 6 P.2d 247; MacDonald v. Roeth, 179 Cal. 194, 200 et seq., 176 P. 38; Cross v. Bouck, 175 Cal. 253, 257, 165 P. 702 (explained on denial of hearing by Supreme Court in George Cople Co. v. Hinds, 34 Cal.App. 576, 580, 170 P. 155); Hines v. Brode, 168 Cal. 507, 510, 143 P. 729; Garstang v. Skinner, 165 Cal. 721, 726, 134 P. 329; Barbour v. Flick, 126 Cal. 628, 633, 59 P. 122; 1934, 22 Cal.L.Rev. 456, 457; 1939, 13 So.Cal.L.Rev. 168, 169.

Since the enactment of section 3343, however, all the California cases have either held or assumed that the statute prescribed the measure of damages to be applied in fraud cases. Jacobs v. Levin, 58 Cal.App.2d Supp. 913, 137 P.2d 500, is directly in point. It was there held that in view of the enactment of section 3343 the plaintiff could not recover on the theory that the house he had purchased from defendants was worth less than the value it would have had if, as defendants had impliedly represented, it had contained a usable fireplace. The court noted the arguments for and against both rules and stated, 58 Cal.App.2d Supp. at page 916, 137 P.2d at page 501: "Neither rule has proved altogether satisfactory and as a result the law has fluctuated from time to time in some of the states. 24 Am.Jur. p. 60. After considering the merits of the two rules the American Law Institute in its Restatement of the Law of Torts adopted the federal or 'out-of-pocket loss' rule. Restatement, § 549." The court then concluded that by the enactment of section 3343 the out-of-pocket loss rule was substituted for the loss-of-the-bargain rule in California.

In Rothstein v. Janss Investment Corp., 45 Cal.App.2d 64, 73, 113 P.2d 465, 469, it was said: "Since the cause must be remanded for a trial of the issues, it may be well to call attention to the present rule as to damages in such cases as embodied in the provisions of section 3343 of the Civil Code, added by Statutes of 1935. * * * The measure of damages thus set forth is the difference between the consideration paid for the property and the actual value of the property, with additional damage, if any. This would appear to abrogate the former rule as set forth in Rogaff v. Bartles, 1931, 115 Cal.App. 429, 1 P.2d 517, and cases there cited, wherein it was held that the measure of damages was the difference between the actual value of the property and the value it would have had if the representation had been true."

In Shonts v. Hirliman, D. C., 28 F.Supp. 478, 481, 482, it was stated that the rule permitting recovery on the basis of value of the property if it had been as represented "was abolished in California by the Amendment of 1935 to Section 3343 of the Civil Code."

Feckenscher v. Gamble, 12 Cal.2d 482, 85 P.2d 885, was an action for damages for fraud arising from false representations of value made by defendants during the course of a transaction by which plaintiff and defendants exchanged certain properties. Section 3343 of the Civil Code became effective after the accrual of the cause of action but before the trial. The trial court, however, allowed recovery in the sum of $17,760, representing the difference between the "actual value" of the property which plaintiff received and "the valuation * * * as represented." 12 Cal.2d at page 499, 85 P.2d at page 893. On appeal, in sustaining defendants' objection that the correct measure of damages was not applied, this court declared that after "the completion of the transaction and before the trial of the case, the measure of damages was changed by the legislature by an amendment and the new measure was in effect at the date of the trial" and, further, that section 3343 governed even though it was not the measure of damages in existence at the time of the accrual of the cause of action. 12 Cal.2d at pages 499, 500, 85 P.2d at page 893. The opinion states that the reasonable value of the property parted with by plaintiff was $13,700, that she actually received nothing of value from the transaction, and, accordingly, that the judgment should be modified by reducing the amount of recovery from $17,760 to $13,700. Thus, it was squarely held that, after the enactment of section 3343, a person who has been defrauded may no longer recover the difference between the actual value of the property received and the value it was represented to have.

A number of other cases have applied section 3343 without any discussion of the problem. Herzog v. Capital Co., 27 Cal.2d 349, 354, 164 P.2d 8; Schied v. Bodinson Mfg. Co., 79 Cal.App.2d 134, 145, 179 P.2d 380; Kendrick v. Schwartz, 69 Cal.App.2d 171, 175, 158 P.2d 405; Macart v. San Joaquin B. & L. Ass'n, 45 Cal.App.2d 395, 400, 114 P.2d 395; Mortimer v. Young, 37 Cal.App.2d 164, 168, 98 P.2d 1061; see Zinn v. Ex-Cell-O Corp., 24 Cal.2d 290, 297, 149 P.2d 177; Taylor v. Wright, 69 Cal.App.2d 371, 385, 386, 159 P.2d 980; Martin v. Tully, 44 Cal.App.2d 226, 234, 112 P.2d 282. We have been able to find no case, however, which has applied the benefit-of-the-bargain rule after section 3343 became operative. Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 67 P.2d 1039, is apparently the last decision stating the former rule to be a proper measure of damages. The judgment in that case was rendered May 6, 1935, before section 3343 became effective, and the opinion made no reference to the statute.

[17] In view of the broad, general language of section 3343 of the Civil Code and the uncertainty in the law that existed both here and elsewhere prior to the adoption of that section, it is reasonable to conclude that the statute was enacted to provide a uniform rule for fraud cases, and we can see no reason for refusing to follow the decisions which have applied it as the exclusive measure of damages. Moreover, to hold that an additional or alternative measure may be applied in some cases would create further confusion with respect to when the alternative measure would be appropriate in place of the statutory measure and whether the matter would be one for the judge, as a matter of law, or for the jury.

The provisions of section 3343 to the effect that the defrauded person may also recover any "additional damage" arising from the particular transaction and that nothing in the statute shall be deemed to deny to such a person "any legal or equitable remedies" to which he may be entitled, do not indicate that any other *measure of damages* may be applied. The right to recover *additional* damages does not refer to the *measure* of damages, but, rather, to such matters as expenses or other consequential injury resulting from the fraud. See Jacobs v. Levin, 58 Cal.App.2d Supp. 913, 917, 137 P.2d 500; see also Rest., Torts, § 549, which also permits such additional recovery. The provision relating to other legal or equitable *remedies* likewise does not pertain to measure of damages, but, rather, it preserves such other remedies as the right to rescind or the right to recover on a warranty, if any. See Jacobs v. Levin, supra, 58 Cal.App.2d Supp. at page 918, 137 P.2d 500. The construction which has been placed on section 3343 does not preclude the allowance of exemplary damages. Civ.Code, § 3357; Taylor v. Wright, 69 Cal.App.2d 371, 386, 159 P.2d 980.

[18] In the present case it is clear, therefore, that the trial court could properly award only out-of-pocket loss in fixing respondents' damages. The purchase of the farm equipment could be disregarded in determining the amount of damages only if the transaction was entirely separate and distinct from the purchase of the farm and the crops. The court, however, found in accordance with the allegations of the cross-complaint that "the purchase of said real property, personal property, farm equipment and crops * * * arose out of and were a part of the same transaction." See Civ. Code § 1642; Goodspeed v. Great Western Power Co., 33 Cal.App.2d 245, 265 et seq, 91 P.2d 623, 92 P.2d 410. Since the items of the transaction were not severable, the sum paid for the farm equipment must be included as a part of the total consideration given by respondents and the actual value of the farm equipment must be included as a part of the value of the property received by respondents. The purchase price of the farm equipment was $1500. Respondents' witness testified that its value as of June, 1944 was $2404.75, and appellant testified that its value as of that date was approximately $7000. No finding was made, however, as to the value of this property, and the failure to determine the amount and to include it in computing the value of the property received constituted prejudicial error.

[19] The judgment provides that the balance due on the note for $24,000 secured by the crop mortgage be set off against the damages for fraud; that the note be thereby paid and discharged; and that the balance of the damages for fraud be credited upon and set off against the first payments of the principal and interest due and to become due on the note for $34,000 secured by the deed of trust on the real property. Appellant complains because the damages are set off against the first payments to become due on the real property note instead of against the last payments. It is clear, however, that the award of damages on the cross-complaint was payable immediately, whereas under the terms of the note appellant had an immediate right only to such payments as had then become due. Although he was entitled to a set-off with respect to the matured payments, he had no right to a set-off as to payments that were not yet due. C.C.P. §§ 438, 440; see 23 Cal.Jur. 232; 47 Am.Jur.

738. The set-off with respect to the real property note was made by the court at the request of the appellant, and he cannot complain if the court in seeking to do equity gave him a greater advantage than he may have been legally entitled to receive.

The failure to find the value of the farm equipment and make the proper allowance therefor in awarding damages requires a new trial for the limited purpose of ascertaining the value of such equipment.

That portion of the judgment appealed from is reversed, and the cause is remanded with directions (1) to ascertain the value of the farm equipment as of the date of sale; (2) to add the amount of that value to $38,583.77, the value of the real property and the crops as found by the trial court; (3) to deduct that total from $68,000, the price paid for the real property, crops, and equipment; (4) to adjudge that respondents are entitled on their cross-complaint to damages in the amount of the difference between the price paid and the total value of the real property, crops, and equipment; and (5) to allow the amount of the damages as so computed to be set off in the manner provided in the judgment appealed from, the set-off to be effective as of January 4, 1946, the date of rendition of that judgment. The parties shall bear their own costs on appeal.

SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent.

I do not agree that the out-of-pocket loss rule is preferable to the benefit-of-the-bargain rule as a measure of damages in fraud-sale cases; nor do I agree that we are bound to hold that the purpose of enacting section 3343 (of the Civil Code) in 1935 was to substitute the out-of-pocket loss measure of damages for fraud in place of the former benefit-of-the-bargain rule. The statute as enacted specifically declares that "Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled." As I read the whole enactment, in the light of the language above quoted and the history of the bill in this state and similar measures elsewhere, we could justifiably hold that the purpose of the legislature was not *prohibitively to substitute* the "out-of-pocket" rule for the "benefit-of-the-bargain" rule but, rather, *permissively to provide* an additional or alternative remedy or measure of damages which might be applied in proper cases.

It seems reasonable to me to believe that the legislature had purposed giving the defrauded victim greater protection; but the construction given the act by the majority opinion turns it into an act to protect the perpetrator rather than the victim of the fraud. As pointed out by Professor Williston, under the rule now adopted by the majority "a fraudulent person can in no event lose anything by his fraud. He runs the chance of making a profit if he successfully carries out his plan and is not afterwards brought to account for it; and if he is brought to account, he at least will lose nothing by his misconduct." (5 Williston on Contracts, Rev. Ed., sec. 1392, p. 3886.)

It is quite conceivable that a buyer might purchase property solely because it was represented to possess a certain quality; the presence or absence of that quality in one case might substantially affect, and in another not affect at all, the market value of the property. In one case the "benefit-of-the-bargain" rule might alone afford an adequate and just remedy; in the other case the circumstances could well be such that only the "out-of-pocket" rule would accomplish a substantial recovery. Under the majority opinion rule the fraudulent misrepresentation is wholly immaterial on the question of the amount of damages; and a fraudulently induced purchase contract entered into under our system of free enterprise, of course for profit, and which would produce a profit if the fraudulent misrepresentations were true, affords no basis whatsoever for the recovery of damages on account of the falsity of the representations and the consequent failure of the contract to produce a profit. If the property purchased is worth barely the contract price, no recovery of damages can be had; the loss of the legitimately contemplated profit of the entrepreneur must be borne wholly by the victim, not at all by the perpetrator, of the fraud; if the property is worth less than the contract price, the worst that can happen to the fraud perpetrator is that he may be restored to his former estate; i. e., he may be deprived of his fraudulent profit, but of no more. The innocent victim, however, as noted, is deprived of his legitimately contemplated profit.

I recognize that in a number of cases decided in this jurisdiction since the 1935 statute was enacted it has been tacitly assumed that the new legislation stated the exclusive measure of damages in fraud-sale cases; but in the absence of discussion pointed directly at this question, and considered determination thereof, I do not believe that we should now regard it as closed.

In my view the trial court's findings are predicated on a proper theory of recovery (the benefit-of-the-bargain rule) and are supported by sufficient evidence. Accordingly, I would affirm the judgment.

Rehearing denied; SCHAUER, J., dissenting.

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31 Cal.2d 872

PEOPLE of the State of California, Plaintiff and Respondent, v. SOGATARO FUJITA and Kozue Fujuita, his wife, and Tomoe Fujuita, Defendants and Appellants.

S. F. 17589.

Supreme Court of California, in Bank.
May 18, 1948.

Appeal from Superior Court, Fresno County; Clark Clement, Judge.

William E. Ferriter and James C. Purcell, both of San Francisco, and G. L. Aynesworth and Ida E. Campbell, both of Fresno, for appellants.

Fred N. Howser, Atty. Gen., and Jack W. Hardy, Deputy Atty. Gen., for respondents.

PER CURIAM.

This action was brought to declare an escheat of real property held by aliens ineligible for American citizenship. Subsequent to the noticing of the appeal, the Supreme Court of the United States decided the case of Oyama v. State of California, 68 S.Ct. 269, and the parties hereto conceding that the Oyama decision is controlling of the issues presented here, have filed a stipulation for reversal of the judgment.

Judgment is therefore reversed, each side to bear its own costs on appeal, and remittitur to issue forthwith.

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31 Cal.2d 871

PEOPLE of the State of California, Plaintiff and Respondent, v. FEDERAL LAND BANK OF BERKELEY, a corporation, et al., Defendants and Appellants.

L. A. 19942.

Supreme Court of California, in Bank.
May 18, 1948.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

A. L. Wirrn, Fred Okrand and Charles A. Thomasset, all of Los Angeles, for appellants.

Fred N. Howser, Atty.Gen., Jack W. Hardy, Dep. Atty. Gen., and James Don Keller, Dist. Atty., of San Diego, for respondent.

PER CURIAM.

This action was brought to declare an escheat of real property held by aliens ineligible for American citizenship. Subsequent to the noticing of the appeal, the Supreme Court of the United States decided the case of Oyama v. State of California, 68 S.Ct. 269, and the parties hereto, conceding that the Oyama decision is controlling of the issues presented here, have filed a stipulation for reversal of the judgment.

Judgment is therefore reversed, each side to bear its own costs on appeal, and remittitur to issue forthwith.

31 Cal.2d 766

WARNER BROS. PICTURES, Inc. v. BRODEL et al.

L. A. 19887.

Supreme Court of California, in Bank.

May 3, 1948.

Rehearing Denied May 27, 1948.

1. Infants 🔑58(1)

Disaffirmance of a minor's contract, executed or executory, whether disaffirmance is declared before or after majority, has the effect of rescission.

2. Infants 58(1)

Code section that a "minor" cannot disaffirm a contract, otherwise valid, to perform or render services as an actor or actress, where contract has been approved by superior court, deprives a minor of right of disaffirmance not only during minority but also after reaching majority. Civ.Code, § 36.

See Words and Phrases, Permanent Edition, for all other definitions of "Minor".

3. Contracts 🔑172

An "option agreement" is a contract distinct from the contract to which the option relates, since it does not bind the optionee to perform or enter into the contract under the terms specified in the option.

See Words and Phrases, Permanent Edition, for all other definitions of "Option Agreement".

4. Contracts 🔑172

An option contract gives the optionee a right against the optionor for performance of the contract for which the option relates, on exercise of the option, which the optionor cannot defeat by repudiating the option.

5. Contracts 🔑172

Since optionor promises to perform contract to which option relates, subject to a condition at discretion of optionee, an option contract involves on part of optionor a unilateral promise to perform obligations of the contract to which the option relates.

6. Master and servant 🔑3(1)

Even though option agreement differs from contract of employment, granting of option for a contract of employment by a prospective employee to a prospective employer involves a binding promise of the employee to perform services on specified terms and thus constitutes on his part a contract to perform or render services.

7. Injunction 🔑61(2)

Equity rule that under a contract calling for exceptional services an employer can enjoin his employee from rendering such services to others, is applicable to options.

8. Infants 🔑58(1)

Code section providing that a minor cannot disaffirm a contract, otherwise valid, to perform services as actor or actress, where such contract has been approved by the superior court, applied to option provisions of contract between producer of motion pictures and minor actress giving producer six separate options to extend the term of actress' employment for additional successive periods of 52 weeks each. Civ.Code, § 36.

9. Infants 🔑58(1)

Labor Code Section prohibiting enforcement of contracts for employment extending over a period of more than seven years, applies to the term of employment of minors under contracts specified in code section providing that a minor cannot disaffirm a contract, otherwise valid to perform services as an actor or actress, where contract has been approved by superior court. Labor Code, § 2855; Civ.Code, § 36.

10. Statutes 🔑181(2)

Statutes should be given a common sense meaning that entails no unreasonable consequences.

11. Constitutional law 🔑211
Infants 🔑4
Statutes 🔑76(1)

Code section providing that a minor cannot disaffirm a contract, otherwise valid, to perform services as an actor or actress where contract has been approved by superior court, does not violate constitutional rights of a minor under the equal protection of laws clause of the Federal Constitution or under provisions of state constitution against special legislation. Civ. Code, § 36; Const. art. 4, § 25; U.S.C.A. Const. Amend. 14.

12. Injunction ⚷189

If moving picture producer's allegations in complaint stated a cause of action against actress who had disaffirmed a contract entered into with producer when actress was a minor, to enjoin actress from performing services for others, and were supported by proof, trial court could grant producer any relief consistent with its cause of action. Code Civ.Proc. § 580.

SHENK and CARTER, JJ., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Warner Bros. Pictures, Inc., against Joan Brodel, professionally known as Joan Leslie, and others to enjoin performance of services by the named defendant for the other defendants. From a judgment for defendants, the plaintiff appeals.

Judgment reversed.

Prior opinion, 179 P.2d 57.

Freston & Files, Ralph E. Lewis and Gordon L. Files, all of Los Angeles, for appellant.

Oscar R. Cummins, of Beverly Hills, Jennings & Belcher, Frank Belcher, Max Radin, Aaron J. Blackman and Robert Kingsley, all of Los Angeles, for respondents.

TRAYNOR, Justice.

On March 27, 1942, plaintiff, a producer of motion pictures, entered into a written agreement with defendant Brodel, then a minor seventeen years of age, wherein the latter promised to perform dramatic services exclusively for plaintiff "for and during the term of the agreement." The instrument provided that "the term of this contract" should commence on March 30, 1942 and continue thereafter for 52 weeks; that during this period defendant should receive a weekly salary of $600; and that "in consideration of the terms and covenants of this agreement and of the consent of the producer to the amount of compensation as herein set forth" plaintiff should have six separate options to extend the term of defendant's employment for additional successive periods of 52 weeks each, at a progressively higher salary, namely, $750, $1,000, $1,250, $1,750 and $2,250 per week. Under section 36 of the Civil Code the agreement was submitted to the Superior Court of Los Angeles County for approval, and on May 12, 1942, the court approved the agreement and incorporated in it its order. This incorporation makes it clear that the court approved the whole agreement including the options.

When this order was made, the pertinent provisions of section 36 read as follows: "A minor can not disaffirm a contract, otherwise valid, to perform or render services as actor, actress, or other dramatic services, as participant or player in professional sports, including, but without being limited to, professional boxers, professional wrestlers and professional jockeys, where such contract has been approved by the superior court of the county where such minor resides or is employed. Such approval may be given on the petition of either party to the contract after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard."

Defendant performed her obligations under the agreement for the first fifty-two weeks, and, when plaintiff elected to exercise the first three options, she continued to perform for three additional periods of fifty-two weeks each. In January 1946 defendant reached her majority. On February 13, 1946 plaintiff gave notice to defendant of its election to exercise the fourth option. Defendant replied by notifying plaintiff that she disaffirmed her agreement and would render no further services to plaintiff. Immediately thereafter she entered into an agreement with the other defendants, also motion-picture producers, to perform dramatic services for them.

Basing its cause of action on the foregoing facts alleged in its complaint together with the allegation that when the other defendants entered into their contract with defendant Brodel, they were aware of her obligations toward plaintiff and contrived to circumvent plaintiff's rights, plaintiff brought this action for declaratory relief and for an injunction preventing defendant Brodel from performing and the other defendants from causing her to perform dramatic services for anyone except plaintiff. The trial court sustained demurrers interposed by defendants, without leave to amend, and dismissed the action. Plaintiff appeals.

Plaintiff contends that the approval of the agreement by the court deprived defendant Brodel of the right of disaffirmance. Defendant contends that this approval deprived her of the right of disaffirmance only during her minority but did not preclude disaffirmance within a reasonable time after she reached majority. Defendant contends also that section 36 applies only to contracts of employment; that options for a contract of employment are not contracts of employment; that therefore the court had no power to approve the option features of the agreement; and that the statute cannot be applied to the present case without depriving defendant of her constitutional rights under the equal protection of the laws clause of the United States Constitution, Amend. 14, and the provisions against special laws in section 25 of Article IV of the California Constitution.

[1, 2] Section 35 of the Civil Code provides: "In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor * * * may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards." Section 36 provides that "A minor cannot disaffirm a contract" approved by the court. Defendant contends that the use of the phrase "a *minor* cannot disaffirm" in section 36 (italics added) makes it clear that disaffirmance of a contract approved by the court is barred only for the period of the minority of the party to the contract and that the minor can disaffirm the contract during the second period referred to in section 35, namely, within a reasonable time after majority. This contention takes no account of the fact that section 35 grants the right of disaffirmance before or after majority only in cases "other than those specified in section thirty-six and thirty-seven," or of the fact that it speaks of disaffirmance after majority as disaffirmance "by the minor," and thus specifies the status of the person when he made the contract, not his status when he disaffirms it. There is no need to repeat in other sections of the Civil Code the provisions in section 35 as to who may disaffirm and when disaffirmance may be declared; they are part of the law of disaffirmance in that code and must therefore be read into other sections of the code relating to disaffirmance of contracts of a minor. Moreover, section 36 confers upon the superior courts the power by their approval of contracts of minors to remove from the obligations incurred therein the uncertainty that otherwise attends contract obligations of a minor because of his right of disaffirmance. Disaffirmance of a contract, executed or executory, whether declared before or after majority has the effect of a rescission. Flittner v. Equitable Life Assur. Soc., 30 Cal.App. 209, 216, 157 P. 630; Tracy v. Gaudin, 104 Cal.App. 158, 160, 285 P. 720; see, 1 Williston, Contracts, Rev. Ed., Sec. 231. If section 36 prohibited disaffirmance of a contract approved by the court during minority only, but permitted disaffirmance thereof after majority, it would not remove the uncertainty attending the right of disaffirmance. If the section merely postponed the exercise of the minor's right to disaffirm, it would thereby only prolong the uncertainty, since a minor who intended to disaffirm the contract would have to leave the matter in suspense until he reached majority.

[3] Defendant's contention that a court has no power under section 36 to approve an option such as the options in the agreement between parties is based on the language of the section providing for approval of a contract "to perform or render services." Defendant contends that since an agreement granting an option is a contract to keep an offer open and as such is distinct from the contract to which the option relates, an option for a contract of employment is therefore not itself a contract "to perform or render services." It is universally accepted that an option agreement is a contract distinct from the contract to which the option relates, since it does not bind the optionee to perform or enter into the contract upon the terms specified in the option. It does not follow, how-

ever, that by entering into an option contract, whereby he irrevocably promises to render services to the optionee upon the timely exercise of the option by the latter, an optionor does not enter into a contract "to perform or render services."

[4-6] In an option contract the optionor stipulates that for a specified or reasonable period he waives the right to revoke the offer. (Bard v. Kent, 19 Cal.2d 449, 452, 122 P.2d 8, 139 A.L.R. 1032; Hicks v. Christeson, 174 Cal. 712, 716, 164 P. 395; Seeburg v. El Royale Corporation, 54 Cal. App.2d 1, 4, 128 P.2d 362; Bruce v. Mieir, 120 Cal.App. 287, 290, 7 P.2d 1037; see, Johnson v. Clark, 174 Cal. 582, 163 P. 1004; Reese Co. v. House, 162 Cal. 740, 124 P. 442; Tufts v. Mann, 116 Cal.App. 170, 178, 2 P.2d 500; Restatement, Contracts, sec. 47.) Such a contract is clearly different from the contract to which the irrevocable offer of the optionor relates, for the optionee by parting with special consideration for the binding promise of the optionor refrains from binding himself with regard to the contract or conveyance to which the option relates. An option contract relating to the sale of land is therefore "by no means a sale of property, but is a sale of a right to purchase" (Hicks v. Christeson, 174 Cal. 712, 716, 164 P. 395, 397; see, Smith v. Bangham, 156 Cal. 359, 365, 104 P. 689, 28 L.R.A.,N.S., 522; Ware v. Quigley, 176 Cal. 694, 698, 169 P. 377; Ludy v. Zumwalt, 85 Cal.App. 119, 130, 131, 259 P. 52; Alegretti v. Gardner, 74 Cal.App. 564, 566, 241 P. 408; Howard v. D. W. Hobson Co., 38 Cal.App. 445, 455, 176 P. 715; Menzel v. Primm, 6 Cal.App. 204, 209, 91 P. 754), or, as stated in Shaugnessy v. Eidsmo, 222 Minn. 141, 23 N.W.2d 362, 363, 166 A.L.R. 435: "* * * A contract conferring an option to purchase is * * * an irrevocable and continuing offer to sell, and conveys no interest in land to the optionee, but vests in him only a right in personam to buy at his election." Nevertheless, while the optionee incurs no liability with regard to the contract or conveyance as to which he holds an option, the optionor has irrevocably promised upon the exercise of the option to perform the contract or make the conveyance upon the terms specified in his binding offer. Western Union Tel. Co. v. Brown, 253 U.S. 101, 110, 40 S.Ct. 460, 64 L.Ed. 803; Shaugnessy v. Eidsmo, 222 Minn. 141, 23 N.W.2d 362, 363, 166 A.L.R. 435; Richanbach v. Ruby, 127 Ore. 612, 271 P. 600, 61 A.L.R. 1441; 12 Am.Jur. 524, 525. The optionee parts with consideration only because the optionor has incurred such liability. The creation of the final contract requires no promise or other action by the optionor, for the contract is completed by the acceptance of the irrevocable offer of the optionor by the optionee. "The contract has already been made, as far as the optionor is concerned, but it is subject to conditions which are removed by the acceptance." Seeburg v. El Royale Corporation, 54 Cal.App.2d 1, 4, 128 P.2d 362, 363, see, Erickson v. Boothe, 79 Cal.App.2d 266, 272, 179 P.2d 611. Thus the option contract gives the optionee a right against the optionor for performance of the contract to which the option relates upon the exercise of the option, which the optionor cannot defeat by repudiating the option. See, McGovney, Irrevocable Offers, 27 Harv. L.Rev. 644, 646, 654, and cases collected in footnote 5, p. 646; Corbin, Option Contracts, 23 Yale L.J. 641, 656. Since the optionor promises to perform the contract to which the option relates, subject to a condition at the discretion of the optionee, an option contract involves on the part of the optionor a unilateral promise to perform the obligations of the contract to which the option relates. Heller v. Pope, 250 N.Y. 132, 164 N.E. 881, 882; Lake Shore Country Club v. Brand, 339 Ill. 504, 171 N.E. 494, 501; Robbs v. Illinois Rural etc. Corporation, 313 Ill.App. 418, 40 N.E. 2d 549, 551; Schlein v. Gairoad, 127 N.J.L. 358, 22 A.2d 539, 540; Shaugnessy v. Eidsmo, 222 Minn. 141, 23 N.W.2d 362, 365; Zora Realty Co. v. Green, Sup., 60 N.Y.S.2d 440, 445; see, 1 Williston, Contracts, Rev.Ed. pp. 175–176; Corbin, Option Contracts, 23 Yale L.J. 641, 650; Restatement, Contracts, sec. 12. It follows that even though the option agreement differs from the contract of employment, the granting of an option for a contract of employment by a prospective employee to a prospective employer involves a binding promise of the optionor to perform serv-

ices upon specified terms and thus constitutes on his part a contract "to perform or render services."

[7] The rule of equity that under a contract calling for exceptional services an employer can enjoin his employee from rendering such services to others, has been held applicable to options, since "an option, when based on a sufficient consideration, is a contract by which one binds himself to * * * perform services", and an employee can therefore be enjoined from performing extraordinary services to others during a period for which his employment under a contract of employment has been extended by the exercise of an option of the employer. Shubert Theatrical Co. v. Rath, 2 Cir., 271 F. 827, 833, 20 A.L.R. 846; see, Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973, 58 L.R.A. 227, 90 Am. St.Rep. 627.

[8] The fact that the promise of the minor to render services in an option agreement is subject to the condition precedent that the option be exercised does not make section 36 inapplicable. Nothing in that section indicates that a contract to render services must be unconditional to be approved by the court under that section. Thus a court could approve a contract of a minor actor to perform dramatic services made subject to the condition that a certain motion picture in the planning stage shall be produced; or that a certain play shall be performed; or that another actor shall not participate in a performance. There is no difference between contracts of a minor making the rendering of his services dependent upon such conditions, and an option contract making the rendering of his services dependent upon the exercise of the option by the other party.

The options granted to plaintiff by defendant were included in a contract providing for employment of the minor for a period of fifty-two weeks at a salary of $600 per week. Even if they were not in themselves contracts to perform or render services within the meaning of section 36, they can be approved by the court as part of a contract of employment.

Section 36 does not prescribe the terms of a contract to perform or render services in the professions specified in the section. It is obvious that a contract of a minor for employment in such professions may reasonably contain many provisions other than those specifying the services to be rendered and the compensation to be paid therefor. Thus, a minor actor may incur obligations to travel, to participate in instruction and training deemed necessary by the employer, to refrain from immoral conduct, to attend publicity meetings or social gatherings arranged by the employer, and to cooperate in other respects with the employer in his endeavors to attract the attention of the public to the employee. There was no need for the Legislature to enact provisions with regard to the content of the contracts specified in section 36, for the Legislature made each contract subject to judicial scrutiny to insure that in the light of the reasonable interests of both parties it adequately protect the interests of the minor.

The provisions in section 36 regarding the submission of contracts of minors for court approval are based on a policy different from "the policy of the law to discourage adults from contracting with infants" (Tracy v. Gaudin, 104 Cal.App. 158, 160, 161, 285 P. 720, 721; Flittner v. Equitable Life Assur. Soc., 30 Cal.App. 209, 157 P. 630), which underlies the right of minors to disaffirm their contracts. In professions in which one frequently begins a career at a tender age, it is to the interest of minors that they be able to make contracts with employers reasonably protecting the interests of both parties. To accomplish this purpose broad discretion has been vested in the court to which such contracts are submitted. The court may consider whether the terms of the contract are reasonable in the light of the then financial and educational interests of the minor as well as the proper development of his talents and his chances for success in the profession. This discretion, which has been vested in the court to enable the parties to adjust their contract relations to their needs, would be rendered ineffectual to serve the best interests of the minor if it were not applicable to such option provisions as in this case.

[9, 10] An option to extend the term of employment is common to contracts of employment in the professions specified in

section 36. Court decisions relating to contracts of adult performers or players in professional sports evidence the use of such option clauses. Shubert Theatrical Co. v. Rath, 2 Cir., 271 F. 827, 20 A.L.R. 486; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973, 58 L.R.A. 227, 90 Am.St.Rep. 627. In contracts of employment with minor actors option clauses are even more important, for frequently the employer is contracting with persons of no tested ability or established reputation, who may prove to have no appeal to the public. See, Penfield v. Bennet Film Laboratories, 4 Cal. App.2d 306, 40 P.2d 587. He may reasonably object to committing himself to a long term contract of employment or to making large initial investments without securing the right to make use of the talents of the employee in the future should they meet expectations and find public recognition. The expedient of granting one or more options to the employer to extend the term of employment at an increasing rate of compensation encourages him to develop unknown talent; Without such an expedient few employers would risk the costly sponsorship of such talent. Section 2855 of the Labor Code, which prohibits the enforcement of contracts for employment extending over a period of more than seven years, applies to the term of employment of minors under contracts specified in section 36. De Haviland v. Warner Bros. Pictures, Inc., 67 Cal.App.2d 225, 153 P.2d 983. There is thus a seven-year limit on the period for which an actor can be bound by a contract of employment. Given that limitation the court considers before approving a contract under section 36 whether or not the interests of the minor are best protected by a contract granting to the employer the right to exercise one or more options to extend the term of employment. If the court were precluded from approving contracts with such option clauses, even though reasonable persons would include them in their contracts, the employers deprived of the protection of such clauses would unquestionably offer contracts less favorable to the minors. Such an interpretation of section 36 would violate the familiar rule of statutory construction that statutes should be given a common sense meaning that entails no unreasonable consequences. Dempsey v. Market Street R. Co., 23 Cal.2d 110, 113, 142 P.2d 929; Aggeler v. Dominguez, 217 Cal. 429, 434, 19 P.2d 241; Kipp v. Billingham, 217 Cal. 527, 530, 20 P.2d 318; Telegraph Ave. Corporation v. Raentsch, 205 Cal. 93, 97, 269 P. 1109, 61 A.L.R. 366; Cullerton v. Mead, 22 Cal. 96, 98; Loftis v. Superior Court, 25 Cal.App.2d 346, 359, 77 P.2d 491; Calif. Employment Stabilization Commission v. Municipal Court, 62 Cal.App.2d 781, 785, 145 P.2d 361.

We are here concerned with section 36, as it read before the 1947 amendment. In 1947 after the order approving the contract between the parties had been entered the provisions of section 36 were amended by the Legislature.[1] The intent of the Legislature was to leave no doubt as to the meaning of section 36, and in no wise to change it, for it declared: "The amendment made by this act does not constitute a change in, but is declaratory of, the preexisting law." Stats.1947, ch. 526, Sec. 2.

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[1] "A contract, otherwise valid, entered into during minority, cannot be disaffirmed upon that ground either during the actual minority of the person entering into such contract, or at any time thereafter, in the following cases:

"1. * * *

"2. A contract or agreement employing such person as, or wherein such person agrees to perform or render services as, an actor, actress, or other dramatic performer, or as a participant or player in professional sports, including, but without being limited to, professional boxers, professional wrestlers and professional jockeys, where such contract or agreement has been approved by the superior court in the county in which such minor resides or is employed. Such approval may be given upon the petition of either party to the contract or agreement after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard; and said court shall have jurisdiction to approve, and its approval when given shall extend to the whole of said contract or agreement, and of all the terms and provisions thereof, including, but without being limited to, any optional or conditional provisions contained therein for extension, prolongation or termination of the term thereof." Stats.1947, ch. 526, Sec. 1.

[11] It can hardly be questioned that there are reasonable grounds for the statutory provisions withdrawing the right of disaffirmance from minors with regard to contracts to render services in the professions specified in section 36, if such contracts are found reasonable by a court in a special proceeding for the examination thereof. Whether certain other groups of minors engaged in professions similar to those specified in section 36 should be included in the section is a matter of legislative discretion. New legislation such as this ordinarily first covers the fields where it is most urgently needed, and may be extended in the light of experience. People v. Western Fruit Growers, 22 Cal.2d 494, 506, 140 P.2d 13; Rainey v. Michels, 6 Cal. 2d 259, 270–273, 57 P.2d 932, 105 A.L.R. 148; Martin v. Superior Court, 194 Cal. 93, 101, 227 P. 762; Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 323, 325, 326, 88 P. 356, 8 L.R.A.,N.S., 682, 119 Am.St.Rep. 199; In re McKelvey, 19 Cal.App.2d 94, 96, 64 P.2d 1002; Radice v. New York, 264 U.S. 292, 296–298, 44 S.Ct. 325, 68 L.Ed. 690; Keokee Coke Co. v. Taylor, 234 U.S. 224, 227, 34 S.Ct. 856, 58 L.Ed. 1288; Bachtel v. Wilson, 204 U.S. 36, 41, 27 S.Ct. 243, 51 L.Ed. 357; Carmichael v. Southern Coal and Coke Co., 301 U.S. 495, 509, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327. The statute therefore does not violate constitutional rights of the defendant under the equal protection of laws clause of the United States Constitution or under the provisions of the California Constitution against special legislation.

Defendants Nero Pictures Inc. and Nebenzal, relying on Imperial Ice. Co. v. Rossier, 18 Cal.2d 33, 36, 112 P.2d 631, contend that the complaint does not set forth facts sufficient to state a cause of action against them on the ground that the complaint merely alleges that they had knowledge of the obligations of defendant toward plaintiff and not that they induced defendant to breach these obligations. It is unnecessary to determine whether the allegations in the complaint bring plaintiff within the holding of that case, since plaintiff has indicated its intent to amend its complaint as soon as opportunity arises to do so.

[12] Defendants contend that since it does not appear on the face of the contract that the services promised by defendant Brodel were extraordinary services, plaintiff is not entitled to an injunction under sections 2855 of the Labor Code and 526 of the Code of Civil Procedure. On this appeal from a judgment dismissing an action upon sustaining a general demurrer, we are not concerned with the type of relief to which plaintiff may be entitled. If plaintiff's allegations state a cause of action and are supported by proof the court may grant it any relief consistent with its cause of action. Code of Civ.Proc. Sec. 580.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, SCHAUER, and SPENCE, JJ., concur.

SHENK, Justice (dissenting).

There can be no quarrel with the conclusion that section 36 of the Civil Code, as amended in 1927 (Stats.1927, p. 1917), is constitutional and withdraws the right of disaffirmance as to a judicially approved contract to perform dramatic services entered into by a minor; but I cannot agree with the conclusion that by the language of that section in 1927 the Legislature accomplished what it belatedly and twenty years later (Stats.1947, p. 1518) said it intended by the earlier act.

Section 34 of the Civil Code permits a minor to make a contract to perform personal services (as limited by specified laws not involved), subject to his power of disaffirmance under other provisions. Section 35 confers the right of disaffirmance by the minor either before his majority or within a reasonable time afterwards, except as otherwise specified in section 36. The pertinent language of the latter section as it read at the time here involved is: "A minor can not disaffirm a contract, otherwise valid, to perform or render services as actor, actress, or other dramatic services * * * where such contract has been approved by the superior court of the county where such minor resides or is employed. Such approval may be given on the petition of either party to the contract after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard."

Joan Brodel, when seventeen years of age, executed a contract whereby she agreed to perform dramatic services exclusively for Warner Bros. Pictures, Inc., as producer, "for and during the term of this agreement." The "term of this agreement" was specified to commence on the 30th day of March, 1942, and to continue for a period of fifty-two weeks, at a salary of $600 per week. By the same instrument she granted to the producer six separate "rights or options to extend the term of employment" for additional successive periods of fifty-two weeks each at progressively higher weekly salaries. The contract, after notice and hearing, was approved by the court. In due time the producer elected to exercise the first, second and third options, and the artist performed thereunder. On January 26, 1946, the artist arrived at her majority. On February 13, 1946, within the time stated in the contract, the producer gave notice of its election to exercise the fourth option. On February 20, 1946, the artist gave written notice of dissaffirmance and declined to render services pursuant to any purported exercise of the fourth and further options.

The foregoing comprises the substance of the allegations of the complaint. The order sustaining the demurrer and dismissing the action was based upon the trial court's determination that section 36 vested in the court the power to approve only contracts to perform or render dramatic services; that since the grant of a right or option to extend the term of the agreement was not such a contract, the right of disaffirmance as to such right or option was not taken away.

By section 36, as it read at the time here involved, the right was withdrawn as to a minor's contract to perform or render dramatic services, where "such contract" had been approved by the superior court. "Such approval" might be given upon petition, notice and hearing. The court's power was thus expressly limited to approval of a minor's contract to perform or render dramatic services. Approval of anything beyond that was outside of or in excess of the authority vested in the court. Since upon approval disaffirmance was prohibited only as to contracts to perform dramatic services, approval of anything further would accomplish nothing. It would be purely gratuitous, and could not deprive the minor of the right of disaffirmance otherwise conferred by law. Language extending the expressed deprivation should not be judicially supplied.

The specification of a contract to perform dramatic services refers to an accepted offer, a present binding obligation to perform those services. A valid option is not an accepted offer, but merely binds the optionor to keep open an offer. It is the sale of a present right to create a future obligation to perform. Hicks v. Christeson, 174 Cal. 712, 716, 718, 164 P. 395; Seeburg v. El Royale Corporation, 54 Cal.App.2d 1, 4, 128 P.2d 362; Brickell v. Atlas Assur. Co., Ltd., 10 Cal.App. 17, 22, 101 P. 16, citing Am. & Eng. Ency. of Law; Cline v. Hall, 107 Okl. 218, 232 P. 31, 33; section 47, Restatement of the Law of Contracts. There is no obligation to perform until the option is exercised, and conceivably the offer may never ripen into an obligation to perform.

The plaintiff objected to this construction and application of the language employed by the Legislature, but did not question the fact that the words of the contract appeared to limit the employment and the promise to perform dramatic services to a term of one year from March 30, 1942. It argued that the purpose of the enactment would be obviated unless the several options to extend the term for the successive periods be included within the present obligation to perform dramatic services. To the possible answer that it could have written a contract for a straight seven year term the plaintiff replied that the executed contract had been the standard in form for many years.

The plaintiff invoked the rule of contemporaneous construction. The construction asserted was not express but tacit; that is, it was inferred from a consistent failure by minor artists for about twenty years or since 1927 to attempt disaffirmance of judicially approved contracts, or to request limited approval by the court, on the ground that disaffirmance was not withdrawn as to the option features included within a contract to perform dramatic services. This failure, however, may also be noted as evidence of satisfaction by the minors with their contracts. But assuming that such failure could create a contemporaneous construction, the rule is nevertheless inapplicable when the statute calls for a different construction. Johnston v. Board of Supervisors, 31 Cal.2d 66, 187 P.2d 686, citing California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 294, 140 P.2d 657, 147 A.L.R. 1028.

The plaintiff also relied on the act of 1947 (supra, Stats.1947, p. 1518) which amended the language of section 36 regarding the contract as to which the minor's right of disaffirmance was withdrawn upon approval by the court. That section now contains the following relating to the contract and the authority of the court: "A contract or agreement employing such person as, or wherein such person agrees to perform or render services as, an actor, actress, or other dramatic performer, * * * where such contract or agreement has been approved by the superior court * * * and said court shall have jurisdiction to approve, and its approval when given shall extend to the whole of said contract or agreement, and all of the terms and provisions thereof, including, but without being limited to, any option or conditional provisions contained therein for extension, prolongation or termination of the term thereof." Section 2 of the 1947 act states that the amendment does not constitute a change in, but is declaratory of, the preexisting law.

Without such a legislative declaration a later amendment may be taken as stating the intended meaning of a statute before amendment. De Haviland v. Warner Bros. Pictures, 67 Cal.App.2d 225, 232, 233, 153 P.2d 983. The addition of the legislative declaration is not a matter of judicial inquiry unless it has some weight in determining prior legislative meaning. It can have no weight where the declaration is diametrically opposed to the fact. California Employment etc. Com. v. Payne, 31 Cal.2d 210, 187 P.2d 702. Without that declaration the conclusion is irresistible that the change in wording of section 36 was intended as a change in meaning. In truth the later inclusion of matters not theretofore mentioned would be taken as a legislative admission that at the time of the prior statute they were either overlooked or were not intended to be included. Inasmuch as the 1927 and 1947 amendments to section 36 provide the express exceptions to the exercise of the power of disaffirmance conferred by section 35, the courts should confine the exceptions within the bounds of the plain language employed by the Legislature. It does not appear whether the claimed standard form of contract for employment of actors in motion picture production was in use in 1927. If so, the Legislature by the amendment to section 36 in that year did not indicate awareness thereof so as clearly to authorize approval of the entire contract. From the clear language of the 1947 amendment expressing such intent, it becomes obvious that the Legislature was made aware of the facts at least since the commencement of the present action. I see no justification for employing the expedient of interpretation in accord with the 1947 legislative declaration to countenance a statutory deprivation of the defendant's right of disaffirmance of which she was not thus clearly deprived under the applicable preexisting law. In such case the later amendment becomes a rule for the future only. Matter of Coburn, 165 Cal. 202, 209, 210, 131 P. 352; Clayton v. Schultz, 4 Cal.2d 425, 430, 50 P.2d 446.

In my opinion the trial court correctly ruled that the facts stated in the complaint did not constitute a cause of action, and I would affirm the judgment.

CARTER, J., concurs.

Rehearing denied; SHENK and CARTER, JJ., dissenting.

31 Cal.2d 782

LOEW'S INC. v. ELMES.

L. A. 20217.

Supreme Court of California, in Bank.
May 3, 1948.

Infants ⟹47

Code section providing that a minor cannot disaffirm a contract, otherwise valid, to perform services as an actor or actress, where contract has been approved by superior court, authorized superior court to approve a contract between moving picture producer and minor actress providing for one year term of employment and granting producer six options to extend the term of actress' employment for successive periods of one year at a progressively higher salary. Civ.Code, § 36.

SHENK and CARTER, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Proceeding in the matter of the contract between Loew's Incorporated, a corporation, and Joan Winifred Elmes, a minor, wherein Loew's Incorporated sought approval by the superior court of the contract. The superior court approved the contract only as to original one year term of employment, and withheld approval of the six options in the contract for successive periods of one year, and Loew's Incorporated appeals.

Order reversed.

Prior opinion, 179 P.2d 74.

Loeb & Loeb, David T. Sutton and Herman F. Selvin, all of Los Angeles, for appellant.

No appearance for respondent.

Max Radin, of Berkeley, and Frank B. Belcher, of Los Angeles, amici curiæ on behalf of respondent.

TRAYNOR, Justice.

On May 13, 1946, appellant, a producer of motion pictures, entered into an agreement with respondent, then 14 years of age, similar to the agreement in Warner Bros. Pictures, Inc. v. Brodel, Cal., 192 P.2d 949, this day decided. This agreement provided for a one-year term of employment and granted appellant six options to extend the term of respondent's employment for successive periods of one year at a progressively higher salary. The agreement was submitted to the Superior Court of Los Angeles County for approval under section 36 of the Civil Code. On August 6, 1946, the court entered an order approving the agreement as to the original one-year term of employment only. It withheld approval of the options, ordering as to the option next in time: "That said minor and her parents return and appear before this Court when and if the option provided for in subdivision (a) of paragraph 23 of said contract is exercised for the further order and instructions of this Court." Appellant appealed "from so much of said order as fails to approve said contract in its entirety and without limitation or restriction as to time or term."

By its order the court withheld approval of the contract submitted by the parties. Under section 36 of the Civil Code the court in its discretion may make its approval of the contract subject to the acceptance by the parties of modifications proposed by the court. If the order of the court in the present case were based on the exercise of that discretion, this court would not disturb it. It appears, however, from the record in this case as well as from the judgment in Warner Bros. Pictures, Inc. v. Brodel, supra, that Judge Paonessa based his order in this case as well as his decision in the other on the ground that the Superior Court lacks power under section 36 to approve options. Since we reach a different conclusion as to the construction of section 36 for the reasons set forth in the opinion in Warner Bros. Pictures, Inc. v. Brodel, supra, it is necessary to remand this case to the Superior Court.

The order is reversed.

GIBSON, C. J., and EDMONDS, SCHAUER, and SPENCE, JJ., concur.

SHENK, Justice.

I dissent. It may not be disputed that the superior court now and since the 1947 amendment of section 36 of the Civil Code

(Stats. 1947, p. 1518) has the power to approve options granted with a contract to perform dramatic services. For the reasons stated in my dissenting opinion in Warner Bros. Pictures, Inc. v. Brodel, Cal., 192 P.2d 949, I am not in agreement with the conclusion that the court had that power prior to the amendment.

CARTER, J., concurs.

31 Cal.2d 713

COBORN v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 20363.

Supreme Court of California.
April 29, 1948.

1. Workmen's compensation ⚷1939

In compensation proceeding, Supreme Court must search record to discover whether evidence was reasonably susceptible to inferences drawn by commission in support of its conclusion that claimant was only a partial dependent and, on favorable discovery, to affirm the award, and Supreme Court need not search only for evidence for inferences that might support claimant's views. Labor Code, §§ 5952, 5953.

2. Workmen's compensation ⚷1939

Questions of substantial or inconsequential nature of support contributions, made by deceased employee during his lifetime to a dependent, are primarily for the Industrial Accident Commission in a compensation proceeding, to determine from the facts, and only where there is no evidence of substance to support commission's determination may award based thereon be annuled. Labor Code, §§ 5952, 5953.

3. Workmen's compensation ⚷1483

Evidence sustained Industrial Accident Commission's finding of "partial dependency" rather than "total dependency", where 61-year-old mother of deceased employee was doing part-time work at time of his death, for which she averaged about $25 weekly, employee's monthly contributions to her averaged $70, and her monthly living expenses were about $155. Labor Code, § 3502.

See Words and Phrases, Permanent Edition, for all other definitions of "Partial Dependency" and "Total Dependency".

Proceeding by Bessie D. Coborn to review and annul an award of the Industrial Accident Commission of the State of California to petitioner as partial dependent of Allen G. Coborn, an employee of the Northern Transportation Company, a corporation, of which the Pacific Indemnity Company, a corporation, was insurer.

Award affirmed.

Prior opinion 183 P.2d 691.

Haight, Trippet & Syvertson, of Los Angeles, and Roy A. Gustafson, of Oxnard, for petitioner.

R. C. McKellips, John A. Rowe, Jr., and T. Groezinger, all of San Francisco, and Herlihy & Herlihy and K. A. Stoll, all of Los Angeles, for respondents.

SHENK, Justice.

The petitioner seeks a review and the annulment of an award based on a finding of partial dependency, on the ground that the commission exceeded its jurisdiction in failing to find total dependency.

Allen G. Coborn, the petitioner's son, was instantly killed on July 13, 1946, while he was employed as a truck driver. The only question here is whether the facts bearing on the petitioner's dependency as a matter of law require the commission to make a finding of total dependency. Those facts are briefly:

The decedent was born in 1908. His mother was about sixty-one years of age at the time of the accident and had been a widow since the son was four years old. The son had been married. A decree of divorce became final as of January 4, 1945. He paid no support money to his wife and there was no issue of the marriage. He lived in a hotel room for which he paid $10 per week. He had considered re-marrying but he informed his mother a few days before the accident that the plan would not be carried out. His earnings from his employment were in excess of $500 per month.

The petitioner lived in a small apartment. Her living expenses, including rent of $25 but excluding clothing, were $155 per month. Prior to August, 1945, she worked in a defense plant, earning $38 to $40 per week, but one week after V-J day that employment terminated. In that month the son made his first contribution to her support in the sum of $45. From that date she drew $20 per week in unemployment insurance for 23 weeks. She had about $1,000 in a savings account, a portion of which she used in an attempt to obtain a patent for a pie box invention. Her son's contributions continued in varying amounts, usually in cash, the largest being $170 in January, 1946. According to the petitioner's own computation from figures not otherwise in evidence, the average monthly contribution was $70. In January, 1946, she fell from a stepladder in her home and received insurance of $26.

On April 23, 1946, the petitioner accepted steady part time work in a cafeteria and continued in that employment to and including the day of her son's death. She received a gross of $288.62, which was an average of about $25 per week for that employment period. On the day of her son's death she had $235 left in her savings account and about $207 in cash. She testified that she accepted the part time work for the limited purpose of accumulating a small reserve to be used for mattress, pillows, gowns, slippers and kimonos needed for a period of convalescence after a contemplated operation which was deemed necessary by her and her son, the expense of which otherwise the son intended to pay; that he did not know she was working until about a month before his death; that he expressed an objection to her working, and stated his intention to provide her entire support; and that she intended to quit before the first of August, 1946, because she had not been well.

The commission made a finding of partial dependency and thereon based an award of $2,940, and made an additional award of $300 reimbursement for funeral expense.

The matter of the petitioner's dependency is governed by section 3502 of the Labor Code, which provides that the extent thereof "shall be determined in accordance with the facts as they exist at the time of the injury of the employee."

The petitioner contends that, conceding her employment at the time of the accident, the evidence shows that her son was supplying all her ordinary needs, and that the small amount received from the cafeteria was not for her ordinary expenses, but was a minor consideration intended for a specific purpose, which under the doctrine of such cases as Peterson v. Industrial Accident Commission, 188 Cal. 15, 204 P. 390, should not deprive her of the benefits of total dependency.

In the Peterson case it was held that applicants should not be deprived of the rights accorded total dependents merely because of minor considerations or benefits which do not substantially affect or modify the existing status. This court recognized the theory of the Compensation Act that dependents were to be compensated for the loss of the support they were receiving from the decedent at the time of his injury, computed on the rate of contribution at the time. Spreckels Sugar Co. v. Industrial Accident Commission, 186 Cal. 256, 199 P. 8. It was decided that irregular employment in taking charge of neighbors' children, or work for a limited period in delivering a daily paper, did not affect a status otherwise of total dependency. It was concluded that since at the time of the deceased employee's injury the applicants were dependent upon his earnings and contributions for shelter, food, and clothing, and had no independent means of their own, they were total dependents, and an award of total dependency was affirmed. The same principle was applied in affirming an award of partial dependency in London Guarantee & Accident Co., Ltd., v. Industrial Accident Commission, 203 Cal. 12, 263 P. 196 (where ownership of property was held not to prevent dependency); also in Pacific Indemnity Co. v. Industrial Accident Commission, 204 Cal. 427, 268 P. 633 (where an award based on total dependency was affirmed although the dependent received a "little" assistance temporarily from showing rooms to prospective tenants of an apartment house, the court saying that the commission was justified in disregarding the amount as inconsequential). See also Pacific Employers Ins. Co. v. Chavez, 5 Cal.2d 247, 54 P.2d 701; Ocean Accident & Guarantee Corp. v. Industrial Accident Commission, 88 Cal.App. 369, 263 P. 823. The following decisions of the Industrial Accident Commission also show that it is fully aware of the principle and its application in appropriate cases: Flatland v. Industrial Accident Commission, (1936) 1 C.C.C. 55; Independent Crop Dusting, Inc. v. Industrial Accident Commission, (1936) 1 C.C.C. 63; Royal Indemnity Co. v. Industrial Accident Commission, (1939) 4 C.C.C. 168; National Automobile Ins. Co. v. Industrial Accident Commission, (1941) 6 C.C.C. 74; Associated Indemnity Corp. v. Industrial Accident Commission, (1943) 8 C.C.C. 73; Colonial Ins. Co. v. Industrial Accident Commission, (1946) 11 C.C.C. 50.

The findings and conclusions of the commission were based on the referee's report the substance of which was that a consideration of the evidence in the light of the Peterson case did not compel the conclusion that the sums contributed by the applicant to her own support were inconsequential, but that on the contrary they were substantial; that she had regular employment bringing in earnings of over $80 per month which were used toward keeping up a standard of living above that which the son provided.

[1] It is not the function of this court to search only for evidence or inferences which might support the petitioner's views. It may be assumed that inferences from the factual record would support such a conclusion, had it been reached by the commission. The first duty of the court is to search the record to discover whether the evidence is reasonably susceptible to the inferences drawn by the commission in support of its conclusion, and upon favorable discovery to affirm the award. Hartford Accident & Indemnity Co. v. Industrial Accident Commission, 197 Cal. 17, 239 P. 330.

[2] There is no direct evidence which supports the petitioner's conclusion that the son was contributing her entire living expenses at the time of his death. On the other hand the evidence is susceptible to the inference and conclusion stated by the referee and adopted by the commission. From the evidence the commission could reasonably conclude, as it did, that the petitioner had been supporting herself in part, was so supporting herself at the time of the injury, and that the son contributed only partially to the total amount needed for her ordinary living expenses. On that condition of the record the court cannot draw a conclusion in accord with the petitioner's contention without usurping the function of the commission. Questions of the substantial or inconsequential nature of support contributions to the dependent are primarily for the commission to determine from the facts of each particular case. The framework of the Compensation Act shows the legislative intent to leave such questions for determination by the commission. Only where there is no evidence of substance to support its determination may the award based thereon be annulled. Sections 5952, 5953, Labor Code; Southern Pacific Co. v. Industrial Accident Commission, 177 Cal. 378, 380, 170 P. 822; Walker v. Industrial Accident Commission, 177 Cal. 737, 738, 171 P. 954, L.R.A.1918F, 212; Myers v. Industrial Accident Commission, 191 Cal. 673, 676, 677, 218 P. 11; Stoll v. Industrial Accident Commission, 20 Cal.2d 440, 445, 126 P.2d 865; Lockheed Aircraft Corp. v. Industrial Accident Commission, 28 Cal.2d 756, 760, 761, 172 P.2d 1; Helmick v. Industrial Accident Commission, 46 Cal.App.2d 651, 657, 661, 116 P.2d 658; Gardner v. Industrial Accident Commission, 73 Cal.App.2d 361, 362, 363, 166 P.2d 362.

[3] We conclude that the evidence supports the commission's finding that the condition existing at the time of the employee's

death was one of partial dependency of the applicant. No question arises as to the correctness of the award based thereon. The award is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, and SCHAUER, JJ., concur.

CARTER, Justice (concurring).

I am constrained to concur in the judgment of affirmance because, and only because, I am convinced there is some evidence in the record which tends to support the finding of the commission that petitioner was *only partially* dependent on deceased at the time of the latter's injury and death. While there is, in my opinion, ample evidence to support a finding of total dependency, there is also some evidence of partial dependency. In this state of the record we are required to sustain the finding of partial dependency and affirm the award.

"It is not the function of an appellate court to weigh the evidence or to pass upon the reasonableness of conflicting inferences which may be drawn from the evidence even if that evidence is undisputed. Under our system of jurisprudence the weighing of the evidence and the determination of the effect of the inferences to be drawn therefrom is solely for the trier of fact. Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; Eagles v. Samuels, 329 U.S. 304, 67 S.Ct. 313; Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Ellis v. Union Pacific Ry. Co., 329 U.S. 649, 67 S.Ct. 598; National Labor Relation Bd. v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170; Commissioner of Internal Revenue v. Scottish Amer. Co., 323 U.S. 119, 65 S.Ct. 169, 89 L.Ed. 113; Unemployment Compensation Commission v. Aragan, 329 U.S. 143, 67 S.Ct. 245; Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 67 S.Ct. 801. The same rule is applicable to the review of proceedings before the Industrial Accident Commission.

The chief difference in the function of an appellate court in reviewing awards of the Industrial Accident Commission and judgments and orders of a trial court is, that the Labor Code expressly provides that: "The provisions of Division IV and Division V of this code shall be *liberally construed by the courts* with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Labor Code, sec. 3202. [Emphasis added.] This provision is, of course, applicable to the review by this Court and the District Courts of Appeal of awards made by the Industrial Accident Commission. There is no such provision of law applicable to a review of judgments and orders of trial courts. Notwithstanding the provisions of section 3202 of the Labor Code, some courts have applied the more conservative rules of the common law to the review of awards of the Industrial Accident Commission and annulled many of such awards in favor of injured employees or their dependents in cases where such awards would have been affirmed had the rule of liberal construction provided for in section 3202 of the Labor Code been applied. See, dissenting opinions in Aetna Cas. & Surety Co. v. Ind. Acc. Comm., Cal.Sup., 182 P.2d 159, and California Shipbuilding Corp. v. Industrial Acc. Comm., Cal.Sup., 188 P.2d 32.

This case was first decided by the District Court of Appeal, Second Appellate District, Division One, and the decision rendered therein annulled the award of partial dependency and remanded the cause to the respondent commission with directions to find that petitioner was totally dependent upon deceased and to enter an award on that basis. Cal.App., 183 P.2d 691. The view expressed by the District Court of Appeal in its opinion was to the effect that there was no conflict in the evidence relative to the total dependency of petitioner, and that the Industrial Accident Commission therefor exceeded its jurisdiction in rendering an award based upon partial dependency only. This opinion is well reasoned, and when read in the light of the majority opinion of this Court in this case, demonstrates the closeness of the factual situation upon which the finding of the commission is based. The record clearly presents a factual picture upon which reasonable minds might differ as to whether petitioner was totally or only partially dependent upon deceased at the time of his injury which resulted in his death. In view of the conclusion reached by the majority of this Court that there is a conflict in the evidence on this issue, and the commission having found in favor of partial dependency, under the rules above stated, the award must be affirmed.

SPENCE, Justice (concurring).

I concur in the judgment as petitioner's own testimony showed, as a matter of law, that her dependency was "partial" rather than "entire." Labor Code, sec. 3502. Accepting petitioner's testimony as true, the situation "existing at the time of the injury" of the deceased on July 13, 1946, was as follows:

Petitioner was then regularly employed at part-time work earning over $100 per month, which was approximately two-thirds of her living expenses of $155 per month. Deceased had never contributed anything to the support of petitioner prior to August, 1945, at which time petitioner ceased working in a defense plant and started to draw unemployment insurance. Thereafter and during the period between August, 1945, and the death of the deceased on July 13, 1946, deceased's contributions to petitioner's support averaged $70 per month, which was less than one-half of petitioner's living expenses.

These admitted facts show a typical case of "partial" dependency as found by the Commission, and it seems clear that if a finding of "entire" or "total" dependency had been made, such finding could not have been sustained. London Guarantee & Accident Co. v. Industrial Acc. Comm., 57 Cal.App.2d 616, 135 P.2d 7; Tuttle v. Industrial Acc. Comm., 31 Cal.App.2d 279, 87 P.2d 881.

EDMONDS, J., concurs.

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